

Initial appraisal of a European Commission Impact Assessment

European Commission proposal on procedural safeguards for children in criminal proceedings

Impact Assessment (SWD (2013) 480, SWD (2013) 481/final/2 (summary)) for a Commission Proposal for a Directive on procedural safeguards for children suspected or accused in criminal proceedings (COM (2013) 822 final).

• Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's Impact Assessment accompanying the above proposal which was transmitted on 28 November 2013. In the Council Resolution on a Roadmap for strengthening procedural rights, adopted in November 2009¹, the Commission was invited to submit proposals covering a number of specific measures. Three Directives have since been adopted covering the right to interpretation and translation, the right to information, and the right of access to a lawyer and the right to communicate. During the negotiations on these measures, rules with regard to vulnerable persons were left aside by the European Parliament and the Council as it was intended to foresee specific safeguards for vulnerable persons, in particular children, in a separate legal instrument. The proposed measures are part of a package which includes two other proposals, one on the right to provisional legal aid, and a second on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial.

• Identification of the issue at stake

The number of children facing criminal justice across the EU is approximately 1,086,000, i.e. 12 per cent of the European population facing criminal justice each year. Estimates with regard to vulnerable adults range between 358,000 to 719,000 persons (four to eight per cent of the total population facing criminal justice). According to the IA, '[d]espite the existence of common principles and minimum standards stemming from the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and other international law instruments, the fair trial rights of children and vulnerable adults are...not sufficiently guaranteed within the EU...The criminal proceedings and practices of a certain number of Member States have serious shortcomings when measured against these minimum criteria.' (IA, p. 9).

The IA thus identifies the general problems in need of possible EU action as being i) the insufficient protection of fair trial rights of children and vulnerable adults under the current international and European legal framework; ii) the lack of any overarching protection of these

¹ 2009/C295/01

groups by the measures already adopted; and iii) the insufficient mutual trust between judicial authorities arising as a result of this situation, which hampers judicial cooperation in criminal matters.

It explains the justification for the selection of the specific problems addressed, referring to case law of the European Court of Human Rights (ECtHR), as well as situations in the Member States. In addition, whilst it is commonly accepted in international law instruments that in criminal matters any individual below the age of 18 should be considered as a child², the IA identifies a major specific difficulty with regard to the lack of a commonly accepted definition for 'vulnerable adults'. Although the IA claims that 'the definition of what is vulnerable is in itself an important item for discussion in this Impact Assessment' (IA, p. 7, footnote 8), the promised 'discussion' does not in fact appear to go much beyond repeated references throughout the text to the absence of a common definition and the extreme difficulty of arriving at one. (See below for further treatment of this question).

• Objectives of the legislative proposal

The objectives of the Commission proposal are to set common minimum standards throughout the European Union on the rights of children suspected or accused in criminal proceedings; to ensure that those children can effectively participate in the proceedings and benefit from their fair trial rights to the same extent as other suspects or accused persons, and to create an environment of enhanced mutual trust between judicial authorities. Due to the lack of any commonly agreed definition, the rights of vulnerable adults are to be covered separately in a non-binding Commission Recommendation.

• Range of the options considered

Option 1: Status quo - no action

At EU level, the directives on procedural rights that have been adopted so far provide certain specific provisions with regard to children and vulnerable adults, but do not, and were never intended to, provide an overarching protection for the specific needs of these persons. The IA considers that in the absence of major legislative developments, and given the existing arrangements at Member State level, it is anticipated that these rights will remain at the current insufficient level, with consequent negative implications regarding mutual trust between judicial authorities.

Option 2: low level of obligation - non-legislative action (soft law)

This option would consist of three elements:

- a) information gathering, monitoring and evaluation at EU level of the treatment of children and vulnerable adults;
- b) support for training of law enforcement and judicial authorities;
- c) dissemination of good practice examples on the basis of guidelines.

Option 3: medium level of obligation - minimum rules (legal instrument)

This option goes further than option 2 by setting minimum rules applying the European Court of Human Rights' 'acquis' and aspects of relevant international, European and Member State legislation. It foresees a number of procedural safeguards for the protection of children and

² This is distinct from the concept of the age of criminal responsibility.

vulnerable adults. These are divided into the following seven specific measures which correspond to EU and international legal instruments:

1. assessment of vulnerability;
2. assistance by parent or person of trust;
3. medical assistance;
4. mandatory access to a lawyer;
5. special provisions on conduct of police interviews;
6. special provisions on court hearings;
7. specific rules concerning detention.

Option 4: high level of obligation - more ambitious rules on safeguards (legal instrument)

This option goes further than option 3, applying the same categories of measures, but imposing more ambitious rules concerning certain safeguards such as the assessment of vulnerability, medical assistance (for vulnerable adults), police interviews, court hearings and detention.

The Commission's **preferred option** is a combination of elements of options 3 and 4 to be presented separately in the form of a *Directive* for children and a *Recommendation* for vulnerable adults. The IA considers that this approach, with the introduction of safeguards from the very beginning of the proceedings until the trial stage, 'would significantly contribute to the achievement of the general objectives', (IA, p. 61), although in the case of vulnerable adults, this is 'under the assumption that the Recommendation is implemented by Member States.' (IA, p. 63).

• **Scope of the Impact Assessment**

The IA assesses all options on the basis of their effectiveness in meeting the defined objectives; their political feasibility; their impact on fundamental rights; their financial and economic impact, (although in fact this tends to concentrate on costs involved rather than on any broader economic impact there might be); their social impact; and their impact on domestic justice systems. By far the greatest attention is given to the financial impact. When considering the likely impacts of options 3 and 4, the IA examines each option in two parts, firstly with a view to the directive covering children, and secondly with a view to the Recommendation covering 'vulnerable adults'.

Analysis of the social impact of the measures is restricted to a general, qualitative assessment, relating to the level of protection of procedural rights that would be afforded, and brief reference to possible associated direct and indirect benefits. References to potential benefits, such as improvement in family situations, greater integration into society, or 'the socio-economic impact of excessive pre-trial detention' (IA, p. 48), tend to be rather vague and could have benefitted from the addition of some specific examples.

By contrast, the IA provides extremely detailed cost estimates, notably for both parts of options 3 and 4, with clear information about the methodology and figures used (see Annexes VII to IX). It uses in-depth analysis of the respective national legislation in EU Member States in order to assess the consequences of each parameter of each option, and indicates the individual Member States affected in each case. The explanation of the basis for the calculation of the estimated financial and economic impact of option 2 seems slightly incomplete, however. While the training costs have been aligned with those estimated under option 4 and set out in detail at

Annex VIII, the additional amount of 1.6 million euros to cover a best practice study, guidelines, on-line platforms etc. does not appear to be backed up with detailed figures in the way that the costs of options 3 and 4 are. Nor is there any explicit reference to the potential cost of the possible EU monitoring and evaluation body mentioned under option 2a).

The IA explains that the estimates do not take into account possible cost savings resulting from a reduction in current costs of appeals, re-trials, compensation or aborted prosecutions which might be avoided as a result of the measures, which it says are impossible to calculate due to lack of data. However, it does cite, in a footnote, a useful example of costs arising from a Scottish case, which ultimately arrived before the ECtHR, and where costs exceeded €175,000 (IA, p. 17, footnote 52). This in itself gives an idea of the scale of potential savings and might helpfully have been backed up by other similar examples from other Member States. The IA points out that a detailed analysis of legal measures and costs related to legal aid is subject to a separate IA accompanying the proposal on legal aid.

One issue that the IA does not address in any detail, is the choice of a non-binding instrument to deal with the needs of vulnerable adults. The IA explains that 'at an early stage of the analysis it was concluded that, although the need to ensure a sufficient protection of vulnerable adults involved in criminal proceedings has been clearly demonstrated in this Impact Assessment...and is also recognised by stakeholders..., the difficulty to determine an overarching definition, and therefore the scope of application of the initiative..., as well as the existence of fewer relevant international standards and provisions, ruled out taking legally-binding action in relation to safeguards for vulnerable adults.' (IA, p. 43). Its conclusion is that 'the problem can be overcome by a modulated response in the form of a less prescriptive measure such as a Recommendation'³ (IA, p.11).

This raises two questions, neither of which is adequately addressed in the Impact Assessment. The first concerns **the choice of a non-binding instrument**. Much of the analysis of options 1 and 2 demonstrates the unlikelihood of significant progress being made in the protection of vulnerable persons' rights 'in the absence of major *legislative* developments' (emphasis added) (IA, p. 31), and that 'the risk is high that in particular those Member States which currently do not comply with minimum international and ECtHR standards, will not fully implement the guidelines' (IA, p. 44). This would presumably imply that the introduction of a non-binding Recommendation may not be sufficient to achieve the desired result, unless of course all Member States decide to implement it. This seems to be confirmed by the IA's own conclusions which state, in relation to the Recommendation option, that the lack of a common definition of vulnerable groups 'will have a certain negative impact on the efficiency of such a measure' (IA, p. 49), and that 'the absence of any method of enforcement might result in only a variable improvement in the Member States' (IA, p. 50). Despite this rather lukewarm appreciation of the value of such an approach, the IA does not suggest any alternative avenues to explore.

The second question concerns **the decision to discard the option of defining the term 'vulnerable adult'** because it was 'not feasible' (IA, p. 34). Whilst it is clear from the overview of stakeholder consultations that many expressed the view that reaching such a definition would be extremely difficult, none seemed to suggest that it would be impossible or should not be attempted. The IA itself states that '[b]ased on the [European Court of Human Rights] case law and legislation in Member States, vulnerable adults are "individuals who cannot understand or

³ C(2013)8178: internal referral to LIBE on 4/12/13

effectively exercise their legal rights because of, for instance, a disability, mental impairment, a physical or psychological weakness".⁴ (IA, p. 9). Similarly, the Commission Recommendation refers to suspects or accused persons 'who are not able to understand and to effectively participate in criminal proceedings due to age, their mental or physical condition or disabilities ("vulnerable persons")'⁴. The IA does not explain why these examples are not considered to provide a suitable potential basis, at least, for a minimum definition. Also, the question arises as to why this difficulty has not stopped other pieces of legislation already being adopted in the same field with specific provisions referring to vulnerable persons (e.g. directive 2013/48/EU on access to a lawyer).

- **Subsidiarity / proportionality**

The legislative proposal is based on article 82(2) (b) TFEU. The IA considers that it is unlikely that Member States acting individually would be able to establish the common standards of rights with regard to children and vulnerable adults which are to be expected under an EU level system of judicial cooperation. A comprehensive level of protection across Member States, with minimum safeguards across the EU, and consequent mutual trust between judicial authorities, can therefore only be ensured by action at EU level. The Explanatory Memorandum of the legislative proposal points out that the measures proposed do not go beyond the minimum required to achieve the stated objective, and that other measures considered, aimed at achieving greater harmonisation of standards, were discarded during the IA process for reasons of proportionality.

The subsidiarity deadline for national parliaments expired on 12 February 2014. At the time of writing, one Reasoned Opinion has been submitted by The Dutch House of Representatives.

- **Budgetary or public finance implications**

According to the IA, the enhancement of procedural safeguards will lead to an increase in the costs for law enforcement authorities. The bulk of the costs would therefore fall to public administrations at national and local level. However, the IA points out that some cost savings will be achieved by a reduction of lengthy trials or the frequency of appeals. The Explanatory Memorandum of the proposal indicates that there are no implications for the EU budget.

- **SME test / Competitiveness**

The IA Executive Summary Sheet states that businesses, SMEs and micro-enterprises will not be directly affected by the proposal. Nor is there any reference in the IA itself to any direct or indirect impact.

- **Simplification and other regulatory implications**

The fact that vulnerable persons are already referred to in existing legislation stemming from the Roadmap (see IA, Annex I), would suggest that particular attention will need to be given to ensuring coherence between that legislation and the proposed directive.

⁴ C(2013)8178/2, recital 1

- **Quality of data, research and analysis**

The assessments made appear to be reasonable and to be based on sound and extensive research and analysis. The methodology used is clearly explained and detailed data is presented for all Member States. There is also a separate section devoted to numerous examples of ECtHR case-law related to children and other vulnerable persons (Annex V). An extensive bibliography of documents and studies used appears at Annex III. Use has also been made of information from previous consultations. An external study by the company ICF-GHK was commissioned in September 2011 to gather evidence for the IA, focussing on problem definition, policy options and costs, although there does not appear to be any direct link to the study itself, which is regrettable.

- **Stakeholder consultation**

The overview provided at Annex II demonstrates that a wide selection of major stakeholders was approached, in addition to Member States, in preparation of the measures, even if there is no comprehensive list of all the stakeholders consulted. The IA explains that vulnerable persons were consulted via NGOs and relevant professionals representing their interests. As far as public consultation is concerned, the IA states that 'given that Member States and stakeholders were consulted in several expert meetings and workshops, **a public consultation was not held**' (emphasis added) (IA, p. 10, footnote 20). **This seems surprising, particularly on an issue which might well generate a great deal of public interest, and on which individual members of the public might have had useful experience which they could have brought to the table.**

The IA refers to a number of options that were discarded, in addition to the definition issue mentioned earlier, either because stakeholder discussions revealed that there would be no consensus to legislate, or due to reasons of subsidiarity, proportionality or limitations of the legal basis in the Treaty.

- **Monitoring and evaluation**

The IA considers that 'providing for a robust monitoring and evaluation mechanism is crucial to ensure that the rights envisaged in the Directive are complied with in practice as well as in legislation' (IA, p. 66). It refers to plans for the Commission to carry out a study, three to five years into the application of each instrument of the procedural rights Roadmap, and sets out the quantitative and qualitative monitoring indicators that might be used to assess progress with regard to the rights of children and vulnerable adults respectively. Given the emphasis placed on the lack of any commonly recognised definition of 'vulnerable adults', the value of any monitoring indicator based on that concept (e.g. the number of vulnerable adults benefiting from an in-depth assessment), certainly in comparative terms between Member States, and in terms of assessing the extent to which rights of all vulnerable persons are guaranteed throughout the EU, might be limited.

The Commission proposal provides for a reporting requirement for Member States but does not refer to any obligations for the Commission in this area, or to any suggestion of reports to be submitted to Parliament and Council (*see below*).

• Commission Impact Assessment Board

The IA Board issued a negative opinion on a draft of the IA on 5 July 2013. A revised draft report was subsequently submitted on which the Board issued a positive opinion on 20 September 2013. It nevertheless still called for further improvements in a number of respects, notably with regard to a more balanced and concrete presentation of the specific problems; clarification of the added value and proportionality of the options; and further improvement in the assessment and comparison of impacts. Annex XI of the IA outlines the changes that were made to the draft report in the light of the Board's comments. While many of the Board's sometimes very detailed criticisms would appear to have been addressed, some more explicit explanation of the combination of elements of options 3 and 4, might have been helpful. Also, while the IA does provide a summary of the views of stakeholders, as requested by the Board, it does not systematically identify all the stakeholder groups concerned in each case. **It should be noted that the IA Board does not make any reference to the questions of the choice of instrument or of the definition of 'vulnerable adults'.**

• Coherence between the Commission's legislative proposal and IA

The Commission's legislative proposal appears to follow the recommendations expressed in the IA as far as procedural safeguards for children are concerned. It does not, however, include the specific provision that Member States should be required to request the physical presence of the child's parents or person of trust at the police station. Although the IA explains that the question of the presence of parents *at interrogations* was a matter of controversy, and therefore was not included, the provision concerning parents' presence at the police station was something which was explicitly mentioned in the context of the preferred option (see IA, pp. 21, 37 and 39).

As far as monitoring and evaluation is concerned, the proposal reflects the IA's recommendation that Member States should report on the effective implementation of legislative measures (Article 20). It does not, however, make any reference to the Commission's envisaged study. **Neither the IA nor the proposal refers to any requirement for the Commission to report to the European Parliament and Council on the implementation of the Directive**, either individually, or as part of its evaluation of the application of the Roadmap measures as a whole.

• Conclusion

The Impact Assessment provides a thorough analysis and clear presentation of the current situation, the reasons that action is required, the options considered, and the implications, particularly in terms of cost, of the measures proposed. This initial appraisal nevertheless identifies a number of issues which might merit further attention, including in particular:

- the choice of a non-binding instrument to deal with vulnerable persons other than children;
- the decision not to address the lack of definition of 'vulnerable adult';
- the lack of public consultation in the preparation of the initiative;
- the reporting requirements on the implementation of the measures.

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This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), analyses whether the principal criteria laid down in the Commission's own Impact Assessment Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

This document is also available on the internet at:

<http://www.europarl.europa.eu/committees/en/studies.html>

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