EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

28 November 2017

Case Document No. 4

International Commission of Jurists (ICJ) v. Czech Republic
Complaint No. 148/2017

SUBMISSIONS OF THE GOVERNMENT ON THE MERITS

Registered at the Secretariat on 15 November 2017

THE CZECH REPUBLIC

OBSERVATIONS OF THE GOVERNMENT
ON THE MERITS OF COLLECTIVE COMPLAINT

INTERNATIONAL COMMISSION OF JURISTS
v. THE CZECH REPUBLIC
(no. 148/2017)

PRAGUE

15 NOVEMBER 2017

1. In its letter of 21 September 2017 the European Committee of Social Rights ("the Committee") notified the Government of the Czech Republic ("the Government") that on 13 September 2017, the collective complaint lodged by International Commission of Jurists (ICJ, "the complainant organisation"), a non-governmental organisation, against the Czech Republic had been declared admissible, noting that the issues related to the admissibility of the collective complaint were closely connected with issues of the merit. In the letter, the Committee also invited the Government to submit their observations on the merits of this collective complaint.

THE FACTS

2. The Government do not agree with the simplified interpretation, presented by the complainant organisation, of the statistics on proceedings involving children under the age of 15 on what otherwise are criminal acts. The Government shall submit their observations on these statistics in the section on the merits of the collective complaint.

THE LAW

3. The complainant organisation claims, in particular, that the Czech Republic does not comply with Article 17 of the European Social Charter, adopted in 1961 ("the Charter"), read in isolation or in conjunction with the prohibition of discrimination embodied in the Preamble of the Charter, on the ground that children under the age of 15 are deprived of social protection at pre-trial phase called examination, in proceedings on acts that otherwise are criminal acts. Children under the age of 15 are discriminated against because they do not enjoy the same criminal procedural safeguards as other juvenile or even adult offenders in criminal proceedings.

4. The relevant part of the Preamble of the Charter reads as follows:

> "The governments signatory hereto, being members of the Council of Europe, (…) Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin; (…)"

Article 17 of the Charter, providing for the right of mothers and children to social and economic protection, reads as follows:

> "With a view to ensuring the effective exercise of the right of mothers and children to social and economic protection, the Contracting Parties will take all appropriate and necessary measures to that end, including the establishment or maintenance of appropriate institutions or services."

I. ALLEGED VIOLATION OF ARTICLE 17 OF THE CHARTER READ IN ISOLATION

5. The complainant organisation complains that in contravention of Article 17 of the Charter, the Czech Republic does not provide social protection to children under the age of 15 in proceedings on acts that otherwise are criminal acts, as it fails to

- ensure mandatory defence from the moment measures under the Juvenile Justice Act have been used or actions under the Criminal Procedure Act have been taken against them,
- ensure access to the police file during the pre-trial stage (the examination phase) of the proceedings,
- ensure that children are served with the final decision of the police authority and have the right to appeal against this decision,
- provide protection against unreasonable and unnecessary formal trials before juvenile courts.

(i) Introductory remarks

a) On the compatibility of the complainant organisation's claims with Article 17 of the Charter

6. First of all, the Government fully refer to their observations on the admissibility of the complaint of 23 June 2017, because they continue to be convinced that the complainant organisation's claims concern solely the right to a fair trial, and therefore do not fall within the scope of Article 17 of the Charter, which safeguards the right of mothers and children to social and economic protection, nor within the scope of any other article of the Charter.

7. Since the submitted complaint does not concern any right protected by the Charter the Government consider that the Committee should decide that the invoked provision have not been breached.

8. Since the Committee has decided that the complaint is admissible and noted that it will deal with the Government's objections relating to the applicability of Article 17 to the subject matter of the present complaint at the merits stage, the Government are submitting their observations on the merits of the complaint to the Committee.

b On the system of the social protection of children and the object and purpose of proceedings in cases of under-15 children on otherwise criminal acts

9. Before the Government comment on each of the claims raised by the complainant organisation they have to offer several general remarks on the system of social protection of the children below the age of criminal responsibility and on the object and purpose of the relevant part of Act no. 218/2003 on the responsibil-

ity of juveniles for unlawful acts and on juvenile justice ("the ZSVM" or "the Juvenile Justice Act"), which provides for proceedings in cases of children under the age of 15 on acts that otherwise are criminal acts.

10. The Government note in the first place that a child starts to be criminally responsible after reaching of the age of 15. Wording of the Juvenile Justice Act, as in force since 2004, summarises the proceedings in cases of delinquent juveniles, who comprise two categories of children differentiated by age. The first category includes children not criminally responsible, who were not yet 15 at the time of committing an otherwise criminal act and who cannot be held criminally liable due to being underage. The other category includes juvenile delinquents up to the age of 18 who were 15 at the time of committing the offence, and therefore are already criminally responsible.

11. In proceedings conducted in cases of juvenile offenders Chapter II of the ZSVM is used, subsidiarily also using criminal law regulations, and proceedings conducted against them have the nature of criminal proceedings, whereas the legislation on proceedings in cases of children below the age of criminal responsibility under the age of 15 is completely different. Proceedings in cases of under-15 children on otherwise criminal acts, set out in Chapter III of the ZSVM, have the nature of civil proceedings in which civil law regulations are subsidiarily used. The concepts of criminal law therefore cannot be used at all in respect of children below the age of criminal responsibility. The Government consider the different character of the two types of the proceedings as one of the essential aspects which must be borne in mind while examining the complaint at hand.

12. As mentioned above, the complainant organisation claims failure to provide social protection to children under the age of 15 who have committed an otherwise criminal act, on the ground that such children are not afforded selected guarantees such as are available to accused persons in criminal proceedings.

13. The Government note that in no way is it possible to deduce from the fact that criminal law regulations or the principles that protect prosecuted persons cannot be applied to children who do not have the status of prosecuted persons that social protection is not provided to such children. In fact, the protection of under-15 children who have committed an otherwise criminal act has a different form in proceedings entailing the hearing of such an act before a court and this protection is based on the rights guaranteed to such children in civil law regulations.

14. In the Government's opinion, the protection of the rights embodied in Article 17 of the Charter is definitely not limited to procedural rights only. In relation to proceedings in cases of under-15 children, the legal system rests on the social and guardianship model,[1] where emphasis is placed on identifying the

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[1] The other is the justice model, where the view prevails that a child who has committed an offence was guided primarily by his or her individual choice and the other factors are supporting only. The child can be found criminally liable, where the only appropriate measure is the possibility to im-

causes of and preventing children's delinquent behaviour through the choice of appropriate measures. The Juvenile Justice Act also fully applies elements of restorative justice, emphasising the rehabilitation, protection and education of the perpetrators rather than their punishment. This law pursues the objective of protecting society against children's delinquent behaviour through their proper upbringing while respecting their needs and through creating suitable social environment for their healthy mental, physical and social development and socially beneficial life.[2]

15. Acts that are otherwise criminal acts are heard in civil proceedings, because such proceedings are much better suited to take into account the specificities inherent in this category of children. A detailed examination of the situation of the child and his/her family and the child's behaviour at school, in the domestic environment and in the public, and a detailed survey of the child's life so far can help to assess the level to which the child has developed mentally and morally, the nature of the child, the environment in which the child is growing up, the influence of this environment on the child, and how the child's family contributes to his/her overall development, and potentially other factors that play a role in the upbringing of the child. For a decision in the case to be fair, as much knowledge as possible must be gathered on how the child was developing until the time of committing the otherwise criminal act, and these findings must be evaluated in the context of the circumstances under which the otherwise criminal act was committed, including the extent to which the child participated in it. It is only the aggregate of the facts so found and verified which will establish a sufficient and reliable basis for deciding on the measure or the means that would meet the stated objective of the law.

16. It must be emphasised that throughout the proceedings, a crucial role is played by the engagement of the authority for social and legal protection of children, the specially trained staff members of which are able to opt for suitable approaches and, leveraging their expertise and practical experience, effectively promote the interests of each particular child in all the required areas. They are therefore present during both procedural hearings and informal meetings on matters concerning the child, where they have a say in the selection of the suitable means.

17. Proceedings in cases of under-15 children under the Juvenile Justice Act are therefore capable of achieving a comprehensive solution to the case at hand and the social reintegration of the child. One of seven measures can usually be imposed on children during the proceedings on the basis of the results of prior pedagogical and psychological examination[3], specifically the following measures: an educational duty, an educational restriction, a warning alert, inclusion in

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pose punishment. *Cf.* Muncie, J., *Youth and Crime. A Critical Introduction*. London: Sage Publications, 1999, pp. 264 to 271

[2] Explanatory report on the ZSVM, Parliament paper 210, the 2002–2006 term, p. 48, http://www.psp.cz/sqw/text/tiskt.sqw?o=4&ct=210&ct1=0

[3] Article 93 § 1 of ZSVM: "*Where an under-15 child commits an otherwise criminal act, the juvenile court can impose on the child, usually on the basis of the results of prior pedagogical and psychological examination, the following measures (…)*"

a therapeutic, psychological or another suitable upbringing programme at an educational care centre, supervision by a probation officer, protective institutional education or protective institutional treatment. By imposing one or multiple suitable measures the court pursues the objective of actively influencing the upbringing of the child, protecting the child against harmful influences and restoring the child's social environment. The court determines the measure(s) on the basis of the maximum individualisation reflecting the child's personal situation. The court may also decide to refrain from imposing a measure where the mere hearing of the offence suffices for achieving the purpose of the law.[4]

18. The above makes it clearly apparent that social protection of under-15 children in proceedings on otherwise criminal acts is, on the contrary, the key objective of this legislation, which caters to children's specific needs and provides them with support by a number of entities in the proceedings. It is a sophisticated system *sui generis* taking into account the child's best interests. By their very nature, the above special attributes of this system therefore preclude the meeting of any of the standards of criminal procedure. The complainant organisation's opinion of a violation of Article 17 of the Charter, in which it incorrectly points to only some of the procedural aspects, completely tearing them out of the context of the entire legislation on this issue, is therefore a major simplification and incorrect.

19. Furthermore, the regulation of the ZSVM is just one of the components of the complex care provided to the children below the age of criminal responsibility who committed an unlawful act.

20. The delinquency of a juvenile often arises from the neglect of the parents of the child who fail to perform properly their parental rights and responsibilities. A child who is not provided with sufficient care and attention might easily become endangered and start to conduct unlawful acts. Therefore, in compliance with Article 6 c) of Act no. 359/1999, on social and legal protection of children, the children who lead shiftless and immoral life and committed an unlawful act are one of the target group of the social and legal protection provided to endangered children based on the law.

21. Fundamental role in the protection of the endangered children is performed by the authority for social and legal protection of children which provides preventive and consultative services towards the families of the endangered children. The authority for social and legal protection of children is obliged to examine the causes of the delinquency of the child, to advise parents and activate them in the performance of their parental responsibilities or to compose an individual plan of the protection of the child. Where the interest on the proper upbringing of the child calls for that, authority for social and legal protection of children is entitled to impose one of the educational measures on the child or his/her parents.

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[4] Article 93 § 10 ZSVM: "*The juvenile court can refrain from imposing a measure if the consideration of the child's act by the public prosecutor or before the juvenile court suffices to achieve the purpose of this law (Article 1§ 2).*"

22. The intervention of the authority for social and legal protection of children is based on principles of social work and its goal is to stabilize the situation of the child and his/her family, so that the intervention of the State authorities with the parental responsibilities is not necessary anymore and other means of the support are sufficient. However, if the measures imposed by the authority for social and legal protection of children turn out not to be sufficient for the rehabilitation of the child who is neglected the authority for social and legal protection of children might propose to the court to impose a more intervening measure concerning the upbringing of the child in compliance with the Act on social and legal protection of children or with Act no. 89/2012, Civil Code.

23. In compliance with Act no. 257/2000, on Probation and Mediation Services, a probation officer of the Probation and Mediation Services is another important stakeholder who contributes to the rehabilitation of the child who is in conflict with law. The probation officer ensures mediation in order to solve the conflict between the offender and the victim and conduct activities striving for the reconciliation of the conflict situation.

24. The service of the probation officer is offered to the child already in pre-trial proceedings and it includes besides mediation also proposal of suitable programmes and educational measures. The service is provided for free and in the pre-trial proceedings only with the consent of a child. If a child decides to participate in the programme, his/her collaboration with the probation officer is later taken into account by the court. The probation officer cooperates closely with the representatives of the authority for social and legal protection of children, and if it is useful he cooperates also with schools, church, NGOs and other stakeholders.

25. The Government would add for completeness that the compliance of this legislation with the Czech Republic's international obligations has been repeatedly and intensively examined by various expert forums at the national level. In connection with the impact of the judgment of the European Court of Human Rights ("the Court") in the case of *Blokhin v. Russia* (no. 47152/06, judgment [GC] of 23 March 2016), the Expert Panel on the Enforcement of the Judgments of the European Court of Human Rights and the Implementation of the European Convention on Human Rights ("the Convention") (*Kolegium expertů k výkonu rozsudků Evropského soudu pro lidská práva a provádění Evropské úmluvy o lidských právech*) focused on this issue in June 2017. In May 2015, the legislation was the subject of a Suggestion by the Government Council for Human Rights (*Rada vlády pro lidská práva*) on the Rights of Children under the Age of 15. Discussions on this topic are going to continue, specifically already at the beginning of 2018. The issue of the procedural guarantees afforded to children below the age of criminal responsibility which is referred to by the complainant organization is therefore of the interest of the national authorities at the moment and the national authorities are going to deal with the issue in the future as well.

26. The compliance of the wording ZSVM and the resulting practice with the Czech Republic's constitutional order and international obligations has been examined by the Constitutional Court, which has repeatedly concluded that chil-

dren's rights are effectively protected in proceedings. It has arrived at this conclusion in, for example, its decision under II. ÚS 1199/13 of 14 November 2013, where it dismissed a constitutional appeal complaining about the fact that the appellant and his parents had not been allowed to consult the court file:

> "As follows from the requested criminal file and communications from the police and the District Public Prosecutor, the procedure was conducted under Article 65(1) of the Code of Criminal Procedure, and under Article 160(1) of the Code of Criminal Procedure taken together with Article 159a(6) of the Code of Criminal Procedure, because in the instant case, prosecution of the appellant is impermissible owing to his being underage. The above provisions specify the persons who have the right to consult the file and make copies of documents in the file, and the persons on whom the decision not to proceed with the matter should be served. Since criminal justice authorities have concluded that the appellant's case entails an act that otherwise is a criminal act, which was committed by a child under the age of 15, and prosecution was therefore impermissible because the child was underage, a motion for imposing a measure under Article 90(1) of Act no. 218/2003 has been lodged in the instant case. **In this case, the appellant and his legal guardians will already be parties to the proceedings and therefore a guardian will be appointed for the appellant under Article 91 of the above law for the purposes of these proceedings; the guardian will defend the minor's interests. In other words, some other procedural means provided to him for the protection of his right by the law are available to the appellant.** And it is only after exhausting these means that the appellant can inveigh against the decision on the last remedy available for the protection of his right (Article 75(1) of the Act on the Constitutional Court). A motion lodged earlier is inadmissible." (Highlighted bold by the Government.)

27. In another decision under I. ÚS 273/14 of 19 February 2014 the Constitutional Court highlighted the special objective of the legislation in question and special needs of children:

> "The rights of children under the age of 15 are, naturally, safeguarded, specifically in Chapter III of the ZSVM. Their protection is entrusted to the guardian, appointed from the ranks of the Bar, and also to the authority for social and legal protection of children; but also the child's legal guardians or persons in whose custody or similar care the child has been placed also participate in this protection. Under Article 91(1) of the ZSVM, all these persons in whom protection of under-15 children's rights has been vested are parties to the proceedings conducted under Chapter III of this law (see also Šámalová, Milada: *Children under the Age of 15 and Safeguarding Their Rights*; in: *Státní zastupitelství* 3/2013).
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> It should be emphasised that one of the objectives of the Juvenile Justice Act **is effective effort to ensure protection for such child primarily in such a way that upon finding the causes that led to the committing of an otherwise criminal act, the child is subjected to influence geared towards preventing the child from committing such acts in the future, and so avoid further delinquency.** This ob-

jective then quite naturally and correctly leads to a certain **formulation of the legislation, which reflects children's needs and the necessity of increased protection for their development."** (Highlighted bold by the Government.)

28. In its case law, the Committee has concluded that for the rights safeguarded by the Charter to be practical and effective, rather than purely theoretical (*International Commission of Jurists v. Portugal*, Complaint No. 1/1998, decision on the merits of 9 September 1999, § 32), the States parties must

a) adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals laid down by the Charter;

b) maintain meaningful statistics on needs, resources and results;

c) undertake regular reviews of the impact of the strategies adopted;

d) establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage;

e) pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable (*European Federation of National Organisations Working with the Homeless (FEANTSA) v. France*, Complaint No. 39/2006, decision on the merits of 5 December 2007, §54).

29. The Government are convinced that the very provisions contained in the ZSVM constitute – within the meaning of the Committee's above requirements – measures geared towards ensuring social protection for children who have committed delinquent acts. Moreover, the regulation is just a component of a complex care provided to children who are in conflict with law. As follows from the above, the Government are also systematically examining the impacts of this law, and the discussions held so far have not indicated any problems in the law to which a response would be required.

c) On the nature of proceedings in cases of under-15 children on otherwise criminal acts

30. For all the claims raised by the complainant organisation, the absolutely crucial question is whether or not proceedings in cases of under-15 children on otherwise criminal acts have the nature of criminal proceedings and, if so, the procedural safeguards available to accused persons must therefore be provided to the child who is a party to such proceedings.

31. The Government are aware that the existence of a "criminal charge" within the meaning of Article 6 of the Convention is not based solely on the classification of proceedings under national law, and that the Court also takes into account some other criteria in its case law. The second criterion that the Court takes into consideration is the nature of the offence that is the subject matter of the proceedings, and the third criterion is the nature and the degree of severity of the penalty that can be incurred for the particular offence (*Engel and Others v. the*

Netherlands, no. 5100/71 and other, judgment (plenary) of 8 June 1976, § 82). The second and third criteria are basically alternative and for arriving at a conclusion on the applicability of the criminal limb of Article 6 it suffices to meet only one of them. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a conclusion as to the existence of a criminal charge (*Ezeh and Connors v. the United Kingdom*, no. 39665/98 and no. 40086/98, judgment [GC] of 9 October 2003, § 82).

32. In its collective complaint, the complainant organisation refers to the *Blokhin v. Russia* judgment (cited above, § 179), where the Court arrived at the conclusion of the applicability of the criminal limb of Article 6 of the Convention through the cumulative assessment of the second and third criteria although under national law, the applicant's acts in this matter had not been classified as criminal acts. When examining the third criterion, the Court primarily highlighted the penalising nature of the applicant's placement in a detention centre. For the Court, the key factors were that the centre was closed and guarded, inmates were subject to constant supervision and to a strict disciplinary regime, inmates were routinely searched on admission and all personal belongings were confiscated, supervisors supervised the strict regime at the centre and any breach thereof was punished.

33. The Government emphasise that it is the nature of the measures imposed on children under the age of 15 in proceedings on otherwise criminal acts in which the fundamental differences from the nature of the measures reviewed by the Court in the above case should be seen. The reason is that none of the measures that can be imposed under the Juvenile Justice Act has the nature of sanction; on the contrary, all of them seek to wield positive influence over the child's personality in the light of the principle of the child's best interest. Even the measure in the form of protective institutional education, which interferes with the child's autonomy the most appreciably, is imposed on children solely as a protective and upbringing measure. Protective institutional education is carried out in facilities having the nature of schools, which cooperate with the child's family and so provide the family with assistance in arrangements of matters concerning the child, including family therapy and training in parental and other skills necessary for upbringing and care in the family.

34. The Government are therefore convinced that it is not appropriate to view proceedings in cases of under-15 children through the prism of the criminal limb of Article 6 of the Convention. It is therefore appropriate to only examine the question of whether or not the proceedings meet the general requirements for a fair trial such as the requirement for the independence and impartiality of the court, public hearing of the case, adversarial proceedings, equality of arms, and the right to be present during the court hearing.

(ii) On ensuring mandatory defence from the moment measures under the Juvenile Justice Act were used or actions under the Code of Criminal Procedure were taken against under-15 children

35. The complainant organisation claims that social protection of children under the age of 15 in proceedings on otherwise criminal acts is not ensured, since legal assistance is not provided from the very beginning of proceedings to children under the age of 15 who are suspect of committing an otherwise criminal act. It points out that in the case of juveniles, the law requires that they are represented by a lawyer from the very beginning of the proceedings, including during the examination phase (which is the first phase of the pre-trial stage). On the other hand, legal assistance is not provided for children under the age of 15, who are not criminally responsible.

a) On the documents and judgments to which the complainant organisation refers

36. The complainant organisation notes that the Charter is a living instrument, which ought to be interpreted in accordance with the relevant international instruments, and also in the light of the current case law as regards the protection of children and young persons.

37. Although the Government do not challenge the need to interpret the Charter in accordance with other relevant international obligations they have to draw attention to the fact that a number of the documents and judgments to which the complainant organisation refers are not relevant in any respect for the situation of the children who are parties to proceedings in cases of under-15 children on otherwise criminal acts and who are thus below the age of criminal responsibility.

38. The complainant organisation bases the right to the provision of legal assistance to children in such proceedings on, for example, *Committee of Ministers of the Council of Europe, Recommendation on the European rules for juveniles offenders subject to sanctions or measures CM/Rec(2008)11,* which, however, only applies to proceedings in cases of criminally responsible juveniles against whom criminal proceedings are brought.[5] Proceedings in cases of children below the age of criminal responsibility are not the subject matter of this document.

39. The same is true for the document *Children's rights under the European Social Charter,* which was, moreover, issued only as an information document prepared by the Secretariat of the European Social Charter, and therefore is not

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[5] Point 21.1 lays down that "'*juvenile offender' means any person below the age of 18 who is alleged to have or who has committed an offence".*
Point 21.3 lays down "'*offence' means any act or omission that infringes criminal law".* At the same time, children under the age of 15 are not criminally responsible, and so cannot commit an act that infringes criminal law.

legally binding, as is also stated on its front page. In the relevant points, this document also concerns solely criminally responsible juveniles.[6]

40. In their introductory provisions, the other documents to which the complainant organisation refers, including *Committee of Ministers of the Council of Europe*, *Recommendation concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, Rec (2003)20*; [7] *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*[8] and *Commentary to the European Rules for juvenile offenders subject to sanctions or measures*,[9] discuss the issue of setting the suitable minimum age for criminal responsibility, and in the following text they focus **solely on juveniles who have reached this age, and are therefore prosecuted.**

41. It is also quite logical that these recommendations, which are geared towards providing all available legal guarantees to juveniles, who are a vulnerable group because of their low age, place special emphasis on the importance of legal representation in criminal proceedings. But these documents cannot be used in the situation of under-15 children who are, in connection with committing an otherwise criminal act, parties to civil proceedings. However, the complainant organisation also makes many references to these irrelevant documents in other chapters of its complaint.

42. The Government have also reservations to the used quotes from the Court's case law to which the complaint refers. With the help of quotes torn out of context the complainant organisation infers the State's obligation to provide children below the age of criminal responsibility with legal assistance from the very beginning of the proceedings at all times (this is known in Czech legislation as 'mandatory defence') from judgments that frequently address completely different legal questions.

43. In *Salduz v. Turkey* (no. 36391/02, judgment of 27 November 2008, § 55) the Court discussed the question of the accused person's access to defence counsel at the early stages of the proceedings. It concluded that access to a lawyer should be provided as from the first interrogation of a suspect by the police. This access to legal assistance by a defence counsel, whom the person depositing

[6] In "Criminal liability and criminal law in respect of children" on page 5 the document sets out: "*As regards children and the criminal law, Article 17 of the Charter requires that the age of criminal responsibility must not be too low*[1]. *Further the criminal procedure relating to children and young persons must be adapted to their age. Minors should only exceptionally be remanded in custody and only for serious offences and should in such cases be separated from adults*."

[7] Committee of Ministers of the Council of Europe, Recommendation concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, Rec (2003)20: I. "*Juveniles means persons who have reached the age of criminal responsibility but not the age of majority; however, this recommendation may also extend to those immediately above these ages.*"

[8] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice: Point 23: "*The minimum age of criminal responsibility should not be too low and should be determined by law.*"

[9] Commentary to the European Rules for juvenile offenders subject to sanctions or measures, § 4: "*Rule 4 stipulates that the law should set a minimum age for any type of intervention resulting from an offence.*"

an 'explanation' to the police retains on his/her own, is fully enabled in Czech legislation,[10] but should not be confused with the accused person's right to receive legal assistance, i.e. the appointment of the defence counsel by the State. Besides, it is necessary to point out that interrogation must be distinguished from a different legal institute which is providing an explanation. The interrogation is permissible first after the initiation of criminal prosecution while a child below the age of criminal responsibility might not be prosecuted at all. It can be added for completeness that at the time when the above applicant committed the unlawful act he was 17, under Turkish legislation was criminally responsible, and criminal proceedings were conducted against him.

44. In another of the cases cited by it, *Panovits v. Cyprus* (no. 4268/04, judgment of 11 December 2008, §§ 73–74), the complainant organisation points out the case of an applicant arrested by the police when he was 17, who had allegedly committed an unlawful act and who had also been regarded as already criminally responsible. In this case, the Court noted that neither the applicant nor his father was advised of the applicant's right to receive legal representation during his interrogation by the police, whom the applicant could have consulted during the questioning. The applicant should have been advised of this right all the more so for the fact that he had been underage and was taken for questioning without his legal guardian. Again, the Court did not deal with the situation of a child below the age of criminal responsibility in this case, either, nor did it conclude that the police should have had the duty to provide the applicant with legal assistance proactively on its own in this case.

45. In the case of *Adamkiewicz v. Poland* (no. 54729/00, judgment of 2 March 2010) the Court also examined, in the ambit of Article 6 § 3 of the Convention, the possibility to exercise the right to defence, which is available to a criminally responsible applicant, and its conclusions therefore cannot be applied to proceedings in cases of under-15 children.

46. In the case of *Bouamar v. Belgium* (no. 9106/80, judgment of 29 February 1988, § 60), the Court found a breach of Article 5 § 4 of the Convention due to the absence of the applicant's lawyer during the decision-making on his deprivation of liberty.

47. Finally also in the cited case of *Anna Koreba v. Belarus* (Communication No. 1390/2005, Views of 25 October 2010, § 7.4), in which the UN Human Rights Committee was deciding, the Committee examined the provision of legal assistance to the author's criminally responsible son who had, in addition, been remanded in custody.

48. The Government therefore do not regard the arguments based on the judgments cited in favour of the complainant organisation's claim as relevant.

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[10] Article 158 § 5 of Act no. 141/1961, Code of Criminal Procedure: "*When providing explanation, every person has the right to receive legal assistance from a lawyer. Where explanation is requested from a minor, the minor's legal guardian or appointed guardian shall be notified of this step in advance; the foregoing shall not apply where this step cannot be postponed and it is not feasible to notify the legal guardian or appointed guardian.*"

b) On the pre-trial phase of criminal proceedings called examination

49. The Government deem it necessary to analyse the ways and means used for the efficient provision of protection for the child's rights in proceedings and to highlight the major specificities of such proceedings. Social and legal protection of children is an issue that falls within the State's social policy, in which the State traditionally enjoys a certain margin of appreciation in the light of the Court's case law (*Andrejeva v. Latvia*, no. 55707/00, judgment [GC] of 18 February 2009, § 86). The Government are therefore convinced that the legislation contained in the ZSVM and geared towards providing for the child's best interest does not extend beyond the State's margin of appreciation.

50. Under Chapter III of the ZSVM, proceedings in cases of children under the age of 15 are preceded by a procedure under Articles 158 *et seq.* of the Code of Criminal Procedure; this procedure is called 'examination'. When examining the facts of the otherwise criminal act committed by a child under the age of 15, the police authority must carefully follow certain specificities; these stem from the very fact that a person not criminally responsible has committed the unlawful act.

51. In this pre-trial phase, the police authority and the public prosecutor are only tasked with clarifying all the material circumstances of the case and gathering information for the public prosecutor to move for civil proceeding to be brought before a juvenile court. When clarifying the matter the police authority is allowed to take only the necessary steps, such as searching the scene and collecting clues to the otherwise criminal act, which the law allows it to carry out.[11] In

[11] Article 158 § 3 of the Code of Criminal Procedure: "*The police authority shall promptly write a record of starting steps in criminal proceedings to clarify and check facts that good reasons exist to believe that they indicate that a criminal offence has been committed; in the record, the police authority shall describe the facts and circumstances for which it is initiating the proceedings and the manner in which it has learned of them. Within 48 hours from starting the criminal proceedings, it shall send a copy of the record to the public prosecutor. Where danger from delay is imminent the police authority shall write the record once it has carried out the urgent and unrepeatable steps. In order to clarify and check facts that good reasons exist to believe that they indicate that a criminal offence has been committed, the police authority shall gather the required information and the necessary explanations and clues of the criminal offence. As part of this, the police authority is authorised, in addition to the steps specified in this Chapter, to the following, without limitation:*

a) request explanations from natural and juristic persons and governmental authorities,

b) request expert statements from the relevant authorities and, if needed for assessing the matter, also expert opinions,

c) obtain the required information, in particular documents and other written material,

d) examine the object and search the site,

e) subject to the conditions in Article 114, request a blood test and other such tests, including the sampling of the required biological material,

f) make audio and video recordings of persons, take fingerprints subject to the conditions in Article 114, and have a person of the same sex or a doctor examine the body and measure the body from the outside if this is necessary for identifying the person or for identifying and capturing the traces or consequences of the act,

g) subject to the conditions in Article 76, arrest the suspect,

h) subject to the conditions in Articles 78 to 81, take the decisions and measures that are indicated in those Articles,

order to find the facts of the case, it can cooperate with the authority for social and legal protection of children and the Probation and Mediation Service.

52. The examination phase only lasts until the moment when the course taken by the unlawful act is clarified and documented. Once it transpires during the examination that good reasons exist to suspect a person under the age of 15 of having committed an otherwise criminal act, the police authority shall decide not to proceed with the matter due to the impermissibility of prosecution, and this marks the end of the examination phase. The file is then referred to the public prosecutor who, if he agrees with the police authority's conclusion, moves for the adoption of a measure under Article 90 of the ZSVM.[12]

53. The public prosecutor is tasked with supervising the lawfulness of the proceedings.[13] Thus, should the public prosecutor conclude that the course of action followed by the police authority was incorrect and the decision not to proceed with the matter should not have been taken, or should have been taken on some other statutory grounds, the public prosecutor quashes the police authority's unlawful or unfounded decision and may replace it with his own decision.

54. The procedure before the bringing of prosecution in cases of otherwise criminal acts is carried out solely for the purpose of a 'tentative' finding, which is not binding on the juvenile court, of whether or not it can be understood that the under-15 child has committed an otherwise criminal act. It should be emphasised that the juvenile court subsequently conducting proceedings under civil law regulations is not bound by the evidence gathered by the police authority otherwise than as documentary evidence. In order to satisfy the principle of immediacy, the court can therefore take additional evidence on its own motion, including the hearing of witnesses.

55. During examination, the police authority has the opportunity to request the child to provide an 'explanation'. The purpose and objective of this explanation, which should also have the nature of a hearing within the meaning of Article 12 of the Convention on the Rights of the Child, is to provide for the child's right to voice his or her views of the suspicion basically in the entire context. Just as any other person under Article 158 § 5 of the Code of Criminal Procedure, on the occasion of providing an explanation the child has the right to a lawyer's legal assistance. The child's interests are also protected by the police authority's obligation to the effect that the child's legal guardian or appointed guardian be always notified of this step if it concerns a minor. The police authority is also obliged to notify the authority for social and legal protection of children of the step of

i) in the manner specified in Chapter IV, carry out urgent or unrepeatable steps provided the taking of such steps does not, under this law, fall within the exclusive powers of another criminal justice authority."

[12] Article 90 of Act no. 218/2003, Juvenile Justice Act: *"A measure can be imposed on a child under the age of 15, who has committed an otherwise criminal act, upon a motion of the public prosecutor's office. The public prosecutor's office shall file the motion promptly upon learning that prosecution is impermissible because the person is below the age of criminal responsibility."*

[13] Article 174 § 1 of the Code of Criminal Procedure: "*The public prosecutor shall supervise lawfulness in pre-trial proceedings.*"

'providing an explanation'.[14] A staff member of the authority for social and legal protection of children, or another person experienced in the upbringing of children, then attends the hearing of the child and therefore can, if need be, adequately intervene during the course of the explanation being provided by the child in case the police authority fails to respect the child's rights and interests to the full extent.[15] Depending on the nature of the matter the child's legal guardian may also be present, unless the circumstances of the case at hand, such as a suspicion that the child's parent is abetting the child to unlawful acting, prevent this.

56. The above indicates that the fact that the State does not provide legal assistance to the child on the occasion of explanation does not mean that the child's interests are not protected. A staff member of the authority for social and legal protection of children shall be present during the providing of explanation by an under-15 child at all times, and it is usually possible for the child's legal guardian or guardian to attend the provision of explanation, and the child has access to legal assistance by a lawyer at all times; the Government therefore believe that the child's rights are effectively protected.

c) On provisions for the child's rights in proceedings before juvenile courts

57. In compliance with Article 12 of the Convention on the Rights of the Child, which provides for the right of the child who is capable of forming his or her own views to express those views freely in all matters affecting the child, the hearing of the child is always arranged in proceedings before juvenile courts. Under the last sentence of Article 92 § 1 of the ZSVM, the child's views shall be found at all times before the court decides. Under the Supreme Court's case law as well, an oral hearing concerning the motion filed by the public prosecutor's office for the imposition of a measure shall at all times be held in proceedings before juvenile courts.

58. In proceedings before a juvenile court, the child shall be represented at all times, specifically by a guardian appointed for the child by the court from the ranks of the Bar.[16] The guardian's task is not to seek under all circumstances that the under-15 child avoids the imposition of a measure; rather, the guardian should contribute to finding the best response to the child's unlawful act. The parties to the proceedings also include the competent authority for social and legal protec-

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[14] The second and third sentences of Article 24 § 2 of Act no. 273/2008 on the Police of the Czech Republic read as follows: "*At the request of the person whose liberty has been restricted the police shall notify a person close to this person, or another person as may be determined by the person whose liberty has been restricted, thereof. Where this person is a minor or a person with restricted legal capacity, the police shall also notify the legal guardian or appointed guardian of such person. Where this person is under the age of 15, the police shall also notify the authority for social and legal protection of children. (…) The police shall make the notifications promptly.*"

[15] Article 11 of Police President Instruction no. 289/2016 of 29 December 2016, on operations in relation to children

[16] Article 91 § 2 ZSVM: "*The juvenile court shall appoint a lawyer as the child's guardian for the proceedings. In this respect, the lawyer shall also continue to carry out his/her authorisations following the child's majority until the end of the proceedings in the case of the under-15 child.*"

tion of children, the child's legal guardians or persons with whom the child has been placed for upbringing or other similar care. These persons' participation in the proceedings helps to enhance the protection of the child's rights and interests.

59. As mentioned above, the juvenile court never relies solely on the documentary evidence gathered by the police authority during examination. The court itself can, upon the parties' or its own motion, take any other evidence, including the hearing of witnesses. Proceedings in cases of under-15 children are non-contentious proceedings based on the principle of adverse party. The child and the appointed guardian representing the child therefore have the opportunity to defend the child's rights and interests by commenting on evidence taken and by proposing their own evidence. They are therefore able, *inter alia*, to request that witnesses be heard or to oppose the content of the record of explanation taken down in the examination phase. Although the court is not obliged to take all the evidence adduced, in the case of proposals for evidence that it has not taken it must explicate the reasons for why it has decided so.[17]

60. The Government remark that since the effective date of the Juvenile Justice Act in 2004, the Supreme Court has not come across any case in which the court did not accommodate requests for evidence taking or any case in which the rights of the child's guardian or another person were curtailed by failure to hear a witness whose testimony would have been important for the decision on imposing a measure. If any such defect did occur, it was cured by ordinary legal remedies.

61. The Government are therefore convinced that civil proceedings before juvenile courts, which are governed by the principle of adverse party, make it possible for the child and the person representing the child to promote the child's rights effectively, and the child's procedural rights in the proceedings are fully provided for.

(iii) On access to the police file during the pre-trial stage (the examination phase)

62. The complainant organisation claims that social protection is not ensured, since the child is not allowed access to the police file during the examination phase, and the child is therefore unable to adduce new evidence efficiently or to comment on the evidence that has been taken.

a) On the judgments to which the complainant organisation refers

63. The complainant organisation refers to the Court's judgments in which the Court found a breach of Article 6 § 1 of the Convention (*Brandstetter v. Austria,* nos. 11170/84 12876/87 and 13468/87, judgment of 28 August 1991, § 68) on the grounds of a violation of the principle of adversarial trial, or a breach of Article 6 § 1 taken together with Article 6 § 3 of the Convention on the grounds that the principle of adversarial trial and equality of arms was violated since the

[17] The Constitutional Court's judgment under I. ÚS 413/02 of 8 January 2003

applicant was unable to gain direct access to the case file until a very late stage in the proceedings (*Öcalan v. Turkey,* no. 46221/99, judgment of 12 May 2005, § 148; *Foucher v. France*, no. 22209/93, judgment of 18 March 1997, § 36).

64. The Government would point out that the complainant organisation itself notes that the cited judgments in criminal cases concern the trial stage and it is therefore not possible, in the context of Czech legislation, to apply them to the pre-trial stage, and even less to the examination phase of the pre-trial stage. The Government therefore do not regard the above case law as relevant for this claim of the complainant organisation.

b) On the child's and legal guardians' ability to access the file

65. It should be reiterated that the central part of the proceedings on whether or not the child has committed an otherwise criminal act takes place in proceedings before a juvenile court, in which the child's and his/her legal representative's access to the file is already fully provided for and the requirement for adversarial trial and equality of arms is satisfied. The content of the police file serves solely as a basis for filing a motion for a measure to be imposed.

66. In addition, it should be noted that although the right to consult the file primarily inures to the accused person, and possibly to other persons involved in the criminal proceedings (the victim, the participating persons, and their defence counsels and attorneys), the opportunity for the child and his or her parents to consult the police file at the examination phase is not excluded. The key aspect for considering of the possibility to inspect the file is therefore the procedural status of the person concerned and not his age.

67. Unless the frustration of the purpose of the proceedings is imminent, the child's parents or other legal guardians are notified by the police authority of the substance of the under-15 child's act that is being examined.[18] Further to this notification, it is possible to accommodate the child's or his or her legal guardians' request for access to the file unless serious reasons for refusing this request are found. Such serious reasons would primarily include reasons of tactics in the pending examination or a conflict of interests of the persons requesting access to the file.

68. It should also be noted that not even persons accused of a criminal offence are allowed access to the file unconditionally or under any circumstances once the criminal proceedings have been brought. The law specifies the situations where the accused person and the defence counsel can be denied access to the file for serious reasons.[19]

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[18] Article 71 § 2 of Police President Instruction no. 103/2013 of 28 May 2013 on certain tasks of the authorities of the Police of the Czech Republic in criminal proceedings

[19] Article 65 § 2 of the Code of Criminal Procedure: "*During the pre-trial, the public prosecutor or the police authority can deny the right to consult the files and simultaneously the other rights laid down in (1) for serious reasons. The public prosecutor shall, at the request of the person whom the denial concerns, expeditiously review the gravity of the reasons for which the police authority has denied the rights. These rights cannot be denied the accused person and the defence*

69. The Government therefore conclude that the claim raised by the complainant organisation is not based on the truth, since it is not always that the child is denied access to the police file on the unlawful act that the child has allegedly committed. It is true that in certain cases, the child has no access to the police file in the phase of examination, but the child's rights are not curtailed in any manner even in such cases. The reason is that the taking of all evidence is concentrated in the proceedings before the juvenile court, while the pre-trial phase called examination, during which the child's access to the file may not be provided at all times, is only focused on uncovering the facts that can be reasonably believed to indicate that a criminal office or an otherwise criminal act has been committed.

(iv) On failure to ensure that children are served with the final decision of the police authority in the examination phase and have the right to appeal against this decision

70. The complainant organisation also claims that social protection of the child in proceedings is not ensured as the child is not served the police's decision (*usnesení*) not to proceed with the matter due to the impermissibility of prosecution, and the child therefore cannot file an appeal against this police decision.[20]

71. It also claims that in the majority of cases where the public prosecutor moves for a measure to be imposed, juvenile courts consider cases of only petty offences and the child is therefore subjected to a purely formal and unnecessary trial. It supports this claim by statistics, according to which in 2014 and 2015, the courts only heard the offence, whereupon they did not consider it to be necessary to impose a measure on the child in almost one third of cases.

72. First of all, the Government have to oppose the complainant organisation's claim that the children and their legal guardians are not informed about the decisions not to proceed with the matter due to the impermissibility of prosecution because of underage. . In compliance with Opinion 1 SL 705/2017 of the Analytical and Legislative Department of the Supreme Public Prosecutor's Office (*Nejvyšší státní zastupitelství*), which has addressed this issue, public prosecutors are being trained in specialised seminars to the effect that the child's legal guardians should be notified of the decision not to proceed with the matter due to the impermissibility of prosecution because of underage. This is possible because regarding the serving of the decision not to proceed with the matter a general regulation on the serving according to Article 159a § 6 is applied and it stipulates that a person who is directly affected should be notified about the decision. Thus, legal guardians are notified via this channel of the result of the examination of the facts related to the committing of an otherwise criminal act by an under-15 child, and

counsel once they have been notified of the opportunity to consult the files and also on the occasion of the negotiation of the agreement on guilt and punishment."

[20] Article 159a § 2 of the Code of Criminal Procedure: "*Before bringing prosecution, the public prosecutor or the police authority shall decide not to proceed with the matter if prosecution is impermissible under Article 11.*"

receive this information before the public prosecutor's office moves for a measure.

73. The Government admit that the applicable legislation does not allow under-15 children to lodge a remedy against the decision not to proceed with the matter due to the impermissibility of prosecution because of underage. An ordinary remedy against the police authority's decision is a complaint that makes it possible to challenge the relevant decision on the grounds of its inaccuracy or of its breaching the provisions on the proceedings that preceded the delivery of the decision.[21] However, in a situation where the decision not to proceed due to the impermissibility of prosecution is delivered, because the person is not criminally responsible due to being underage, the question remains of what the inaccuracy of the decision could consist in other than an incorrect identification of the child's age.

74. If the claim raised by the complainant organisation is intended to imply that a decision not to proceed with the matter could in theory be also delivered in cases where the child has committed a less grave unlawful act that did not have the nature of an otherwise criminal act, it should be noted that the police authority and the public prosecutor are, naturally, primarily obliged to examine whether or not the act was an otherwise criminal act, and must do so before delivering this decision.

75. Acts that have the elements, save for the perpetrator's criminal responsibility, of a criminal offence, which include the formal features of a particular criminal offence and social harmfulness, satisfy the definition of the 'otherwise criminal act'.[22] Acts by under-15 children, which are less socially harmful, and thus also less grave, and which it is enough to penalise by holding the child liable under a different law in pursuance of the principle that repression under criminal law is subsidiary only, therefore logically cannot be described as 'otherwise criminal acts'.

76. In its decision under II. ÚS 628/15 of 11 August 2015, the Constitutional Court has also commented on the issue of the extent to which an act is socially harmful for the purposes of moving for the imposition of a measure; in its decision it holds that a motion for the imposition of a measure can only be lodged in response to acts that are, in terms of their social harmfulness and gravity, at least at the same level as is required in relation to wrongdoings of juvenile offenders:

> "However, the above does not mean that the public prosecutor should, in cases of under-15 children, proceed mechanically and without a deeper insight into the circumstances of the case and the children's

[21] Article 145 of the Code of Criminal Procedure: *"The decision can be challenged*
a) on the grounds of the inaccuracy of any of its rulings, or
b) on the grounds of its breaching the provisions on the proceedings that preceded the delivery of the decision if such breach was capable of causing a ruling in the decision to be inaccurate."

[22] Article 12 § 2 of Act no. 40/2009, Code of Criminal Procedure: "*The perpetrator's criminal responsibility and the penal consequences related thereto can only be invoked in socially harmful cases where invoking responsibility under a different law does not suffice.*"

personal situation. On the contrary, it is very important that the public prosecutor sensitively considers the gravity and harmfulness of their unlawful acts and the facts that characterise their personality, including the manner in which the act was committed and the motives that have driven the child to commit the act. **The reason is that in these cases it also applies that measures under Chapter III of the Juvenile Justice Act can be used in relation to such children solely when they commit acts that are otherwise criminal acts, regardless of the fact that all of their unlawful acts are non-punishable already due to their being underage** (*cf.* Article 89 § 2 and Article 93 § 1 of the cited law). The Constitutional Court thus agrees with the appellant that such acts must primarily be socially harmful acts. In relation to children, the Juvenile Justice Act does not specify the required social harmfulness and gravity of their acts in any manner, **but it can be understood that such acts must have at least the same level of social harmfulness and gravity as is required in relation to the wrongdoings of juveniles**. However, such acts should be, in general, even more grave and harmful than those for which juveniles can be prosecuted. Visible here again is the principle, spelled out in the foregoing, that steps taken in relation to under-15 children should reflect the fact that the children are still immature individuals requiring special considerations, if only for their still incomplete mental and moral development. The acts committed by them should therefore be viewed from a certain distance and taking into account the specificities of their personality, especially where only sporadic breaches of legislation are at issue. If, then, the second sentence of Article 90 § 1 of the law requires the public prosecutor to immediately lodge a motion for imposing a measure on a child who has committed an otherwise criminal act, this formulation means that the public prosecutor should do so in cases of acts that are at least comparable, in terms of their gravity and harmfulness, with wrongdoings of juveniles, but advisably rather in cases of even more grave and harmful acts the hearing of which before juvenile courts is also substantiated by the specific circumstances related to the personality of the child who has committed them, and the circumstances of the case. On the contrary, it is not appropriate to overestimate the importance of the protected interest that has been affected by the act, or its consequences. A sensitive and balanced approach to the delinquency of these children is important mainly to prevent cases basically involving 'schoolboy pranks' from reaching juvenile courts, the hearing of which may be accompanied by a stigma that would mark the further development of the child adversely or for a long time." (Highlighted bold by the Government.)

77. As mentioned in § 53 above, in a situation where the police authority decides not to proceed with the matter because the perpetrator is not criminally responsible, but the requirement for the social harmfulness of the act has not been met, the public prosecutor does not move for the imposition of a measure under the ZSVM but instead quashes the police authority's relevant decision and deliv-

ers his own decision.[23] In this decision, the public prosecutor decides not to proceed with the matter because the case does not involve a suspicion of a criminal offence.[24]

78. It can only be noted on the statistics submitted by the complainant organisation that it is not possible to deduce simplistically from the fact alone that in 2014 and 2015 courts decided in 28% and 27% of the cases to refrain from imposing a measure on the child that motions for the imposition of a measure were lodged without any facts existing to indicate that the child had committed an otherwise criminal act. This is because there are more reasons for courts refraining from imposing a measure.

79. In the first place, such a reason can be the fact that it has not been established in the proceedings that the otherwise criminal act was committed by the child against whom the proceedings are conducted. As mentioned above, evidence concerning the committing of an otherwise criminal act is only taken in proceedings before the juvenile court. It is only up to the court to judge, on the basis of the documentary evidence submitted in the motion for the imposition of a measure and the evidence taken by the court itself on its own motion or on the basis of the parties' proposals, whether or not the child has committed the otherwise criminal act.

80. It should also be recalled that the ZSVM is based on the principle of restorative justice and its objective is for the child to refrain from committing additional unlawful acts and to find a place in society matching his or her abilities and mental development, and to help, to the extent of his or her abilities and capacity, to redress the damage caused by the unlawful act.[25] If, then, the court concludes that this edifying purpose has been met by the very consideration of the matter,

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[23] Article 174 § 2e) of the Code of Criminal Procedure: "*In addition to the authorisations laid down in Article 157 § 2 the public prosecutor is also authorised to the following when exercising supervision:*
e) quash the police authority's unlawful or ill-founded decisions and measures, which he may replace with his own; in respect of decisions not to proceed with the matter, he can do so within 30 days of the service thereof; where he has replaced the police authority's decision with his own decision otherwise than on the basis of the entitled person's complaint against the police authority's decision, a complaint against his decision is admissible in the same scope as complaints against the police authority's decisions,"

[24] Article 159a § 1 of the Code of Criminal Procedure: *"Where the case does not involve suspicion of a criminal offence, the public prosecutor or the police authority shall decide not to proceed with the matter, unless the case should be disposed of in a different manner. Such disposal can be, in particular,*
a) referring the case to the competent authority to consider an administrative offence, or
b) referring the case to another authority for disciplinary considerations."

[25] Article 1 § 2 ZSVM: "*The purpose of considering unlawful acts committed by children under the age of 15 and juveniles is to use, in relation to the person who has committed such act, a measure that will effectively help such person to refrain from committing additional unlawful acts and to find his or her place in society matching his or her abilities and mental development, and to help, to the extent of his or her abilities and capacity, to redress the damage caused by the unlawful act; the proceedings shall be conducted so that they help to prevent and obviate the committing of unlawful acts.*"

the law envisages that the child does not have to be subjected to any measure.[26] The Constitutional Court has also highlighted this option available to juvenile courts in its decision under II. ÚS 628/15:

> "The reason is that the primary objective of these proceedings is not to punish the child repressively but to form the child in an edifying manner and protect the child against adverse influences. **This is why not only the outcome from such proceedings before juvenile courts but also the entire proceedings must encourage the child to adopt generally acceptable norms of behaviour, promote the positive elements of the child's personality, reinforce the child's socially useful ties, and support the child's specific interests or search for a place in society adequate to the child's abilities and mental development** (see also Article 1 § 2 of the Juvenile Justice Act). This is why, for example, Article 93 § 10 of the Juvenile Justice Act lays down that juvenile courts can refrain from imposing a measure where the consideration of the child's act by the public prosecutor or before the juvenile court suffices to achieve the above objective." (Highlighted bold by the Government.)

81. In addition to the statistics submitted by the complainant organisation, which are intended to point out the potential lodging of motions for measures in unsubstantiated cases, the Government submit for comparison a list of the outcomes from indictments brought in cases of juvenile offenders.

82. Categorising the data in the detailed table in Annex 1, which contains a number of different ways in which the indictment was disposed of, into Group 1, where the juvenile was convicted and punished (convicted, cumulative sentence (*společný trest*), overall sentence (*souhrnný trest*)), and Group 2, where the juvenile was not punished (acquitment, conditional discontinuance under Article 308 of the Code of Criminal Procedure, conviction with punishment waived, discontinuation, referral), and excluding other exceptional and statistically negligible methods of disposal (settlement, appeal on points of law, complaint about a violation of the law, renewal of proceedings, quashing by the Constitutional Court), we will find the percentage of the cases where courts punished the juvenile offenders. The results do not significantly differ from the statistics submitted by the complainant organisation in the cases of under-15 children. In 2013, 2014, 2015 and 2016, criminal courts refrained from punishing juvenile offenders in 31.3%, 23.1%, 27.6% and 24.8% of the cases.

83. The Government therefore summarise that the statistical data submitted by the complainant organisation cannot be regarded as proof that motions for the imposition of a measure are being lodged in unsubstantiated cases. Juvenile courts can be prompted to refrain from imposing a measure for a number of reasons; unfortunately, such reasons cannot be read in more detail from the available statistics.

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[26] Article 93 § 10 ZSVM.

(v) On the need to conduct proceedings on the imposition of a measure before juvenile courts

84. The complainant organisation also claims that in proceedings in cases of under-15 children on otherwise criminal acts, the protection of the children against formal and unnecessary proceedings before juvenile courts is not ensured. It claims that social protection of children within the meaning of Article 17 of the Charter is not ensured because the legislation on proceedings before juvenile courts does not allow any diversions, unlike criminal proceedings.

a) On the judgments and documents to which the complainant organisation refers

85. The Government must again comment on the case law to which the complaint refers. The complainant organisation cites judgments in the cases of *Bouamar v. Belgium* (no. 9106/80, judgment of 29 February 1988) and *D.G. v. Ireland* (no. 39474/98, judgment of 16 May 2002), arguing that in those cases the Court has formulated a positive obligation of the State to ensure that mediation and other diversions are available in proceedings in cases of children below the age of criminal responsibility.

86. The Government regard this interpretation of the above judgments as completely erroneous and self-serving. Both judgments concern the issue of detention for the purposes of educational supervision within the meaning of Article 5 § 1 (d) of the Convention, and in the paragraphs cited by the complainant organisation, or in any other paragraphs, they do not comment at all on the issue of diversions, let alone the State's positive obligation to ensure diversions in proceedings stemming from them.

87. The State's obligation to ensure, in civil proceedings before juvenile courts, diversions within the meaning of the diversions that are used in criminal proceedings under Czech law also cannot be inferred from the other documents to which the complainant organisation refers.[27] The Government note that again, the complainant organisation cites documents[28] that pertain to criminal proceedings in cases of criminally responsible juveniles and recommend that such proceedings be based on the principle of restorative justice and ensure alternative and educative measures that can be imposed on children instead of the usual measures under criminal law.

88. As regards the other cited documents, which actually do pertain to proceedings in the case of children below the age of criminal responsibility, such as Council of Europe Commissioner for Human Rights, *Children and Juvenile Jus-*

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[27] Settlement under Article 309 of the Code of Criminal Procedure, conditional discontinuance under Article 307 of the Code of Criminal Procedure, waiver of prosecution under Article 71 ZSVM.

[28] *Vienna Guidelines for Action on Children in the Criminal Justice System.* As the very name of the document indicates the document applies to criminally responsible children and recommends that in proceedings on their delinquency, a broad range of alternative and educative measures be available (see point 15).

tice: Proposal for Improvements, this document recommends that appropriate health/social services be provided for these children.[29] And indeed, the Government are convinced that these recommendations are completely satisfied in proceedings under Chapter III of the ZSVM. As mentioned above, the measures that can be imposed on children under this Chapter of the law include, for example, protective institutional education, which takes place in facilities having the nature of schools, and institutional protective treatment, which takes place on an 'outpatient' or an institutional basis at a health facility. Thus, these measures, just as all the other measures, seek to wield a positive influence on the child's personality and on the integration of the child into society, and their objective is not to punish the child.

b) On the claim of the non-existence of diversions

89. In respect of the claim of the existence of formal and unnecessary proceedings before juvenile courts, the Government refer to their comments in §§ 74–77 above.

90. The Government are convinced that the guardian-based system of proceedings in cases of under-15 children is fully in line with the requirements of international documents that children below the age of criminal responsibility be not subjected to criminal proceedings and that in reaction to their offending, alternative measures for their rehabilitation be adopted. It should be emphasised that it is only when it is proved in the proceedings that the child has committed an otherwise criminal act that the juvenile court selects the measure that is the most appropriate one with regard to the child's age, mental and moral maturity, and the gravity of the committed act.

91. Moreover, judges as well as prosecutors, police officers or officers of Probation and Mediation Services who are in touch with children in conflict with law are obliged to undergo a training regarding the special treatment of child offenders.[30] Therefore, the proceedings take into account the needs of children and the children are not stressed in any way during the trial or pre-trial phase of proceedings.

92. The Government believe that the existence of diversions within the meaning of the Criminal Code in cases of under-15 children would, on the contrary, constitute a lowering of the standard of protection currently afforded to children suspected of an otherwise criminal act. While the applicable legislation requires the hearing of an otherwise criminal act by an independent court and guarantees the child the right to legal assistance by a guardian appointed by the court and all the rights arising from the right to a fair trial, these procedural safeguards would not be provided to the child should diversions be used at the stage preceding trial before the juvenile court. Should diversions be allowed in the pre-trial phase called examination, the police authority would simultaneously *de facto* de-

[29] Council of Europe Commissioner for Human Rights, *Children and juvenile justice: proposal for improvements*, point 4.1.
[30] Article 3 § 8 ZSVM,

cide, in its decision on the diversion, that the child actually *has* committed the otherwise criminal act, but without any proceedings having been conducted before an independent court and ensuring the child's procedural rights.

93. The Government therefore regard also this claim raised by the complainant organisation as ill-founded. The applicable legislation provides children with a high standard of protection of their rights in juvenile court proceedings. Using diversions in the phase of examination, as demanded by the complainant organisation, would clearly result in a considerable impairment of the current high standard of protection.

II. ALLEGED VIOLATION OF ARTICLE 17 OF THE CHARTER IN CONJUNCTION WITH THE PROHIBITION OF DISCRIMINATION

94. The complainant organisation claims that providing children in proceedings in cases of under-15 children on otherwise criminal acts with a lower social protection than that afforded to juvenile or adult parties to criminal proceedings violates Article 17 of the Charter in connection with the prohibition of discrimination on grounds of age.

a) On discrimination on grounds of age

95. The Government primarily note that States are free to accede to certain international obligations at their discretion. Thus, the Czech Republic decided to accede to the European Social Charter of 1961. In the Preamble, the Charter prohibits discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin. Thus, the State's obligation to prohibit discrimination on grounds of age or on grounds of other status does not follow from the text of the Preamble or other provisions of the Charter.

96. The complainant organisation is aware of this fact, and so its claim mainly relies on the wording of Article E of the European Social Charter (Revised) of 1996, which also contains prohibition of discrimination on grounds of other status. However, the Czech Republic has not acceded to the European Social Charter (Revised), and therefore is not bound by it in any manner whatsoever. The complainant organisation therefore cannot invoke a breach of the prohibition of discrimination on the basis of a treaty that the Czech Republic has decided not to accede to, and therefore no international obligations arise for the Czech Republic from such treaty.

97. The Government are therefore convinced that the complainant organisation's claim concerning the discrimination of under-15 children on grounds of age is incompatible with the Charter of 1961 *ratione materiae*, and there has therefore been no violation of the cited provisions.

b) On the comparable situations of children below the age of criminal responsibility and juveniles

98. Should the Committee not agree with the Government's above arguments relating to the complainant organisation's claim of discrimination on grounds of age the Government shall, for the sake of caution, also comment on the comparability of the situations of children in proceedings before juvenile courts and those of juvenile offenders in criminal proceedings.

99. Under the Court's established case law, discrimination means that there must be a difference in the treatment of persons in *relevantly similar situations* that is not reasonably and objectively justified. Defined in the negative way, if the treatment under consideration does not concern persons in relevantly similar situations, then there has been no discrimination (*cf*. the Court's judgments in *Carson and Others v. the United Kingdom*, no. 42184/05, judgment [GC] of 16 March 2010, §§ 83–90; or *Nylund v. Finland*, no. 27110/95, decision of 29 June 1999, part B.2 of the law section).

100. At this point, the Government cannot but emphasise again the obvious difference between criminal proceedings dealing with offences committed by criminally responsible juveniles and civil proceedings dealing with otherwise criminal acts committed by under-15 children, i.e. below the age of criminal responsibility.

101. Quite logically, criminal and civil proceedings are based on completely different principles, and the legal guarantees afforded to the parties to these proceedings therefore cannot be compared in any manner, and it cannot be inferred that juveniles and children below the age of criminal responsibility under 15 are placed in comparable situations.

102. The Government therefore regard the complainant organisation's claim as entirely ill-founded.

III. AS TO THE JUST SATISFACTION CLAIM

103. The complainant organisation demands EUR 10,000 on the grounds of the costs of the legal representation.

104. In line with the reply of the President of the Committee of Ministers' Deputies of the Council of Europe to the President of the European Committee of Social Rights, dated 28 April 2017, relying on a thorough debate on the issue of compensation for costs in collective complaints procedures by the Rapporteur Group on Social and Health Questions (GR-SOC) on 23 March 2017, the Government note that there is no legal foundation for awarding just satisfaction to the complainant organisation either under the Additional Protocol to the Charter providing for a System of Collective Complaints or in the Explanatory Report to the Protocol.

105. However, even in the hypothetical situation that such legal grounds existed it would always have to be established that such expenses were actually in-

curred and reasonable as to quantum (see *Confédération française de l'encadrement CFE-CGC v. France*, collective complaint no. 56/2009, decision on the merits of 23 June 2010, §§ 87 to 89; see also the judgment of the Court cited therein concerning, *inter alia*, the matter of costs of the proceedings in *Nikolova v. Bulgaria*, no. 31195/96, judgment [GC] of 25 March 1999, § 79). That said, the complainant organisation's proposal is manifestly excessive and is not supported by any evidence.

106. In any case, however, even if the Committee finds that there has been a violation of the Charter or the Protocol the Committee does not have the competence to decide about costs of the proceedings or to award the complainant organisation any other financial compensation.

OVERALL CONCLUSION

107. The Government are convinced that none of the objections raised by the complainant organization might result in a violation of Article 17 of the European Social Charter read in isolation or in conjunction with the principle of prohibition of discrimination on grounds of age.

108. First of all, complainant organization's claims concern solely the right to a fair trial, and therefore do not fall either within the scope of Article 17 of the Charter, which safeguards the right of mothers and children to social and economic protection, or within the scope of any other provision of the Charter. Therefore, the complaint at hand is incompatible with the Charter *ratione materiae.*

109. Furthermore, the Juvenile Justice Act is just a part of the complex system of the social protection of children in conflict with law. The protection and support provided to these children is also based on the Act on Probation and Mediation Services and Act on Social and Legal Protection of Children. The educational measures and programmes which are accessible to children in conflict with law based on these acts are effectively interconnected and are imposed not in order to punish a child but to protect and educate him/her.

110. The procedural rights of the child in the civil proceedings in cases of under-15 children on otherwise criminal acts are effectively ensured by a range of measures. Proceedings in cases of under-15 children on otherwise criminal acts have the nature of civil proceedings in which civil law regulations are subsidiarily used. Therefore, the concepts of criminal law such as mandatory defence cannot be used in respect of children below the age of criminal responsibility at all.

111. The Juvenile Justice Act caters children's specific needs and provides them with support by a number of entities in the proceedings. It is a sophisticated system *sui generis* taking into account the child's best interests. Thus, it is not possible to conclude that the procedural rights of children in the proceedings are not ensured effectively and the Czech Republic fails to ensure a right of children to social and economic protection based on these alleged deficiencies.

PROPOSED DECISION OF THE COMMITTEE

112. In the light of the above the Government of the Czech Republic in their observations on the collective complaint propose that the Committee hold that:

- the claim of the violation of Article 17 of the Charter through failure to sufficiently ensure the procedural rights of children in proceedings in cases of children under the age of 15 on otherwise criminal acts is incompatible with the above provision of the Charter *ratione materiae,*
- the claim of the violation of Article 17 of the Charter in conjunction with the prohibition of discrimination on grounds of age is incompatible with the Charter *ratione materiae*,

alternatively that it find that

- Article 17 of the Charter has not been violated,
- Article 17 of the Charter in conjunction with the prohibition of discrimination on grounds of age has not been violated.

Vít A. Schorm
Agent of the Government
signed electronically

ENCLOSURE

- Methods in which indictments brought in cases of juvenile offenders have been disposed of

Annex 1

Disposal of all indictments brought in cases of juvenile delinquents: outcomes from proceedings

Outcome from proceedings	2013		2014		2015		2016	
	Number	Share in %	Number	Share in %	Number	Share in %	Number	Share in %
Convicted	1983	69.24	1593	69.84	1403	71.91	1312	73.92
Acquitted	168	5.87	97	4.25	95	4.87	48	2.70
Discontinued	149	5.20	107	4.69	90	4.61	56	3.15
Referred	80	2.79	40	1.75	30	1.54	26	1.46
Cumulative sentence	25	0.87	21	0.92	14	0.72	7	0.39
Overall sentence	205	7.16	247	10.83	203	10.40	195	10.99
New conviction after applying Article 306a(2) CCP*	0	0.00	0	0.00	0	0.00	0	0.00
Proved to satisfy the imposed conditions following conditional discontinuance under Article 308 CCP	249	8.69	174	7.63	114	5.84	129	7.27
Settlement *	1	0.03	0	0.00	0	0.00	0	0.00
Appeal on a point of law *	2	0.07	1	0.04	1	0.05	1	0.06
Complaint about breach of law *	0	0.00	0	0.00	0	0.00	0	0.00
Renewal of proceedings *	2	0.07	1	0.04	1	0.05	1	0.06
Quashed by the Constitutional Court *	0	0.00	0	0.00	0	0.00	0	0.00
Total	**2864**	**100.00**	**2281**	**100.00**	**1951**	**100.00**	**1775**	**100.00**

Summary of the ways of the disposal of indictments excluding the outcomes marked *

Outcome from proceedings	2013		2014		2015		2016	
	Number	Share in %	Number	Share in %	Number	Share in %	Number	Share in %
Juvenile convicted and punished	1963	68.66	1752	76.88	1410	72.34	1333	75.18
Juvenile not punished	896	31.34	527	23.12	539	27.66	440	24.82
Total	**2859**	**100.00**	**2279**	**100.00**	**1949**	**100.00**	**1773**	**100.00**

Reasons for refraining from punishing the juvenile offender

Outcome from proceedings	2013		2014		2015		2016	
	Number	Share in % of total number	Number	Share in % of total number	Number	Share in % of total number	Number	Share in % of total number
Proved to satisfy the imposed conditions following conditional discontinuance under Article 308 CCP	249	8.71	174	7.63	114	5.85	129	7.28
Convicted with punishment waived (a penal measure imposed)	250	8.74	109	4.78	210	10.77	181	10.21
Acquitted	168	5.88	97	4.26	95	4.87	48	2.71
Discontinued	149	5.21	107	4.70	90	4.62	56	3.16
Referred	80	2.80	40	1.76	30	1.54	26	1.47
Total	**896**	**31.34**	**527**	**23.12**	**539**	**27.66**	**440**	**24.82**