


## European and EU Standards of Rights and Protection of Child Victims of Crime and Their Implementation in the Polish Criminal Process Through Amendments to the Code of Criminal Procedure in 2020–2023

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### Keywords:

European and EU standards, child victim, procedural rights, protection, Polish Code of Criminal Procedure

**Abstract:** The basic assumption of the article is to examine to what extent the latest amendments to the Polish Code of Criminal Procedure (CCP) are in line with international standards of rights and protection of child victims of crime. It should be noted that between 2020 and 2023, the Polish justice system has undergone significant evolution in this area, striving to meet the standards of child-friendly justice specified by legal acts of the Council of Europe and European Union legislation. The following acts were of particular importance here: of 13 January 2023, 7 July 2023, 27 July 2023 amending the provisions of CCP introducing, among others, the institution of individual assessment of the needs of victims (Article 52a), the legal representative of a minor victim (Article 51 § 2a) and amending the procedures for interviewing minor victims and witnesses specified in Articles 185a–185c and f of the Polish CCP. All these amendments will be assessed in the context of the standards set by the Council of Europe Convention on the Protection of Children against sexual exploitation of 25 October 2007 and the Council of Europe Convention on preventing and combating violence against women and domestic violence of 11 May 2011. Regarding EU standards, it is necessary to examine the standards of rights

The article is financially supported by the Polish Minister of Science under the „Regional Initiative of Excellence” (RID) programme.



Ministry of Science and Higher Education  
Republic of Poland



and protection of child victims of crime contained in Directive 2011/93/EU of 13 December 2011 on combating sexual abuse and sexual exploitation of children and Directive 2012/29/EU of 25 October 2012 on minimum standards of protection, rights and support for victims of crime and the draft amendments to this directive of 23 July 2023. This article highlights the most important of the Polish CCP changes in 2020–2023 and presents the current state of implementation of the above mentioned European and EU standards into Polish criminal procedure.

## 1. Introduction

The establishment of Council of Europe and EU standards relating to child victims is justified on the one hand by the magnitude of crimes committed against children and, on the other hand, by studies indicating their special status as victims and witnesses of such crimes requiring appropriate regulation of their protection and interview procedures.<sup>1</sup> In the case of a child witness, the problem of credibility is particularly pronounced since, as studies show, children, especially in the early stages of development, have a limited ability to perceive and communicate their observations, a natural tendency to confabulate and a susceptibility to suggestion. At the same time, for a child, being a witness is particularly difficult and stressful. Taking into account all these factors, the literature indicates that those who interview children face two tasks: they must strive to obtain a full, credible description of the event and carry out this activity in such a way as to protect the child's psyche damaged by the experiences. The European and EU standards outlined below provide for the essential protective rights of child victims in the criminal process. Noting a certain multiplication (duplication) of these standards in the acts of the Council of Europe and the EU, one can notice that they do not generally refer to the rights of children as active parties

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<sup>1</sup> For more, see: Cezary Kulesza, *Wiktymologia procesowa* (Białystok: Temida 2, 2020), 65–74; Matthew McVarish, Marci Hamilton, and Miguel Hurtado, “Justice Unleashed; Ending Limitations, Protecting Children,” Brave Movement, 2023, accessed July 10, 2024, <https://cdn.bravemovement.org/files/Justice-Unleashed-In-Europe.pdf>; Katarzyna Makaruk et al., “Diagnoza przemocy wobec dzieci w Polsce 2023,” Fundacja Dajemy Dzieciom Siłę, Warsaw 2023, accessed July 12, 2024, [https://fdds.pl/\\_Resources/Persistent/0/e/3/9/0e397c8f31d01856cd8d4a9430e56eade6648565/Diagnoza%20przemocy%20wobec%20dzieci%20w%20Polsce%202023%20FDDS.pdf](https://fdds.pl/_Resources/Persistent/0/e/3/9/0e397c8f31d01856cd8d4a9430e56eade6648565/Diagnoza%20przemocy%20wobec%20dzieci%20w%20Polsce%202023%20FDDS.pdf).

to criminal proceedings. It seems that the first act of EU law providing for the rights of victims of crime (including children) to active participation in the criminal process is Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

The Polish criminal procedure implementing European and EU standards has for years provided for specific protective procedures for the interview with a minor as a witness, which are premised on achieving both of the above-mentioned goals of interviewing a child. It should be added that, in addition to protecting the child from trauma and secondary victimization, they must take into account the guarantees of the rights of the accused under the ECHR standard of fair trial.

## 2. European Convention on Human Rights

Referring to European standards, it should be noted that the rights of crime victims (and thus the rights of child victims) are inextricably linked to human rights.<sup>2</sup> In the sphere of international law, however, it should be noted that the European Convention on Human Rights (ECHR) of 1950<sup>3</sup> does not refer to the procedural rights of victims of crimes, as it essentially regulates the positive obligations of states to their citizens: to provide them with effective criminal law protection against violations of the fundamental rights guaranteed by Article 2 (“Right to life”), Article 3 (“Prohibition of torture”) or Article 8 (“Right to respect for private and family life”).<sup>4</sup> A landmark in the European Court of Human Rights’s (ECtHR) implementation of the positive duties of the state in cases of domestic violence was the 2009 judgment in the case of *Opuz v. Turkey*.<sup>5</sup> The case concerned a perpetrator who abused the applicant and her mother for years; the Court found a violation not only of Articles 2 and 3 but also of Article 14 of the ECHR in the form of gender discrimination. Pointing to the positive obligation of state authorities to take effective action by operational measures to prevent domestic violence,

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<sup>2</sup> Albin Dearing, *Justice for Victims of Crime. Human Dignity as the Foundation of Criminal Justice in Europe* (Vienna: Springer, 2017), 9–24.

<sup>3</sup> European Convention on Human Rights of 4 November 1950, *Journal of Laws* 1993, No. 61, item 284.

<sup>4</sup> Andrew Ashworth, Ben Emmerson, and Alison Macdonald, *Human Rights and Criminal Justice*, 3rd ed. (London: Sweet & Maxwell, 2012), 790–823.

<sup>5</sup> ECtHR Judgment of 9 June 2009, Case *Opuz v. Turkey*, application no. 33401/02, hudoc.int.

the ECtHR noted at the same time that a condition for the emergence of such a positive obligation is that the state obtains knowledge of a real threat to a particular individual and, despite this, does not use the means at its disposal to eliminate it.

In the current ECtHR case law on children, it is appropriate to point to the judgment (Grand Chamber) of the ECtHR of 15 June 2021 in the case of *Kurt v. Austria*.<sup>6</sup> The complaint concerned a situation where Austrian authorities failed to protect the applicant and her children from her violent husband, which led to the murder of their son (the husband shot his son at school and then committed suicide). In the judgment, the ECtHR clarified the operation of the general principles applicable to domestic violence cases under Article 2 of the ECHR. However, the Court recognized the rationale of the Austrian government, that based on the circumstances of the case, there was nothing to indicate a real and imminent danger of a risk of further violence by the husband against the applicant's son outside the areas for which the previously applied restraining order was in effect. As a result, the Court accepted that the measures adopted to protect against further victimization of the child were adequate and concluded that there was no violation of Article 2 of the ECHR.

### 3. Lanzarote Convention

European standards for the protection of children from sexual abuse of any kind were set by the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 25 October 2007,<sup>7</sup> also known as the Lanzarote Convention, ratified by all Member States (MS) of the Council of Europe (on 26 September 2014 by Poland). It introduced the obligation for parties to the Convention to criminalize intentional conduct involving the sexual abuse of children (Articles 18–23). The Convention also contains criminal-procedural regulations (Chapter VIII) defining the principles of pre-trial and trial proceedings in cases of crimes under the Convention, including that pre-trial and judicial proceedings are to be conducted in the best interests of the child and with respect for the child's

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<sup>6</sup> ECtHR Judgement of 15 June 2021, Case *Kurt v. Austria*, application no. 62903/15, hudoc.int.

<sup>7</sup> Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse of 25 October 2007 ratified by Poland on 26 September 2014 (Journal of Laws of 2015, item 609) came into force on 1 June 2015.

rights, not to intensify or compound traumatic his or her experiences and that the procedural authorities should provide the child with the necessary assistance (Article 30). The initiation of proceedings in such cases must not depend on the filing of a notice or accusation by the victim, and the withdrawal of testimony by the victim must not prevent further proceedings (Article 32). The initiation of pre-trial proceedings should not be prevented by uncertainty about the actual age of the victim (Article 34 (2)).<sup>8</sup>

Parties to the Convention are to ensure that their domestic laws concerning the practice of certain professions involving work with children do not, for reasons of confidentiality, prevent such persons from informing the relevant services responsible for child protection of any reasonable suspicion that a child has been the victim of sexual abuse or sexual exploitation. In addition, the Convention recommends encouraging any person who knows or suspects, in good faith, that a crime of sexual abuse and sexual exploitation of a child has been committed to report such a case to the relevant authorities (Article 12).

#### 4. Istanbul Convention

The Lanzarote Convention's provisions on the protection of children's rights are referred to by the Council of Europe Convention on preventing and combating violence against women and domestic violence, signed in Istanbul on 11 May 2011, also known as the Istanbul Convention.<sup>9</sup> The Convention obliges MS to ensure that in providing protection and support to victims, due attention is paid to the rights and needs of children who witness all forms of violence covered by the Convention. Measures of protection and support should include age-appropriate psychological assistance and social support for children witnessing violence and should be undertaken, taking into account the best interests of the child (Article 26). It is clear from the wording of Article 26 of the Istanbul Convention that it applies to minor victims and witnesses in the factual sense, that is, children who have been harmed by acts of violence or have witnessed them. However, it undoubtedly also applies to

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<sup>8</sup> Kamil Federowicz, *Przesłuchanie małoletnich i ofiar przestępstw seksualnych* (Warsaw: Wolters Kluwer, 2020), 36 et seq.

<sup>9</sup> Convention on preventing and combating violence against women and domestic violence, signed in Istanbul on 11 May 2011, ratified by Poland on 6 February 2015 (Journal of Laws of 2015, item 961), came into force on 1 August 2015.

children appearing as witnesses in a criminal trial.<sup>10</sup> Article 27 obliges parties to the Convention to adopt measures to encourage persons who witness acts of violence falling within the scope of the Convention or who have reasonable grounds to suspect that such an act may be committed or that further acts of violence may be expected, to report this to the competent organizations or authorities, should be considered important from the point of view of the effectiveness of the prosecution of violence against children. In turn, Article 28 stipulates that parties are required to take the necessary measures to ensure that confidentiality rules imposed by domestic law on persons in certain professions do not, in appropriate circumstances, prevent them from reporting to competent organizations or authorities a reasonable suspicion that a serious act of violence falling within the scope of the Convention has been committed or if further acts of violence may be expected.<sup>11</sup>

The rights of victims of violence (including children) related to their participation in the criminal process are regulated in Chapter VI of the Convention. Article 49, which begins this chapter, contains (as does Article 30 of the Lanzarote Convention) a general obligation on the states parties to the Convention to ensure that the pre-trial investigation and prosecution of all forms of violence covered by the Convention are conducted without undue delay and, at all stages of the criminal proceedings, with respect for the rights of the victim. The drafters of the Convention stressed that any measures taken to implement the commented provision do not violate the right to defense and the requirements of a fair and impartial trial guaranteed by Article 6 of the ECHR.<sup>12</sup> Other regulations provide for the obligations of MS to provide measures for prompt response, prevention and protection against such crimes (Article 50), the use of prohibitions and orders (Article 53), and

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<sup>10</sup> Cezary Kulesza, “Ochrona i wsparcie [Art. 26],” in *Konwencja o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej. Komentarz*, eds. Ewa Bieńkowska and Lidia Mazowiecka (Warsaw: Wolters Kluwer, 2016), 332.

<sup>11</sup> Cezary Kulesza and Piotr Starzyński, “Ochrona i wsparcie [Art. 26–28],” in *Konwencja Rady Europy o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej. Komentarz*, eds. Ewa Bieńkowska and Lidia Mazowiecka (Warsaw: Wolters Kluwer, 2016), 349–367.

<sup>12</sup> See: Cezary Kulesza, *Prawa dziecka pokrzywdzonego przestępstwem w polskim systemie wymiaru sprawiedliwości w świetle standardów europejskich* (Warsaw: Wolters Kluwer, 2024), 37–41; *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*, Council of Europe Treaty Series, no. 210 (Bruxelles: Council of Europe, 2011), 43, accessed May 10, 2024, <https://rm.coe.int/16800d383a>.

limiting the admission at trial of evidence related to the victim's previous sexual life and lifestyle (Article 54). Article 55 stipulates the obligation to prosecute crimes of violence regardless of the initiative of the victim. Existing commentaries justify the omission of an analysis of these provisions and reports on the implementation of the Convention in Europe.<sup>13</sup>

## 5. Directive 2011/93/EU

The most important piece of EU legislation in combating sexual crimes against children is undoubtedly Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011.<sup>14</sup> Its scope and construction are similar to the Council of Europe Convention of 25 October 2007 described above. However, one should consider the different binding forces of European conventions and EU directives. While the former, in the case of their ratification by Poland, become, as international agreements, the source of Polish law binding directly, the EU directives are not “self-executing” and require implementation into Polish law by appropriate laws. The EU legislator leaves the national legislator a certain amount of freedom in the statutory determination of achieving the goals set by the directive.

As for the criminal procedural regulation of the directive, as with the Lanzarote Convention, MS must take the necessary measures to ensure that the prosecution and indictment of the crimes referred to in Articles 3–7 are not conditional on the filing or withdrawal of a complaint or indictment by the victim or his or her representative, and the prosecution itself should be effective (Article 15). The directive also recommends that the confidentiality rules that national law requires of professionals, whose main duty is to work with children, should not prevent those professionals from reporting to child protection services any situation where they have reasonable grounds to believe that a child is being harmed as a result of the crimes referred to in Articles 3–7 (Article 16).

<sup>13</sup> Sławomir Hypś, “Implementation of the Istanbul Convention into the National Criminal Legislation in Poland,” *Review of European and Comparative Law* 55, no. 4 (2023): 221–42; Group of Experts on Action against Violence against Women and Domestic Violence, “1st General Report on GREVIO’S Activities,” Council of Europe, April 2020, 24–41, accessed June 10, 2024, <https://rm.coe.int/1st-general-report-on-grevio-sactivities/16809cd382>.

<sup>14</sup> Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ L335, 17 December 2011.

The directive attaches great importance to the protection, support and assistance of child victims of sexual abuse, and MS are to provide them, guided by the best interests of children (Article 18(1)). In describing these measures, it should be noted that they are similar in principle to the protection and support measures provided by the Lanzarote Convention; on the other hand, they have been in some way duplicated by a more universal later EU act as applying to all victims of crime, namely Directive 2012/29/EU, commented on later in the article. With regard to the commented Directive 2011/93/EU, it should be pointed out that specific measures to provide child victims with assistance and support that enable them to exercise their rights under the directive were taken after an individual assessment of the specific situation of each child victim, taking due account of the child's views, needs and concerns (Article 19(2) and (3)). Since children are victims with special protection needs, the special protection measures provided for in Article 20 of the directive apply to them, namely – a special representative for an aggrieved child if, under national law, persons with parental authority cannot represent the child due to a conflict of interest between them and the aggrieved child or if the child is unaccompanied or separated from the family.

Noting the potential for conflict between the protective rights of the child and the rights of the accused, the directive states in Article 20(3) that “Without prejudice to the rights of the defence, Member States shall take the necessary measures to ensure that in criminal investigations relating to any of the offences referred to in Articles 3 to 7”:

- interviews with child victims are held without undue delay after the facts are reported to the competent authorities, if necessary, in premises specially designed or adapted for this purpose, and conducted by or with the participation of specialists properly trained for this purpose and, if possible, by the same person;
- the number of interviews be as limited as possible and conducted only in cases where it is strictly necessary for the purposes of pre-trial or judicial proceedings;
- the child victim may be accompanied by a legal representative or, in appropriate cases, an adult of the child's choice, unless a reasoned decision to the contrary has been made regarding that person.



In turn, Article 20(4) stipulates that interviews with a child victim or witness could be audiovisually recorded and that these recorded interviews could be used as evidence in criminal court proceedings.

In addition, Article 20(5) provides for protective measures for the child during the trial, namely the exclusion of the public hearing in such cases or ensuring that the child victim can be questioned in the courtroom without being present, in particular through appropriate communication technologies. As indicated in the literature, compared to the catalogue of special protection measures for child victims of crimes set forth in Articles 23 and 24 of Directive 2012/29/EU, the catalogue in the commented directive is somewhat more extensive, as it specifically includes the additional protection measures set forth in Article 20(2) and (3) of the latter.<sup>15</sup>

## 6. Directive 2012/29/EU

The preamble to Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012<sup>16</sup> indicates that “children’s best interests must be a primary consideration, in accordance with the Charter of Fundamental Rights of the European Union and the United Nations Convention on the Rights of the Child.” It also points out that child victims should be recognized as the full bearers of rights set out in the directive and thus be entitled to exercise those rights in a way that takes into account their ability to form their own opinions (paragraph 14).

As for the content of the directive itself, it is worth noting Article 1(2), according to which, when the victim is a child, the best interests of the child must be considered first and evaluated on a case-by-case basis. In turn, the child’s age, maturity level, opinions, needs, and concerns must be considered first. The child and the person exercising parental authority over the child or the legal representative must also be informed of measures or rights specifically addressed to the child. Undoubtedly, the general provisions of Chapter 3 of the directive governing

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<sup>15</sup> Ewa Bieńkowska, *Wiktymologia* (Warsaw: Wolters Kluwer, 2018), 198.

<sup>16</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L315, 14 November 2012.

the participation of all victims in criminal proceedings (Articles 11–17) apply to children.<sup>17</sup>

However, from the point of view of the problems of this study, the most important is Chapter 4 of the Directive on the protection of victims and the recognition of victims with special protection needs.<sup>18</sup> It is appropriate to highlight Article 22(1), which stipulates that MS must ensure that the victims “receive a timely individual assessment” to determine whether they have specific protection needs and whether it is reasonable to apply to them (if they so wish) the special measures provided for by Articles 23–24. In turn, point 4 of Article 22 explicitly accepts that victims with special protection needs are children since, as victims, they are, as it were, by definition, vulnerable to secondary and repeat victimization, intimidation and retaliation. It should be added that according to Article 2(c), any person under the age of 18 is considered a child. However, even children are subjected to the individual assessment set forth in Article 22(1) to determine whether and to what extent they would benefit from the special protective measures specified in Articles 23 and 24. Moreover, even if the individual assessment supports, in the opinion of the assessor, the application of the protective measures provided for in Articles 23 and 24, the will of the victim, including the wish not to benefit from these measures, must be taken into account when making such a decision (Article 22(6)).<sup>19</sup> Once made, the individual assessment need not be final since if the elements on which it is based change significantly, it should be updated throughout the criminal proceedings (Article 22(7)). Article 24 stipulates that where the victim is a child (and therefore a person under 18 years of age), the Member State should provide for the following measures: all pre-trial hearings of the victim may be audiovisually recorded, and such recording

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<sup>17</sup> Cezary Kulesza and Piotr Starzyński, “Udział w postępowaniu karnym,” in *Dyrektywa Parlamentu Europejskiego i Rady 2012/29/UE. Komentarz*, eds. Ewa Bieńkowska and Lidia Mazowiecka (Warsaw: Wolters Kluwer, 2014), 130–228.

<sup>18</sup> For more, see: Lidia Mazowiecka, ed., *Indywidualna ocena służąca ustaleniu szczególnych potrzeb ofiar przestępstw w zakresie ochrony* (Warsaw: Wolters Kluwer, 2015); Kulesza, *Wiktymologia procesowa*, 126–31.

<sup>19</sup> European Commission, DG Justice, “DG Justice Guidance Document,” Bruxelles: December 2013, accessed June 25, 2024, [https://commission.europa.eu/document/download/flf42e20-e4a1-4d8b-a1ef-d06accba34e\\_en?filename=crd\\_guidance\\_en\\_0\\_updated.pdf](https://commission.europa.eu/document/download/flf42e20-e4a1-4d8b-a1ef-d06accba34e_en?filename=crd_guidance_en_0_updated.pdf).

may be used as evidence in criminal proceedings. Procedures for audio-visual recording and their use are determined by national law.

In pre-trial and court proceedings, in accordance with the role of victims in the relevant justice system, the competent authority should provide the victim with a special representative in situations where, according to national law, persons exercising parental authority are excluded from representing children as a result of their conflict of interest with the child, or in situations where the child is unaccompanied or separated from the family (Article 24(1b)). In addition, when a child victim has the right to legal counsel, he or she is entitled to his or her own legal counsel and representation, on his or her own behalf, in proceedings in which there is or may be a conflict of interest between the child victim and those exercising parental authority (Article 24(1)(c)). This can be considered a kind of *lex specialis* to Article 13, defining the right of victims to legal aid.

Article 24(2) establishes a kind of presumption, providing that where it is impossible to determine the age of a victim, and there is reason to believe that the victim is a child, such victim should be considered a child.

Following a series of consultations with EU MS and studies, including an assessment of the functioning of Directive 2012/29/EU in MS, the European Commission has published a draft directive of the European Parliament and of the Council of 23 July 2023, amending Directive 2012/29/EU.<sup>20</sup>

Among the most important proposals relating to child victims, one can point to the obligation of MS to establish “targeted and integrated child support services,” providing for the provision of such friendly and targeted specialized services to ensure the age-appropriate support and protection necessary to comprehensively address the diverse needs of child victims. Such targeted and integrated child-victim support services should be organized in the form of a coordinated multi-agency mechanism and be provided at a single location, following the Barnahus model.<sup>21</sup>

The draft clarifies the principles of individual assessment of victims with special protection needs (Article 22 of the directive) and recommends

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<sup>20</sup> See: Kulesza, *Prawa dziecka pokrzywdzonego przestępstwem*, 83–100.

<sup>21</sup> See: Mary Mitchell, Laura Lundy, and Louise Hill, “Children’s Human Rights to ‘Participation’ and ‘Protection’: Rethinking the Relationship Using Barnahus as a Case Example,” *Child Abuse Review* 32, no. 6 (2023): 1–7, <https://doi.org/10.1002/car.2820>.

that such assessment be made permanently, depending on the situation. In order to ensure effective protection of the child victim in cases where the person with parental custody of the child is suspected (accused) of committing a crime or there is a conflict of interest between the child and the person with parental custody, the draft adds a provision ensuring that in such cases, notification of the crime, medical examination or forensic interview, referral to support services or psychological support, and other actions concerning the child should not be subject to the consent of the person with parental or legal custody, and must have the child's best interests at heart (amended Article 24 of the directive).

## 7. The Protective Rights of a Child Witness in the Polish Justice System

Due to the rich literature relating to the role of the victim in the criminal process, this chapter focuses on the rights of the child as a witness and party to the proceedings in light of the amendments to the Polish Code of Criminal Procedure (CCP) of 1997 in recent years, most notably those made by the Acts of 16 December 2020,<sup>22</sup> 7 July 2022,<sup>23</sup> 13 January 2023,<sup>24</sup> 7 July 2023<sup>25</sup> and 28 July 2023.<sup>26</sup>

A very significant change to the CCP in the protection of the child victim as a party to the proceedings and as a witness should be considered the introduction by the amendment of 16 December 2020 of Article 52a providing for individual assessment of the needs of victims concerning their protection. This provision, in the current wording of § 1, stipulates that in the case of evidentiary actions with the participation of victims, taking into account the need to apply the victim protection measures listed in this regulation, the body conducting criminal proceedings must determine the circumstances of the case, in particular regarding the characteristics

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<sup>22</sup> Act of 16 December 2020, Journal of Laws, item 155, Act amending the CCP effective 9 February 2021.

<sup>23</sup> Act of 7 July 2022, Journal of Laws of 2022, item 2600, as amended, Act amending the CCP effective 1 October 2023.

<sup>24</sup> Act of 13 January 2023, Journal of Laws of 2023, item 289, Act amending the CCP effective 15 August 2023.

<sup>25</sup> Act of 7 July 2023, Journal of Laws of 2023, item 2600, as amended, Act amending the CCP effective 1 October 2023.

<sup>26</sup> Act of 28 July 2023, Journal of Laws of 2023, item 1606, Act amending the CCP effective 15 February 2024.

and personal conditions of the victim, as well as the nature and extent of the negative consequences of the crime. According to § 3 of Article 58a, the findings referred to in § 1 are made by the body conducting criminal proceedings using a questionnaire for individual assessment of the victim no later than before the commencement of the proceedings are drawn up based on a model developed on the basis of a regulation of the Minister of Justice. In the context of children's rights, it should already be noted that the individual assessment will not be carried out in particular when the application of such a protection procedure is mandatory, such as in the case of a victim and a witness under 15 years of age at the time of interview (Articles 185a and 185b). This provision is undoubtedly an implementation of the previously described Article 22 of Directive 2012/29/EU.

Protective procedures for interviewing a child differ in the subject matter concerning the child (a child victim of a crime or a child who is merely a witness to a crime, a child who is under the age of 15 or 18), the subject matter concerning the crime (the types of crimes in which these modes of interview are used), and the intensity of child protection measures in these procedures. Based on the above criteria, the following child interview procedures can be conventionally distinguished:

- (1) Rules for interviewing a child under Article 171 § 3, 4a and 8 of the CCP.
- (2) Interviewing a minor (who is under 15 years of age at the time of interview) victim and witness of crimes specified in Chapters XXIII, XXV and XXVI of the Criminal Code by the court at a session (Articles 185a and 185b of the CCP).
- (3) Interviewing a minor victim of sexual crimes specified in Articles 197–199 of the Criminal Code by the court in session (Article 185c of the CCP).
- (4) Interviewing a witness with a disorder by the court in session (Article 185e of the CCP).
- (5) Interviewing a victim at the trial in the absence of the accused (Article 390 of the CCP).

Undoubtedly, the procedure for interviewing a minor witness under Article 171 has the broadest scope in terms of subjects and objects, but compared to the other procedures, it offers the lowest degree of protection for the child (interview in the presence of the accused and the possibility of multiple interviews, including at trial).

On the other hand, hearings under Articles 185a–c and 185e, f of the CCP provide the widest range of protection for minor witnesses (or witnesses with disorders); the common principles for such hearings can be pointed out as follows:

- the principle of indispensability and one-time interview, which is conducted using audio recording;
- ensuring the freedom and credibility of testimony<sup>27</sup> and protection from trauma and secondary victimization by conducting the interview by the court in a session with the participation of an expert psychologist, possibly legal representatives, guardians, a representative or an adult person designated by the minor, but without the presence of the accused.

The analysis will be limited to the current state of the law in describing the different types of interviews applicable to child witnesses, with particular attention to the changes introduced by the amendment to the CCP of 13 January 2023 (effective 15 August 2023).

After the amendment of 13 January 2023, if the person being interviewed is under 18 years of age, the activities with his/her participation should, if possible, be carried out in the presence of the legal representative or actual guardian unless the good of the proceedings prevents this (Article 171 § 3 of the CCP). Studies of the procedural practice of Western countries and Polish experience indicate that interviewing children in the presence of parents or guardians was more effective and reduced the trauma resulting from the crime.<sup>28</sup> In addition, as of 15 August 2023, the legislature strengthened the protection of the privacy of all witnesses,

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<sup>27</sup> For more about credibility of the children's testimony in sexual abuse cases, see: Jacquelynn F. Duron, "Searching for Truth: The Forensic Interviewer's Use of an Assessment Approach While Conducting Child Sexual Abuse Interviews," *Journal of Child Sexual Abuse* 29, no. 2 (2020): 183–204; Elaine Craig, "Child's Play or Sexual Abuse? Reviewing the Efficacy of the Justice Framework in Dealing with Child on Child Sexual Abuse in the United Kingdom," *Journal of Child Sexual Abuse* 29, no. 6 (2020): 734–48; Ines Chima et al., "Child Sexual Abuse Myth Scale: Validity and Reliability Evidence in the Portuguese Context," *Journal of Child Sexual Abuse* 29, no. 7 (2020): 802–20; Charlotte A. Bücken et al., "'Nothing Happened': Legal Implications of False Denials Among Abused Children," *Child Abuse Review* 32, no. 2 (2023): 1–11.

<sup>28</sup> For more, see: Alicja Budzyńska, "Ochrona małoletnich pokrzywdzonych przestępstwem w procedurach karnych. Perspektywa psychologiczna," in *Dziecko uczestniczące w postępowaniu karnym*, ed. Lidia Mazowiecka (Warsaw: Wolters Kluwer, 2015), 44–6.

introducing the new § 4a, which prohibits asking a witness questions about his or her sex life unless necessary for the resolution of the case. At the same time, the amended § 6 indicates that such questions and irrelevant questions would be waived. As noted in the explanatory statement of the draft amendment, this regulation will, at the same time, fulfil the requirements of Article 54 of the Istanbul Convention. Article 171(8), added by this amendment, requires the interviewing authority to provide information to a witness under 18 years of age before the first interview about the course, manner and conditions of the interview. The obligation to properly instruct the child witness is also indicated in its case law by the ECtHR.<sup>29</sup>

The legislator, through the amendment of 13 January 2023, amended Articles 185a § 1, 185b § 1, 185c § 1 and introduced new Article 185e of the CCP, effective 15 August 2023, in such a way that the repeated interview with a minor victim is subject to the court's granting of the evidentiary request of an accused who had no defense counsel at the time of the first interview of the victim.<sup>30</sup>

To summarize the considerations relating to protective procedures for the interview of minor witnesses (Articles 185a and 185b, as well as the provisions of Articles 185c and 185f insofar as they can be referred to child witnesses), the basic change in this regard was the restriction by the amendment of 13 January 2023 of the possibilities of repeated interview of such a minor witness. It introduced the general rule that the re-examination of a child is possible only if significant circumstances come to light, the clarification of which requires re-examination, or if the evidentiary request of the accused, who had no defense counsel at the time of the first interview with the victim, is granted. This evidentiary motion will not be binding on the court and can be dismissed on the grounds provided for in Article 170, and the decision to dismiss the motion will not be appealable. Thus, to sum up, it can be said that in the case of the dismissal of the request of the defendant for a repeated interview, who had no defense counsel at the time of the first interview of the minor, then, taking into account that

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<sup>29</sup> ECtHR Judgment of 22 June 2021, Case R.B. v. Estonia, application no. 22597/16, hudoc.int.

<sup>30</sup> For more, see: Olga Trocha, Monika Horna-Cieślak, and Paulina Masłowska, *Metodyka reprezentacji małoletniego pokrzywdzonego w sprawach przestępstw seksualnych* (Warsaw: Wolters Kluwer, 2024), 217–23.

the defendant does not participate in the special modes of the interview under Articles 185a–185c and 185e, it may be that the defense will be deprived of any opportunity to participate in the interview of the minor witness. Thus, it seems that as a result of the amendment of 13 January 2023, the legislator has dangerously upset the balance between the guarantees of the right of the accused under Articles 6(3)(c) and 6(3)(d) of the ECHR and the right to protect the minor victim from secondary victimization.<sup>31</sup>

It is also worth pointing out the amendment to the preventive measure specified in Article 275a of the CCP, introduced by the Act of 13 January 2023 on the preventive measure by extending the order provided for therein to periodically order the defendant for a violent crime committed against a cohabiting person to leave the premises occupied jointly with the victim to include a restraining order prohibiting the defendant from approaching the victim at a specified distance if there is a reasonable fear that the defendant will again commit a violent crime against that person, especially if he/she has threatened to commit such a crime.

The protection of the freedom of testimony of all witnesses, including child victims, in court proceedings is undoubtedly the aim of Article 390 of the CCP. Of particular note from the point of view of protecting victims (including children) is Article 390(3). It stipulates that, in the cases provided for in § 2, the presiding officer may also conduct an interview using technical devices that allow this action to be conducted at a distance with simultaneous direct transmission of video and audio. As for recent amendments, it is important to note the addition to Article 390 of the CCP by the amendment of 7 July 2023, a new § 4. It provides for special protection when interviewing at trial as a witness the victims of the most serious crimes (subject to a statutory penalty of a mandatory minimum of eight years of imprisonment), namely intentional crimes against life and health, against liberty or crimes involving violence or unlawful threats: an interview under conditions that exclude direct contact with the accused. Paragraph 4 provides a solution that in the case of the existence of the conditions

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<sup>31</sup> Kulesza, *Prawa dziecka pokrzywdzonego przestępstwem*, 250–5; see also: Cezary Kulesza, “Conflict between the Rights of Victim of a Crime and the Rights of the Accused under the German and Polish Justice System in the Context of the Case-law of European Courts,” *Studia Iuridica Lublinensia* 29, no. 4 (2020): 135–64.



specified in the provision and the filing of a request by the victim, the application of the institution of ordering the accused, by the presiding judge, to leave the courtroom for the duration of the interview with the person in question, while providing the accused with the opportunity to participate in this part of the hearing with the use of technical devices used for remote interview with direct video and audio transmission is relatively obligatory.

Concluding the discussion of protecting the child victim in court proceedings, it is appropriate to point to Article 360 § 1(2) of the CCP. It stipulates that the court may exclude the openness of the hearing in whole or in part if at least one of the defendants is a minor or for the duration of the examination of a witness who has not reached the age of 15. As indicated in its case law, the ECtHR has repeatedly pointed out that in the course of criminal proceedings, certain steps may be taken to protect the victim, provided that they are reconcilable with the adequate and effective exercise of the right of defense.<sup>32</sup>

## 8. The Rights of the Child Victim as a Party to the Proceedings

In a Polish criminal trial, an aggrieved child may act not only as a witness but also as a party to the proceedings, so the obligation provided for by EU standards (see Article 4 of Directive 2012/29/EU) to inform the child of his or her rights is particularly relevant here. As for the principle of procedural information (sometimes referred to as the principle of procedural loyalty), the new § 3 added by the amendment of 13 January 2023 to Article 16 of the CCP stipulates that if the participant in the proceedings is a person who has not reached the age of 18, or a person who is vulnerable, particularly due to age or health, the manner of instruction should be adapted to the person's age, health and mental development. This provision should be considered important as the preamble to Directive 2012/29/EU clearly indicates that both the UN 1989 Convention on the Rights of the Child and Directive 2011/93/EU should be respected in the justice system with regard to the observance of children's rights.<sup>33</sup>

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<sup>32</sup> See: ECtHR Judgment of 13 October 2020, Case *Frâncu v. Romania*, application no. 69356/13, hudoc.int.

<sup>33</sup> Ewa Bieńkowska and Lidia Mazowiecka, "Preambuła," in *Dyrektywa Parlamentu Europejskiego i Rady 2012/29/UE. Komentarz*, eds. Ewa Bieńkowska and Lidia Mazowiecka (Warsaw: Wolters Kluwer 2014), 42–4, 54–5.

It is also worth noting the introduction by the Act of 28 July 2023 of the specified obligation in Article 21 of the CCP (incumbent on the prosecutor and the court, respectively) on the initiation and completion of *ex officio* proceedings against a parent or legal or actual guardian to the detriment of a minor – the family court with jurisdiction over the place of residence of the minor must be notified immediately (Article 21(1)(4)).

The amendment of 7 July 2022 expanded the rights of the victim under Article 49a of the CCP in such a way that the victim may, until the conclusion of the proceedings, file not only a request for damages and compensation for the harm suffered under Article 46 of the CCP (Article 49a § 1) but also a motion to adjudicate the criminal measure introduced by this amendment of the prohibition of contact with the victim specified in Article 41a § 1a of the Criminal Code (Article 49a § 1a of the CCP).<sup>34</sup> In turn, the new Article 49b, introduced by the amendment to the CCP of 16 December 2020, states that if doubts about the age of the victim cannot be removed, and there is a reasonable suspicion that the victim is a minor, the provisions of this Code concerning minor victims must be applied to the victim. This provision is undoubtedly an implementation of Article 24(2) of Directive 2012/29/EU.<sup>35</sup>

As mentioned earlier, in Polish pre-trial criminal proceedings, a child victim may act as a procedural party. However, due to the level of psychophysical development, the child is most often unable to effectively exercise his or her rights as a party to proceedings. An important change from the point of view of the representation of a minor victim in criminal proceedings in a conflict of interest between the minor and his/her parents or guardians is the addition by the amendment of 28 July 2023 to Article 51 new § 2a. It states that the court and, in pre-trial proceedings, the prosecutor immediately, no later than within seven days from the date of the occurrence of the circumstances referred to in Article 98 § 2 of the CCP, apply to the guardianship court for the appointment of a representative for the child referred to in Article 99 § 1 of the Family Code. Currently, by virtue of

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<sup>34</sup> For more, see: Agata Ziółkowska, “Środki karne,” in *Kodeks karny. Komentarz*, ed. Violetta Konarska-Wrzosek (Warsaw: Wolters Kluwer, 2023), 302–15.

<sup>35</sup> Hanna Paluszkiwicz, “Pokrzywdzony,” in *Kodeks postępowania karnego. Komentarz*, ed. Katarzyna Dudka (Warsaw: Wolters Kluwer, 2023), 159.

99<sup>1</sup> § 1 of the Family Code, which also applies in criminal cases, a child's representative in criminal cases may be an attorney or legal counsel who demonstrates special knowledge of cases involving children.<sup>36</sup> The premise of the child's procedural representative is to increase the effectiveness of protecting the child's procedural rights as a party to the proceedings since, as research indicates, the activity of legal representatives and guardians representing the child is unsatisfactory.<sup>37</sup> It should be added that the effectiveness of prosecuting sexual crimes is to be served by the principle of prosecuting them *ex officio* and the legal obligation to prosecute them set forth in Article 240 § 1 of the Criminal Code.

## 9. Summary

The following table presents the most recent changes to the Polish CCP analyzed above regarding the protective rights of the child victims as witnesses and their rights as parties to the proceedings, juxtaposed with the standards of European and EU law, whose implementation was intended by the 2020–2023 amendments of the CCP.

Table 1. *Rights of the child victims of crime in the amended Polish CCP in comparison with European and EU standards*

Regulations of the Polish CCP	Purpose of regulation	Implemented European standard	Implemented EU standard
<b>Protective rights of a child witness</b>			
Interviewing the minor victim and witness by the court in a "blue room" session – Articles 185a, 185b and 185c of the CCP.	Protecting the minor witness from the trauma of having to re-examine him or her at a public hearing in the presence of the accused while reviewing the credibility of his or her testimony and ensuring the accused's right to counsel.	Article 35 of the Lanzarote Convention	Article 23(2) and (3) and 24(1) of Directive 2012/29/EU Article 20(3) and (4) of Directive 2011/93/EU

<sup>36</sup> For more, see: Trocha, Horna-Cieślak, and Masłowska, *Metodyka reprezentacji małoletniego*, 80–104.

<sup>37</sup> Kulesza, *Prawa dziecka pokrzywdzonego*, 205–10.

Regulations of the Polish CCP	Purpose of regulation	Implemented European standard	Implemented EU standard
Interviewing the child under Article 171 of the CCP.	Providing the child with the freedom to testify by being accompanied by a legal representative, guardian or trusted person; protecting the child from questions concerning the child's sexual sphere, informing the child in a way that he or she will understand about the rules and conduct of the interview.	Article 54 of the Istanbul Convention	Article 20(3) (f) of Directive 2011/93/EU Article 4 and 23(3)(c) of Directive 2012/29/EU
The principle of legalism mandating that all public offences against children be prosecuted <i>ex officio</i> (Article 10 of the CCP) combined with the civic duty to report crimes and the legal obligation incumbent on state and local government institutions (Article 304 of the CCP) and the universal legal duty (also incumbent on medical professionals) to report crimes against children listed in Article 240 § 1 of the Criminal Code.	Ensuring the effective prosecution of all crimes against children regardless of their will and the standpoint of their legal representatives or guardians, and regardless of whether they have reported the crime. Increasing the effectiveness of detection (reducing the number) of crimes against children and the effectiveness of prosecution of their perpetrators.	Articles 2 and 3 of the ECHR Article 12 and 32 of the Lanzarote Convention Articles 26–28, 43 and 44(4) of the Istanbul Convention	Articles 15 and 16 of Directive 2011/93/EU
Ordering the perpetrator of domestic violence to leave a place of shared residence with victims of violence or prohibiting contact with them as a preventive measure (Article 275a) or his or her voluntary departure from such a place as a condition of police supervision (Article 275 §przenieś niżej 3 of the CCP).	Protect the child from the danger of secondary victimization and intimidation by the perpetrator of domestic violence during the criminal process.	Article 31(1)(f) of the Lanzarote Convention Articles 52 and 53 of the Istanbul Convention	
Interviewing a child as a witness at a trial in the absence of the accused (Article 390 of the CCP).	Protecting the child witness from the trauma of testifying at trial in the presence of the accused and ensuring the freedom of his or her testimony.	Article 36 (2)(b) of the Lanzarote Convention Article 56(1)(i) of the Istanbul Convention	Article 20(5) of Directive 2011/93/EU Art.19, 23(3)(a) and (b) of Directive 2012/29/EU

Regulations of the Polish CCP	Purpose of regulation	Implemented European standard	Implemented EU standard
The court can exclude the public from the hearing for the time of the interview with a witness who has not reached the age of 15 (Article 360 § 1 (2) of the CCP).	Protecting the child witness from the trauma that may result from testifying at an open and public hearing and ensuring the freedom of his or her testimony.	Article 36(2)(a) of the Lanzarote Convention	Article 23(3) (d) of Directive 2012/29/EU
<b>Rights of the child as a party to proceedings</b>			
The obligation to adapt the manner of instructing the child to the child's age, health and mental development (Article 16 § 3 of the CCP).	Informing the child of his or her rights and responsibilities in a way that he or she can understand and enable the child to exercise them consciously and effectively.	Article 31(6) of the Lanzarote Convention Article 56(1)(c) of the Istanbul Convention	Articles 3 and 4 of Directive 2012/29/EU
The right of the child victim to submit, until the end of the trial, a request for reparation of damages and compensation for the harm suffered under Article 46 of the Criminal Code and a request to impose on the accused a criminal measure prohibiting contact with the victim (Article 49a of the CCP).	Implementation of the victim's right to compensation for the damage and harm caused by the crime and to ensure his or her protection after the end of criminal proceedings.	Article 31(1)(6) of the Lanzarote Convention Article 53 of the Istanbul Convention	Article 16 of Directive 2012/29/EU
The statutory presumption provides that if doubts about the age of the victim cannot be removed, and there is a reasonable suspicion that he or she is a child, the provisions on child victims apply to him or her (Article 49(b) of the CCP).	This regulation serves to improve the standards of criminal proceedings involving child victims and is of particular importance with regard to situations where the application of a certain procedure or procedural institution is related to the minority of the victim, such as in the case of the need to appoint a representative (Article 51 § 2 of the CCP).	Article 34(2) and 35(3) of the Lanzarote Convention	Article 18(3) of Directive 2011/93/EU Article 24(2) of Directive 2012/29/EU

Regulations of the Polish CCP	Purpose of regulation	Implemented European standard	Implemented EU standard
The court, and in pre-trial proceedings, the prosecutor, immediately, but no later than within 7 days from the date of determining that the interests of the child are in conflict with the interests of the legal representatives or guardians (Article 98 § 2 of the Family and Care Code) applies to the guardianship court for the appointment of the child's procedural representative referred to in Article 99 § 1 of the Family and Care Code (Article 51 § 2a of the CCP).	Securing effective representation of a child in the criminal process when parents or guardians cannot provide it.	Article 31(4) of the Lanzarote Convention	Article 20(1) of Directive 2011/93/EU Article 24(1) (b) of Directive 2012/29/EU

Source: author's elaboration

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