

# CHILDREN AS SUSPECTS OR ACCUSED PERSONS IN CRIMINAL PROCEEDINGS

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## PROCEDURAL SAFEGUARDS

JUSTICE



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# Foreword

Every child has a right to be protected even when they are accused or suspected of committing a crime. The basic principles of justice apply to adults and children alike. But our research shows that truly upholding children's rights in the justice system is far from simple.

Too often, children who are suspects or accused persons in criminal proceedings face specific obstacles. They are treated poorly, lack access to understandable information and receive only limited legal support. They are perceived and treated as young adults, not as children.

This goes against the grain of EU and international law which clearly stipulate children's rights protecting their best interests. The EU Charter of Fundamental Rights guarantees the rights of a child (Article 24), as well as the respect for the right to a fair trial, the presumption of innocence and related defence rights (Articles 47 and 48).

Directive (EU) 2016/800 introduces additional safeguards for children who are suspects or accused persons in criminal proceedings. This report presents the agency's findings on how select Member States implement the directive in practice.

The report builds on over 220 interviews with defence lawyers, judges, prosecutors, police officers, social workers, educators and children in nine Member States, covering broad ground in terms of geography and legal traditions. They show that practical implementation varies across countries and highlight some good practices, such as child-friendly templates for better communication, task forces for repeat offenders or artistic expression courses in prison.

But EU countries could do more to fully uphold children's rights in criminal proceedings.

Children should be treated as children. Practices and procedures need to be adjusted to meet their needs: starting from how they are informed about their rights, how they are questioned and how they participate in their trial. This also includes the support of family members during the whole process, ensuring that the children's privacy is protected.

Detention should only be used as a means to educate children, protect them and help successfully reintegrate them into society.

Our findings reveal how children's rights are dealt with in criminal proceedings across the EU. We hope the insights will support authorities and policymakers in gaining a better understanding of the fundamental rights challenges encountered and potential remedies to address these.

The ultimate goal is to protect children, allow them to learn and give them the best chance to succeed in life. Let us take this report as a guide to address the shortcomings that hinder our criminal justice systems from doing just that.

**Michael O'Flaherty**  
*Director*

## Country codes

<b>AT</b>	Austria	<b>EL</b>	Greece	<b>LT</b>	Lithuania	<b>SE</b>	Sweden
<b>BE</b>	Belgium	<b>ES</b>	Spain	<b>LU</b>	Luxembourg	<b>SI</b>	Slovenia
<b>BG</b>	Bulgaria	<b>FI</b>	Finland	<b>LV</b>	Latvia	<b>SK</b>	Slovakia
<b>CY</b>	Cyprus	<b>FR</b>	France	<b>MT</b>	Malta		
<b>CZ</b>	Czechia	<b>HR</b>	Croatia	<b>NL</b>	Netherlands		
<b>DE</b>	Germany	<b>HU</b>	Hungary	<b>PL</b>	Poland		
<b>DK</b>	Denmark	<b>IE</b>	Ireland	<b>PT</b>	Portugal		
<b>EE</b>	Estonia	<b>IT</b>	Italy	<b>RO</b>	Romania		

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## Abbreviations

<b>CJEU</b>	Court of Justice of the European Union, formerly European Court of Justice (ECJ)	<b>EAW</b>	European arrest warrant
<b>CoE</b>	Council of Europe	<b>ECHR</b>	European Convention on Human Rights
<b>CPT</b>	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment	<b>ECtHR</b>	European Court of Human Rights
<b>CRC</b>	Convention on the Rights of the Child	<b>EU</b>	European Union
		<b>FRA</b>	European Union Agency for Fundamental Rights
		<b>UN</b>	United Nations

## Glossary

<b>Accused person</b>	Any natural person whom competent criminal authorities (i.e. the prosecutor, investigative judge or the police) formally charge with having committed a criminal offence. The term commonly refers to persons subject to more advanced stages of pre-trial proceedings and/or persons committed to trial.
<b>Arrest</b>	The action of apprehending persons suspected of involvement in a crime by the law enforcement authorities and placing them into police custody.
<b>Charge</b>	An official notification given to an individual by the competent authority when they are suspected or accused of having committed a crime. Also referred to as an 'accusation'.
<b>Child</b>	Any natural person below the age of 18.
<b>Defendant</b>	Any natural person subject to criminal proceedings that relevant authorities initiate because of a suspicion or charge of committing a crime. The term herein includes suspects or accused persons (see definitions of 'suspect' and 'accused person' in this glossary).
<b>Deprivation of liberty</b>	Arrest or any type of confinement in a restricted space by authorities, including when the police apprehend and question a person without a judicial decision or warrant. The person may be set free after questioning. However, deprivation of liberty applies if they were not allowed to leave police custody for some length of time.
<b>Holder of parental responsibility</b>	Any adult with the responsibility and rights to promote and safeguard the welfare of a child suspected or accused of committing a crime.
<b>Judge</b>	Any public official with the authority and responsibility to make decisions on criminal cases in a court or legal matters.
<b>Lawyer</b>	Any person authorised to pursue professional legal activities, including advising people about the law and representing them in court and other legal proceedings. This includes defence lawyers as persons authorised to advise and represent defendants, in the context of this report.
<b>Non-legal specialist</b>	Any professional qualified to work in the field of juvenile justice with knowledge and expertise in a field other than law. This includes social workers, court assistants, probation officers and psychologists.
<b>Parent</b>	Any adult legally recognised as the mother or father of a child by virtue of birth or adoption. They are normally the holders of parental responsibility when their children are suspected or accused of committing a criminal offence.

<b>Pre-trial detention</b>	Deprivation of a defendant's liberty imposed before the conclusion of a criminal case in the context of judicial proceedings by a judicial authority (i.e. judge, investigative judge or court). Not to be confused with police detention, which takes place before bringing a suspected person before a judge.
<b>Prosecutor</b>	A public official representing the state, who institutes and conducts legal proceedings against a defendant regarding a criminal charge.
<b>Questioning</b>	Any oral interview or interrogation of a person by the police, a prosecutor or a judge during which they are asked questions about their knowledge of or possible involvement in a criminal offence.
<b>Suspect</b>	Any natural person who has been thought of as committing a criminal offence, even before being made aware, by official notification or otherwise, that they are a suspect. The term is commonly used in initial stages of criminal investigations/pre-trial proceedings.
<b>Witness</b>	Any natural person who has been summoned to give testimony. Unlike a suspect, such a person can be compelled to take the oath to ensure that any statements made to the judge are truthful. However, a witness can refuse to give a statement as evidence when there is the possibility of self-incrimination.



## Key findings and FRA opinions

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Articles 47 and 48 of the Charter of Fundamental Rights of the European Union guarantee various defence rights in criminal proceedings. Article 24 of the Charter obliges Member States to take into account the views and well-being of children – persons below the age of 18. Children's best interests must be their primary consideration, and they must allow children to maintain contact and relationships with their parents.

This report presents the findings of research by the European Union Agency for Fundamental Rights (FRA) on the implementation of Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (hereafter 'the directive').<sup>1</sup> Basic principles of justice apply to adults and children alike. However, international and European Union (EU) law require additional protection and safeguards for children that preserve their potential for development and reintegration into society because of their age and vulnerabilities.

The directive aims to bolster protection for children suspected of being involved in criminal proceedings. This goes further than the procedural rights that previous directives guarantee all suspects and accused persons, regardless of age, such as the right to a lawyer, to be informed about rights or to be present at the trial. This report aims to support EU institutions and Member States in ensuring the effective implementation of the directive. The European Commission requested this research for its assessment of the implementation of the directive in the Member States.

This report examines specific legal provisions, and the views and experiences of practitioners in nine Member States and children in eight Member States on the implementation of the directive, based on interviews. The research focuses on specific articles on the rights of child suspects and defendants, rather than the full scope of the directive. The practical implementation of the rights of children who are suspects or accused persons in criminal proceedings varies across the Member States covered, FRA's data indicate. However, some common challenges emerge.

The research covers nine Member States – Austria, Belgium, Bulgaria, Germany, Estonia, Italy, Malta, Poland and Portugal – and draws on the experiences of between 20 and 27 interviewees in a single country. Therefore, the findings do not claim to be representative of the situation in each Member State or the EU as a whole. Nevertheless, the results provide a unique insight into the views of practitioners and children who have first-hand experience of how the directive is applied in practice, and help us to understand the fundamental rights challenges they encountered.



## FRA OPINION 1

Member States should consider best practices – such as using multiple child-friendly formats and including behavioural guidelines – when establishing rules about giving information to children who are suspects or accused persons in criminal proceedings, as the directive requires. In addition, best practices provide guidance for professionals on how to verify that children understand their rights and the general conduct of proceedings, including the outcome. Authorities should take into account the intellectual abilities and language skills of the child, adapting communication according to the needs and vulnerabilities of the persons concerned. These include their level of maturity, cultural and linguistic barriers, their level of literacy and any disabilities.

### Ensure that children are informed about their rights promptly in a way they can understand

Article 4 of the directive grants children the right to be informed about their rights promptly in writing, orally or both, and about general aspects of the conduct of the proceedings in simple and accessible language. Recital 18 of Directive (EU) 2016/800 refers to Directive 2012/13/EU. Directive 2012/13/EU specifies that authorities should inform suspects of their rights before the first questioning. Children should receive information on the procedural steps and the role of the authorities involved in the criminal proceedings that concern them, according to recital 19 of Directive (EU) 2016/800.

All the Member States the fieldwork covers try, to some extent, to respect the rights of children and holders of parental responsibility to receive information on the procedural rights and steps in criminal proceedings, according to the research findings. However, children and adults often receive information in the same way, for example in a standard letter of rights, interviewees in some Member States acknowledge. This does not take account of children's specific needs and capacities, or the need to inform children of their rights in a way they can understand despite their level of maturity or linguistic problems.

Interpreters are not always available, interviewees also report. When available, they are not always able to communicate in a child-friendly way or speak the local dialect that the child understands, even if they can interpret into a specific language. Most interviewees also note that the questioning of child defendants is seldom audiovisually recorded, despite the directive requiring such recording when it is proportionate and in the child's best interests.

Most children interviewed do not remember either being recorded or receiving information that they could easily understand. They rarely recall anyone checking if they had understood the information about their rights or considering specific vulnerabilities when they were given the information. Some state that they only received more understandable information after the first questioning, much later in the proceedings, through lawyers or social workers.



## **Facilitate the effective participation of children and their parents at all stages of criminal proceedings and ensure that children's privacy is protected**

Article 47 of the Charter of Fundamental Rights of the European Union stipulates that everyone whose rights and freedoms guaranteed under EU law are violated has the right to an effective remedy before an independent and impartial tribunal and is entitled to a fair and public hearing. Article 16 of the directive grants children the right to be present at and effectively participate in their trial, in particular through the opportunity to be heard and express their views. Article 15 and recital 57 grant children the right to be accompanied by those with parental responsibility or another appropriate adult during court hearings and other stages of proceedings. Article 14 and recital 56 stipulate that children's privacy should be protected for the duration of the proceedings by favouring non-public hearings to facilitate children's reintegration into society.

Children and their parents have the right to be present and effectively participate in hearings and trial proceedings. These can also be held in private in almost all the Member States that the research covers, findings show. Judges are usually attentive to the personal circumstances of child defendants and their points of view, making sure that children can express themselves and understand the proceedings, according to respondents, including most children.

However, private proceedings are the exception rather than the norm in some Member States. Details of proceedings against children appear in the media in some Member States. Furthermore, parents' involvement is mixed, varying considerably from case to case. The children's social and family background, cultural and language barriers, and the passive role granted to parents in the proceedings are possible reasons for parents' absence in certain cases.



## **FRA OPINION 2**

Member States should strengthen efforts to adapt the conduct of criminal proceedings against children, to allow them to fully participate. Children should have an effective right to be accompanied by parents and other persons of their choice, especially when this amounts to psychological and social support during the proceedings, in line with provisions in the directive. Parents can also provide defence lawyers with insights into the family's and children's background. Authorities should assist parents in supporting their children, for example by giving them clear information about the proceedings and providing them with interpretation services when necessary.

Regardless of the outcome, participation in criminal proceedings is a challenging experience that can have a long-lasting impact on the lives of both children and parents. Rule of law concerns, such as keeping proceedings transparent in order to ensure public oversight and trust in justice, should not prevent judges from holding closed hearings, at least when children are suspected of having committed particularly serious crimes. The media should follow strict ethical codes regarding publishing details of criminal proceedings involving children.



### FRA OPINION 3

Member States should take steps to ensure that children have private consultations with their lawyers before investigations, as required by law, by providing appropriate space in police stations and courts. Authorities should allow adequate time for these consultations so that lawyers have sufficient time with the child to prepare their defence, especially when the child has communication difficulties.

As far as possible, authorities are encouraged to find ways that allow detained children to consult privately with their lawyers without the presence of police officers.

The police should always inform children clearly of their right to remain silent and to have legal assistance when they are interviewed or questioned about a crime. No questioning should take place without the presence of a defence lawyer after charges have been brought.

Member States should take immediate and effective steps to stop any misconduct against child suspects by state agents. All alleged cases of misconduct should be thoroughly investigated and punished.

### Ensure that all children have effective legal assistance at all stages of the criminal proceedings

Article 6 of the directive requires that children who are suspects or accused persons in criminal proceedings have the right to access a lawyer without undue delay. Children should be able to meet privately and communicate confidentially with their lawyer, including before police questioning, and have their lawyer participate effectively during questioning. Moreover, when a child becomes a suspect or accused person during questioning as a witness, the questioning should be suspended until the child is informed of this and is assisted by a lawyer, according to recital 29. Children should have legal assistance available free of charge, according to Article 18.

Legal defence and the presence of a lawyer is mandatory at all stages of criminal proceedings, from the moment of the first questioning by the police, in most Member States that the research covers. Nonetheless, in some Member States the police informally question children and, in some cases, extract confessions without a lawyer, several children and practitioners report. Several children also report being maltreated by police in the absence of a lawyer, including verbal abuse and, on occasion, use of violence.

Member States generally guarantee consultations with lawyers. However, these consultations are not always confidential in practice, findings suggest, because children deprived of liberty are usually supervised by police officers. In addition, the authorities do not always provide adequate time and space for such consultations, professionals interviewed point out. In practice, they sometimes take place in hallways, lifts, cells or courthouse basements.

Legal assistance and contact with lawyers are of crucial importance during criminal proceedings, according to children interviewed. This is because lawyers provide them with essential information about their rights and the general conduct of the proceedings and, in many cases, listen to their point of view.

## Ensure that individual assessments of the psychological and socioeconomic situation of children are carried out effectively and in due time before court hearings

Article 7 and recitals 35–40 of the directive provide that children should undergo an individual assessment to identify their specific needs during the proceedings at the earliest possible opportunity, and appropriate measures should be taken. Relevant specialists should assess, in particular, the child's personality and maturity; the child's economic, social and family background, including living environment; and any specific vulnerabilities of the child, such as learning disabilities and communication difficulties. The assessment should be systematically updated when circumstances change. The children should be closely involved in such assessments.

Individual assessments of children are often carried out in all the Member States studied where the law requires such assessment, the findings reveal.

Some countries adopt a multidisciplinary approach in which teams assess children to find the best solution and appropriate means of support for them. In other countries, an individual social worker or psychologist carries out the assessment. Judges appreciate such assessments, as they are the only way for them to access information about the individual circumstances of children, findings show. The information is often not directly relevant to the alleged crime but can help judges reach a decision on sentencing.

However, such assessments are often not ready on time for the hearing or are not up to date, interviews suggest. Professionals sometimes have to choose between conducting a thorough (good-quality) but longer assessment, and delivering an assessment quickly, without having spent enough time on each individual case, given their heavy workload. Interviewed children suggest that they did not have an individual assessment, did not remember any individual assessment, or recalled some consultations with psychologists but did not know the purpose of such consultations, and they rarely saw a direct impact on the proceedings.



## FRA OPINION 4

Member States should strictly abide by their obligation to conduct individual assessments of various aspects of children's lives through multidisciplinary teams of specialists. The assessments should be conducted as early as possible, no later than committal to trial and before any decision is taken to detain a child at the pre-trial stage. The results of such assessments should be available to judicial authorities before the main hearing or when the liberty of children is at stake, to assist them in the decision-making process.

Authorities should always actively engage the children in their individual assessment to fully respect core principles of the United Nations (UN) Convention on the Rights of the Child (CRC), namely the right of the child to participate, and the obligations stemming from the directive on children's rights. Authorities should make sure that children understand what an individual assessment is, its purpose and how the results might be used.



## FRA OPINION 5

National judicial authorities should consider non-custodial measures as much as possible in view of the serious negative impact of detention on children. In addition, Member States should respect their obligations under the directive by ensuring that children are separated from adults unless this is not in their best interests.

Member States should ensure that all children in detention have full access to physical and psychosocial healthcare services after their initial medical examination in accordance with their individual needs.

In addition, authorities should ensure that children in detention have sufficient access to education, leisure activities and reintegration programmes. These should equip them for a return to normal life.

## Ensure that children are deprived of liberty only in exceptional circumstances and provide rehabilitation measures

Articles 10–12 and recitals 45–53 provide that children should be deprived of liberty for the shortest possible time in each case and that deprivation of liberty is applied as a last resort. Member States should favour non-custodial measures and, when children must be deprived of liberty, they should have special treatment in detention. They should be separated from adults, unless this is not in their best interests, and have additional rights, such as the right to a medical examination on admission and subsequent healthcare, and access to educational and resocialisation programmes and leisure activities. They should be allowed to exercise their right to family life.

Most children are deprived of liberty as a last resort across the Member States studied, findings show. Deprivation of liberty is applied only for more serious crimes and after carefully considering alternative measures.

Punitive measures applied to children should also focus on educating and rehabilitating them, as interviewed professionals acknowledge.

FRA's research identifies shortcomings when children are deprived of their liberty. Not all Member States can ensure the separation of children from adults in police custody and detention. Detained children do not always

have access to appropriate healthcare, education or sports and other leisure activities. Contact with family members is generally ensured and allowed, although the restrictions introduced to combat the coronavirus disease 2019 (COVID-19) pandemic have negatively affected this right by limiting the in-person contacts.

Interviewed children who had been deprived of their liberty experienced particularly serious stress connected to their placement in police custody and detention.





## Provide training for professionals working with child defendants

Article 20 of the directive requires that staff of law enforcement authorities and detention facilities dealing with children receive specific training, including on child psychology and child-friendly communication techniques. Furthermore, pursuant to recital 63, Member States should ensure that judges and prosecutors have specific abilities in this regard or that they can acquire such abilities through access to specialised training. In addition, Member States must promote the provision of training to criminal lawyers dealing with children, and encourage training initiatives for professionals in support and restorative justice services.

Specific training on criminal cases involving children is stipulated in law and offered in most Member States studied, research findings show. However, this training is usually offered on a voluntary basis, and not everyone receives it. A number of professionals interviewed for this research had not received this training.

Children's frequent negative accounts of how professionals treated them during proceedings strongly support the need for training of professionals in contact with children. Moreover, such training typically focuses on legal issues rather than child psychology, social development or how to communicate with children, interviewees report. Yet many interviewees find communicating with children in a criminal justice setting challenging and would appreciate training in this area, for example. Some professionals also admit to having particular difficulties communicating with children from migrant backgrounds because of language and cultural differences.



## FRA OPINION 6

Member States should ensure that professionals involved in criminal justice proceedings with children receive mandatory multidisciplinary training on a range of issues related to legal aspects, the psychological and social development of children, and 'soft' skills and child-friendly communication practices to help them better communicate with children. Training on intercultural skills and cultural diversity would also help practitioners to communicate more effectively with children from migrant backgrounds.

## Endnotes

- <sup>1</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132.



# Introduction

## WHY THIS REPORT?

The criminal justice system “addresses the consequences of criminal behaviour in society and has the objective of protecting people’s right to safety and the enjoyment of human rights”.<sup>1</sup> Rules of criminal law and evidence allow authorities to detect and investigate criminal wrongdoing. These rules should help them identify those suspected or accused of criminal wrongdoing. At the same time, the rules should guarantee a fair legal process, which is a fundamental right in law.

When children, meaning persons below the age of 18, are suspected or accused of committing a crime, European Union (EU) Member States must implement safeguards beyond the traditional fair trial requirements. This is because children are entitled to special care and assistance, as Article 25 of the Universal Declaration of Human Rights proclaims. So does the preamble of the United Nations (UN) Convention on the Rights of the Child (CRC), which all EU Member States have ratified.

Child defendants must therefore be treated differently from adults and receive greater protection and care under international and EU law.<sup>2</sup> Relevant key purposes and guiding principles of criminal justice involving children include ensuring the best interests and well-being of the child, such as their effective participation, education and rehabilitation.

Directive (EU) 2016/800 (hereafter ‘the directive’) established specific procedural rights in judicial proceedings for children suspected or accused of having committed crimes.<sup>3</sup> These rights should be respected and fulfilled across the EU to ensure the same level of protection for all child defendants. This also reinforces mutual trust between EU Member States’ justice systems.

The directive is one of the measures adopted in the framework of the 2009 Roadmap for strengthening the procedural rights of suspects and accused persons, regardless of age, in criminal proceedings.<sup>4</sup> This aimed to codify existing procedural rights, stemming from the European Convention on Human Rights (ECHR) and the jurisprudence of the European Court of Human Rights (ECtHR), at EU level.

The European Union Agency for Fundamental Rights (FRA) conducted research to assess how a selection of Member States implement EU law on procedural rights specific to child defendants in practice, at the European Commission’s request. The results will contribute to the Commission’s report on the implementation of the directive.<sup>5</sup> The opinions deriving from the research seek to help improve the implementation of these rights at national level.

## SCOPE AND PURPOSE

The main objective of the research is to examine how national authorities involved in criminal proceedings apply the procedural rights and safeguards that EU law guarantees to children suspected or accused of having committed a crime. Such authorities include police officers, prosecutors, judges and non-legal specialists such as social workers, probation officers, researchers or educators.

The research methodology entailed a series of interviews with practitioners who have extensive experience in this area and with children who have been suspects or accused persons in criminal proceedings.

The research focuses on specific aspects of the directive that were selected after close consultation with the European Commission and legal practitioners. It does not comprehensively cover all rights and safeguards that the directive may have an impact on. For example, it does not cover the provision in the directive concerning the swiftness and urgency with which criminal proceedings involving children are treated (Article 13 (1)), or the remedies under national law in the event of a breach of the directive's rights (Article 19).

Furthermore, although the directive also applies to children another Member State requests and arrests using the European arrest warrant (EAW) (Article 17), this report does not cover such cross-border proceedings. For them, see in part FRA (2019), ***Rights in practice: Access to a lawyer and procedural rights in criminal and European arrest warrant proceedings.***

This report mainly addresses EU institutions and Member State authorities, including their national police and criminal justice authorities. It sets out to help the European Commission assess the practical application of the rights and safeguards that the directive enshrines. It also aims to produce evidence that can assist Member States in their efforts to enhance their legal and institutional responses to the fundamental defence rights of children who are subject to national criminal proceedings in line with the directive. For more details regarding the particular Member States this report covers, please see the relevant Franet country studies.

The report builds on a combination of desk research and qualitative fieldwork research involving interviews with legal and non-legal experts working in the field of juvenile criminal justice, as well as with children who have been suspected or accused of crime. It does not examine the incorporation of the directive into national legal provisions, as the Commission's implementation report on the directive will analyse that topic. However, this report presents a brief overview of the national laws of the nine Member States this research covers in relation to the particular aspects of the children's procedural rights and safeguards each chapter discusses.

## FRA activity

This report is the latest in a series that FRA has published. Some deal with criminal justice procedural rights in general, that is, those not specific to children, and including the procedural rights of victims of crime. Others focus specifically on children's rights in relation to the justice system and certain fields, such as trafficking. To date, this series includes the following publications.

- FRA (2022), *Handbook on European law relating to the rights of the child – 2022 edition*.
- FRA (2021), *Presumption of innocence and related rights – Professional perspectives*.
- FRA (2019), *Rights in practice: Access to a lawyer and procedural rights in criminal and European arrest warrant proceedings*.
- FRA (2019), *Victims' rights as standards of criminal justice – Justice for victims of violent crime, Part I*. This report outlines the development of victims' rights in Europe and sets out the applicable human rights standards.
- FRA (2019), *Proceedings that do justice – Justice for victims of violent crime, Part II*. This report focuses on procedural justice and whether or not criminal proceedings are effective, including in terms of giving a voice to victims of violent crime.
- FRA (2019), *Sanctions that do justice – Justice for victims of violent crime, Part III*. This report focuses on sanctions and scrutinises whether or not the outcomes of proceedings deliver on the promise of justice for victims of violent crime.
- FRA (2019), *Women as victims of partner violence – Justice for victims of violent crime, Part IV*. This report focuses on the experiences of one particular group of victims, namely women who endure partner violence.
- FRA (2019), *Children deprived of parental care found in an EU Member State other than their own: A guide to enhance child protection focusing on victims of trafficking*. This guide sets out the relevant legal framework governing the protection of children who are deprived of parental care and/or are found in need of protection in an EU Member State other than their own. This includes child victims of trafficking and their treatment in criminal proceedings.
- FRA (2018), *Children's rights and justice – Minimum age requirements in the EU*. This report outlines Member States' approaches to age requirements and limits regarding child participation in judicial proceedings. It also covers procedural safeguards and the rights of children involved in criminal proceedings, and issues related to depriving children of their liberty.
- FRA (2017), *Child-friendly justice – Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States*. This project was based on interviews with justice professionals and police. Interviews were also conducted with several hundred children to learn about their treatment when involved as victims, witnesses or parties in criminal and civil judicial proceedings. The focus was on cases of sexual abuse, domestic violence, neglect and severe custody conflicts.
- FRA (2016), *Criminal detention and alternatives: Fundamental rights aspects in EU cross-border transfers*. This report provides an overview of Member States' legal regulations in terms of framework decisions on transferring prison sentences, probation measures, alternative sanctions and pre-trial supervision measures to other Member States.
- FRA (2016), *Rights of suspected and accused persons across the EU: Translation, interpretation and information*. This report reviews Member States' legal frameworks, policies and practices regarding the right to information, translation and interpretation in criminal proceedings.
- FRA (2016), *Handbook on European law relating to access to justice*. This publication summarises the key European legal principles regarding access to justice, focusing on civil and criminal law.
- FRA (2014), *Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*. This handbook provides guidance on how to establish and run national guardianship systems, including children's support in criminal proceedings.

## How to interpret the research findings

The research was qualitative in nature and a limited number of interviews were conducted in each Member State covered (see Table 1). Therefore, the findings cannot be considered representative of the situation in the Member States studied, nor can they be generalised to other Member States. Nevertheless, the interviews illuminate some of the practical challenges of implementing the directive.

The report includes a number of ‘promising practices’. The selection was based on information that interviewed practitioners provided, and suggestions by the interviewed children and their gatekeepers. They provide policymakers and practitioners with examples of initiatives in different Member States that address a number of common challenges that the research identified. Elements from these examples could be adapted for use in other national contexts.

The report builds on previous FRA research on procedural rights and child-friendly justice.<sup>6</sup> The agency’s two main reports on child-friendly justice from 2015<sup>7</sup> and 2017<sup>8</sup> analysed the treatment of child victims and witnesses in cases of sexual abuse, domestic violence, neglect and severe custody conflicts. It addressed the general procedural rights of suspects and accused persons in criminal proceedings that are not child specific in **its 2016 reports on the rights of suspected and accused persons regarding translation, interpretation and information** in criminal proceedings,<sup>9</sup> and **on criminal detention and alternatives in EU cross-border transfers**,<sup>10</sup> its 2019 **report on access to a lawyer and other procedural rights in criminal proceedings**<sup>11</sup> and its 2021 **report on presumption of innocence and related rights**.<sup>12</sup> The 2016 reports analysed differences in legislation and policies, but the 2019 and 2021 reports, and the current report, focus on the actual application of these policies in practice.

This report focuses on the rights and safeguards that the directive introduced.

**Chapter 1** examines the directive’s scope of application. It deals with age as a precondition for benefiting from the rights the directive provides, its assessment in practice and the presumption that someone is a child in cases of uncertainty. It also touches on the monitoring of the application of measures the directive introduced.

**Chapter 2** addresses implementing the rights the directive provides. They are the rights to information and to have the holder of parental responsibility informed.

**Chapter 3** looks at applying children’s rights to be assisted by a lawyer and to have effective access to legal aid.

**Chapter 4** discusses the practical application of participatory procedural rights, such as the rights to effectively participate and to be accompanied in the proceedings.

**Chapter 5** concerns child-specific rights, such as the right to an individual assessment, privacy in criminal proceedings and having questioning recorded audiovisually.

**Chapter 6** presents the findings on the deprivation of liberty of children and whether it is used as a last resort. It also presents findings on safeguards such as children's rights to a medical examination, special treatment in detention and contact with family members.

**Chapter 7** presents the findings on the special training of professionals involved in juvenile criminal justice and the monitoring of juvenile criminal proceedings, and the effectiveness of the measures applied.

## METHODOLOGY AND CHALLENGES

This report is based on data collected through desk research in nine Member States and accompanying interviews that FRA's multidisciplinary research network, Franet, conducted in 2021.<sup>13</sup> It covers the practical application of selected rights and safeguards for children that the directive enshrines.

Interviews with professionals took place in nine Member States (Austria, Belgium, Bulgaria, Estonia, Germany, Italy, Malta, Poland and Portugal) from February to September 2021.

Interviews with children took place in eight Member States (as above, except for Malta, as local researchers had concerns about the protection of children's privacy) from May to August 2021. Franet also carried out the research with children, except in Germany, where an in-house FRA expert conducted the interviews.

The agency's resources required limiting the research to selected Member States. The nine Member States selected cover the main European legal traditions (common and civil law systems), include a range of cultures and geographical regions and have different population sizes. This is consistent with FRA's practice established in past projects.

FRA consulted practitioners associated with the Council of Bars and Law Societies of Europe,<sup>14</sup> Terre des Hommes,<sup>15</sup> the Ludwig Boltzmann Institute of Fundamental and Human Rights,<sup>16</sup> Defence for Children International,<sup>17</sup> Child Circle<sup>18</sup> and the Byron College Child Advisory Board on restorative justice<sup>19</sup> while developing the research design and methodology. FRA is grateful for their input and contribution to identifying issues in the practical implementation of the rights and safeguards that the directive stipulates.

Overall, 229 respondents were interviewed to gain insights on how national criminal proceedings implement and apply in practice the rights and safeguards that the directive enshrines. They included 180 criminal justice professionals: 40 judges and prosecutors, 36 police officers, 44 lawyers and 60 specialists from different disciplines working in the field of juvenile justice, such as social workers, juvenile court assistants and psychologists. Respondents also included 49 children from selected Member States (see Table 1), of whom seven have been suspected or accused of a crime and 42 have already received a judgment.

**TABLE 1: NUMBER OF INTERVIEWEES PER MEMBER STATE AND TARGET GROUP**

Member State	Police officers	Lawyers	Judges/prosecutors	(Non-legal) specialists	Children	Total number of interviewees
AT	4	5	5	6	6	26
BE	4	5	5	6	6	26
BG	4	5	5	6	6	26
DE	4	5	5	6	6	26
EE	4	4	5	7	6	26
IT	4	5	5	6	6	26
MT <sup>a</sup>	4	5	–	11	–	20
PL	4	5	5	6	7	27
PT	4	5	5	6	6	26
<b>Total</b>	<b>36</b>	<b>44</b>	<b>40</b>	<b>60</b>	<b>49</b>	<b>229</b>

Source: FRA, 2022

## SCOPE OF INTERVIEWS WITH PROFESSIONALS

The criminal justice professionals – police officers, defence lawyers, judges, prosecutors and professional juvenile justice specialists – were asked predefined questions in semi-structured interviews. Questions covered five issues: individual needs assessment, assistance by a lawyer, right to information, right to effective participation in a trial and deprivation of liberty. The interviewers did not share the questionnaire with respondents in advance.

Interviewers could ask follow-up questions or request clarifications. They encouraged respondents to speak freely and draw on their personal professional experiences and observations of other professionals' practices. Interviews with professionals were mostly by teleconference owing to national responses to the coronavirus disease 2019 (COVID-19) pandemic.

## SCOPE OF INTERVIEWS WITH CHILDREN

The children's semi-structured interviews did not cover some thematic areas, such as monitoring, training and privacy, as the children did not have direct insights into those areas. However, contact persons provided additional factual information about the training of professionals in contact with the child in question, for example. Children were asked to speak openly about their experiences and how they were informed, treated and assisted during criminal proceedings as suspects or accused persons. They were also asked to provide their views on how to improve proceedings.

Researchers used appropriate recruitment channels (gatekeepers) to identify and contact children for interviewing, based on FRA's established practice when interviewing children. This included ensuring children's safety and well-being, for example through providing interviewees with information about available support services appropriate for children in these situations. Gatekeepers provided complementary, factual background information about the criminal proceedings involving children, with the child's permission. The children's experiences and perspectives are complementary to the practices the professionals described, and serve to create a more comprehensive picture.

### ▲ Note:

<sup>a</sup> Interviews in Malta did not include judicial authorities or children. This was mainly for data protection reasons, as only a limited number of judges and prosecutors deal with children, and relatively few children are involved in criminal proceedings.

Significant efforts were made to conduct the interviews face to face to establish a trusting relationship and allow children to speak openly about their experiences (including feelings and opinions). This created a space where children would feel safe and comfortable. Overall, 44 interviews were in person and three were online; the format depended on the COVID-19 measures in the relevant country. Interviews were mainly audiorecorded or, in some cases, documented in detailed notes, according to the wishes of the interviewed children.

Only specifically trained and experienced researchers conducted the interviews. FRA appointed the Franet research teams (contractors/researchers) to recruit, select and propose interviewers. FRA assessed the proposed interviewers and approved them or recommended replacing one or more, based on their appropriate research experience of interviewing children and working with children. The evaluation of experience and suitability used their CVs, clean criminal records and necessary background checks.

An in-house expert with experience in child's rights and in interviewing children, including children involved in criminal proceedings, conducted the interviews in Germany.

The child interviewees represented as diverse a range of personal backgrounds, ages and genders as possible, given the number of interviews. They also had different experiences of the seriousness of the crime, levels of social support and pre-trial measures. This diversity helped to create a comprehensive picture.

However, over-representation of certain groups was unavoidable: boys; children from a minority ethnic or migrant background; and children in difficult living situations, including living separately from at least one parent, in care and/or in a household of low socioeconomic status. This reflects the over-representation of children with these characteristics in criminal proceedings in the countries studied, according to gatekeepers/professionals. Children involved in multiple proceedings and/or cases of serious crime are over-represented, as experiences at trial and in detention were of interest and within the directive's scope.



**The age at which engagement with criminal justice starts ranges from 13 to 17**, according to interviewees. The youngest interviewees were 15 and the oldest were 21 when asked to recall their experiences during the research. Eighteen of the 49 interviewees had already turned 18 when interviewed about their experiences as child suspects or accused persons.

## Child interviewees – background characteristics

Overall, 49 interviews with children in conflict with the law who had experienced criminal proceedings were systematically conducted and analysed across eight EU Member States. The target group was children with experience as suspects or accused persons of criminal proceedings after the deadline for incorporating the directive into national law (11 June 2019). Children are from the same regions as the interviewed professionals. The children's characteristics are as follows.

- Thirteen participants are girls (26.5 %) and 36 are boys (73.5 %).
- More than one third (19, 39 %) of interviewees are from a migrant background or belong to an ethnic minority in their countries. Particularly high proportions of interviewees in Germany (100 %), Bulgaria (66.6 %), Austria (50 %) and Belgium (50 %) have such backgrounds. No interviewees are from a migrant or ethnic minority background in Poland and Portugal, whereas the proportion is 16.6 % in Estonia and 28.5 % in Italy. Children from the Russian-speaking minority group in Estonia, Roma children in Bulgaria, and children who have fled from Syria or Afghanistan in Austria and Germany are among the group of interviewees, in line with national demographics and criminal statistics.
- Over three quarters (39, 79.5 %) come from a difficult living situation.
- Most interviewees (81.6 %) live in urban areas in all participating Member States, except in Portugal (50 %) and Estonia (60 %), where half or more are from rural areas.
- A large proportion (36, 74.5 %) of the participating children in conflict with the law were involved in criminal activities that can be described as serious. A multitude of criminal offences and acts involving violence were considered serious crimes. Theft, misdemeanours and public disturbances such as demonstrations were considered 'other' crimes. More than half of the interviewees (31, 63.3 %) were involved in multiple proceedings.



## Endnotes

- <sup>1</sup> See the United Nations Office on Drugs and Crime (UNODC) web page on **crime prevention and criminal justice**. See also UNODC (2015), **Doha Declaration on integrating crime prevention and criminal justice into the wider United Nations agenda to address social and economic challenges and to promote the rule of law at the national and international levels, and public participation**, July 2015.
- <sup>2</sup> See in particular European Parliament (2012), **Charter of Fundamental Rights of the European Union (2012/C 326/02)**, OJ 2012 C 326, Article 24; United Nations (UN), General Assembly (1989), **Convention on the Rights of the Child**, 20 November 1989; Council of Europe (CoE), Committee of Ministers (2011), **Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum**, Strasbourg, October 2011; and UN (1948), **Universal Declaration of Human Rights**, 10 December 1948.
- <sup>3</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132.
- <sup>4</sup> Council of the European Union (2009), **Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings** (Text with EEA relevance), OJ 2009 C 295, 4 December 2009.
- <sup>5</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132.
- <sup>6</sup> FRA (European Union Agency for Fundamental Rights) (2015), **Child-friendly justice – Perspectives and experiences of professionals on children’s participation in civil and criminal judicial proceedings**, Luxembourg, Publications Office of the European Union (Publications Office); FRA (2017), **Child-friendly justice – Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties**, Luxembourg, Publications Office.
- <sup>7</sup> FRA (2015), **Child-friendly justice – Perspectives and experiences of professionals on children’s participation in civil and criminal judicial proceedings**, Luxembourg, Publications Office.
- <sup>8</sup> FRA (2017), **Child-friendly justice – Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties**, Luxembourg, Publications Office.
- <sup>9</sup> FRA (2016), **Rights of suspected and accused persons across the EU: Translation, interpretation and information**, Luxembourg, Publications Office.
- <sup>10</sup> FRA (2016), **Criminal detention and alternatives: Fundamental rights aspects in EU cross-border transfers**, Luxembourg, Publications Office.
- <sup>11</sup> FRA (2019), **Rights in practice: Access to a lawyer and procedural rights in criminal and European arrest warrant proceedings**, Luxembourg, Publications Office.
- <sup>12</sup> FRA (2021), **Presumption of innocence and related rights – Professional perspectives**, Luxembourg, Publications Office.
- <sup>13</sup> For more information, see FRA’s **web page** on Franet.
- <sup>14</sup> For more information, see the Council of Bars and Law Societies of Europe **web page**.
- <sup>15</sup> For more information, see the Terre des Hommes International Federation **web page**.
- <sup>16</sup> For more information, see the Ludwig Boltzmann Institute of Fundamental and Human Rights **web page**.
- <sup>17</sup> For more information, see the Defence for Children International **web page**.
- <sup>18</sup> For more information, see the Child Circle **web page**.
- <sup>19</sup> For more information, see the **web page** of the Byron College Child Advisory Board on restorative justice.

# 1

## DIRECTIVE (EU) 2016/800: SCOPE OF APPLICABILITY, AGE ASSESSMENT AND MONITORING

This chapter discusses the scope of applicability and the monitoring of the directive, its rules and practice regarding age assessment. The directive provides safeguards for children, but national authorities determine whether the person in question is a child or an adult. Age assessment also determines whether the person has reached the minimum age of criminal responsibility in accordance with national law.

The directive lays down common minimum rules concerning rights of children who are suspects or accused persons in criminal proceedings or subject to the EAW.<sup>1</sup>

It sets out the procedural rights of children until the final determination of whether they committed a criminal offence. This includes, where applicable, sentencing and the resolution of any appeal. The directive does not affect Member State rules that determine the age of criminal responsibility.<sup>2</sup>

The directive also applies to children who become suspects or accused persons during questioning by the police or another law enforcement authority.<sup>3</sup>

### 1.1. SCOPE OF THE DIRECTIVE'S APPLICATION AND AGE CATEGORIES

The directive sets minimum standards for procedural rights at each stage of proceedings involving children. It applies from their questioning as witnesses until the final determination of their criminal liability, including sentencing and appeal procedures.<sup>4</sup> This prevents the use of potentially incriminating statements against the child in court if they are later held as a defendant.

It also applies to children who are requested and arrested pursuant to an EAW.<sup>5</sup> However, this report does not deal with this aspect because so few children are subject to the EAW according to initial consultations with experts.

All directives adopted in implementing the criminal procedural roadmap also apply to children.<sup>6</sup> However, this directive strengthens the rights of children as vulnerable defendants, while also referring to rights that other directives cover. These include the rights to:

- information<sup>7</sup>
- an individual assessment<sup>8</sup>
- a medical examination when deprived of liberty<sup>9</sup>
- access a lawyer<sup>10</sup> and legal aid<sup>11</sup>
- be presumed innocent and be present at the trial.<sup>12</sup>

The directive's scope does not cover proceedings against children for minor offences before authorities other than criminal courts that lead to sanctions other than deprivation of liberty. For example, it does not cover minor public order offences or road traffic offences. However, the directive does apply to appeal proceedings before criminal courts and against sanctions for minor offences, even when deprivation of liberty is not at stake. It always applies when the child is deprived of liberty, irrespective of the stage of the criminal proceedings.<sup>13</sup>

Recital 17 of the directive specifies that it does not cover proceedings specially designed for children that could lead to protective, corrective or educative measures. It is unclear whether its scope excludes such proceedings that include deprivation of liberty as a corrective measure.

Article 3 (1) of the directive defines 'children' as all persons below the age of 18, in line with the UN CRC. However, Member States are allowed to set the minimum age of criminal responsibility. This is in line with the UN CRC,<sup>14</sup> the Council of Europe (CoE) legal standards<sup>15</sup> and its Committee of Ministers' guidelines on child-friendly justice.<sup>16</sup>



A young person should be considered a child when their age cannot be determined or there is doubt, as the directive provides.<sup>17</sup> This is in line with General Comments Nos. 10, 12 and 24 of the UN Committee on the Rights of the Child on the child's right to be heard and children's rights in the juvenile and child justice systems.<sup>18</sup>

Article 2 (3) of the directive extends its application to older persons who were younger than 18 when they became suspects or accused persons in criminal proceedings. This is provided that applying the directive or its provisions is appropriate in light of their maturity and vulnerability. Member States may not apply the directive to persons older than 21, and it explicitly excludes provisions involving the holders of parental responsibility.<sup>19</sup>

Recital 12 of the directive also encourages Member States to apply the child-specific procedural safeguards to people between the ages of 18 and 21 who were children when they allegedly committed the crimes. This is in line with the UN Committee on the Rights of the Child general comments recommending that children who allegedly committed a crime and turn 18 during the trial or sentencing process continue to benefit from child justice systems.

The UN Committee also “commends States parties that allow the application of the child justice system to persons aged 18 and older whether as a general rule or by way of exception. This approach is in keeping with the developmental and neuroscience evidence that shows that brain development continues into the early twenties”.<sup>20</sup>

## **1.2. AGE ASSESSMENT AND THE PRESUMPTION OF CHILDHOOD IN CASE OF UNCERTAINTY**

### **Legal overview**

The scope of application of the special rules and procedures designed for children depends on the age of the person concerned.<sup>21</sup> The process of determining their age should be based on all available evidence, recital 13 states. This evidence includes documentary research, statements by the person and checks of civil status. A medical examination may be conducted when other evidence is inconclusive or unavailable.

Sometimes a highly precise age cannot be established using an age assessment procedure. Article 3 of the directive includes a presumption of childhood to cover situations such as these “where it is uncertain whether the person has reached the age of 18”.

In this regard, the directive’s approach follows the guidance of the UN Committee on the Rights of the Child. An age assessment should use the least intrusive method and resort to medical methods only in exceptional cases, according to the UN Committee on the Rights of the Child’s General Comments Nos. 10 and 24. The child or young person should have the benefit of doubt when results are inconclusive. However, the UN Committee stresses that Member States should avoid using bone and dental analysis, as these methods are often unreliable and can be traumatic for the child.<sup>22</sup>

### **Findings: national laws, professionals’ perspectives and children’s experiences**

The directive applies to persons below the age of 18, with extensions for children who reach the age of maturity during the procedures.<sup>23</sup> Article 2 (5) of the directive allows Member States to set the minimum age of criminal responsibility.<sup>24</sup> The directive then applies at national level to those who are deemed criminally responsible. The age assessment procedures are important, as they not only indicate if the special procedural rights and safeguards apply, but also determine if a suspect can be charged with a criminal offence.

The age of criminal responsibility differs across the Member States studied. It is 14 in most, namely Austria,<sup>25</sup> Bulgaria,<sup>26</sup> Estonia,<sup>27</sup> Germany,<sup>28</sup> Italy<sup>29</sup> and Malta.<sup>30</sup> In the other three, it is 18 (16 for serious offences) in Belgium,<sup>31</sup> 17 (15 for serious offences) in Poland<sup>32</sup> and 16 in Portugal.<sup>33</sup>

The age of criminal responsibility ranges from 12 to 17 across all EU Member States. Most (15) set it at 14.<sup>34</sup>

When interviewed, the children were between 15 and 21.

Most Member States studied do not have legal provisions on age assessment procedures involving suspects and accused persons who may be children. National legislation rarely regulates age assessment in detail, if it refers to it at all.

For example, age assessment is part of a general obligation to collect personal information when children are suspected of committing a crime in Bulgaria.<sup>35</sup> Judges can order an investigation to confirm the defendant is a child in Italy.<sup>36</sup> Medical examinations to establish the age of children in criminal proceedings should only be carried out as a last resort according to legal provisions in Austria.<sup>37</sup>

A person should be legally treated as a child in cases of uncertainty, it is widely presumed. If a person's age is unknown and there is reason to believe it is below 18, the person is deemed a child until proven otherwise, most Member States' legislation provides. This applies in Austria,<sup>38</sup> Estonia,<sup>39</sup> Germany,<sup>40</sup> Italy,<sup>41</sup> Malta<sup>42</sup> and Portugal.<sup>43</sup> No legal provision explicitly granting the presumption of childhood exists in Belgium, Bulgaria or Poland.

*How is the age of a person suspected or accused of having committed a crime assessed and determined in practice?*

The age of child suspects is more straightforward to identify when records are available, interviewees across all Member States note. For children such as asylum seekers or Roma children, identifying their age may require extra steps if such records are not available.

Official documents such as birth certificates, passports, identity cards or residence permits help identify the age of a child when this is in question, say interviewees in Belgium, Bulgaria, Germany, Italy, Malta, Poland and Portugal. These interviewees are mainly police officers.

Authorities checked their age when they became suspects, interviewed children in Germany, Poland and Portugal consistently claim. Other forms of identification, such as a health insurance card, were accepted, as they did not all have identity cards. Interviewed children were asked for their age, their identification was checked or they were not asked at all in Austria, Belgium, Bulgaria and Italy.

When they were not asked their age, children assume that it was checked using other means or the authorities somehow already knew. The authorities in Estonia checked the official registry, children report.

When the age of a suspect remains unclear, checking police databases for information about the age of the suspect is general protocol, according to police officers interviewed in Austria, Bulgaria, Estonia, Germany and Malta. The databases may be connected to population registers, the civil registry, medical insurance, municipalities, etc.





Police officers in Bulgaria and Estonia contact the child's acquaintances to establish the age when official documents are unavailable. In Portugal, other people can verify a suspect's identity and age, according to one prosecutor. The other person vouches for the accuracy of the personal data that the suspect provides.

The age of one suspect was unknown because they had no birth certificate or information in an official register, a Bulgarian prosecutor recalls. On request, the civil court issued a decision that the suspect was an adult and not a child.

Medical assessments are one method of establishing the age of a suspect in eight Member States studied (all but Poland), according to the professionals interviewed. Sometimes it is viewed as the last resort, when all avenues for identifying the age of the suspect have been exhausted.

It is the prosecutor's responsibility to order a medical age assessment in Austria, Belgium, Germany, Italy and Portugal. This can take the form of examining the bone structure (e.g. wrist, collarbone, hand) and teeth of a defendant, for example. Data from medical assessments may not be precise, interviewed police officers and prosecutors admit in Austria, Belgium, Germany and Portugal.

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**"For example, in some cultures (e.g. tribes) the citizens will receive a mark on their skin when they become of age. The people in charge of verifying the age of the alleged minor have a schedule of tribal marks for them to check the meaning behind the mark. Thereby, a particular age could be ascertained."**

Social worker, Malta.

A social worker from Malta elaborated on a different form of age assessment: a psychosocial approach. A psychosocial age assessment takes some cultural traditions into account, is more child-friendly, and looks at the child's background and mental state in particular. This process takes a long time. However, it is far better from a human rights perspective than the previous medical assessment using X-rays and dental examinations, the interviewee considers.

Interviewed children with refugee status may have had their age assessed during the asylum determination procedure.

The suspect is presumed to be a child when serious doubts remain, professionals from all nine Member States agree. This accords with the principle of *in dubio pro reo*: a ruling should be in favour of the accused person when there is doubt.

### 1.3. MONITORING IMPLEMENTATION OF THE DIRECTIVE

#### Legal overview

Member States must send the Commission available data showing how they implement the rights under the directive, according to Article 21 of the directive. This must be done by 11 June 2021 and every three years thereafter. This includes data on the numbers of children represented by a lawyer, individual assessments and audiovisual recordings of questioning, and children deprived of liberty, recital 64 stipulates. These should be gathered from judicial and law enforcement authorities, and healthcare and social welfare services.

Member States should establish monitoring mechanisms and periodically review and evaluate child-friendly measures, the CoE Committee of Ministers' guidelines on child-friendly justice encourage.<sup>44</sup> State parties should systematically collect data for evaluating and developing juvenile justice policies, the UN Committee on the Rights of Child similarly urges.<sup>45</sup> These data include those the directive refers to.

#### Findings: national laws and practices on monitoring the directive's application

No information is publicly available on data collection or legal provisions for monitoring and assessing the implementation of the rights of accused children in criminal proceedings in most of the EU Member States studied. The exceptions are Germany and Italy, according to information from FRA's researchers.

In Germany, the Federal Statistical Office publishes annual criminal justice statistics. These can be used to monitor the rights of children who are subject to criminal proceedings.<sup>46</sup> Despite this, academics have criticised the lack of an explicit legal obligation to evaluate the incorporation of the directive into national law.<sup>47</sup>

In Italy, the Ministry of Justice collects data on the number of children involved in criminal proceedings and deprived of personal freedom in penal institutions for minors (*istituti penali per i minorenni*, IPMs), first reception centres (*centri di prima accoglienza*, CPAs) and local communities.<sup>48</sup> The national statistical institute publishes these data on its website.<sup>49</sup>



# Endnotes

- <sup>1</sup> **Directive (EU) 2016/800** of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 1 (a) and (b).
- <sup>2</sup> *Ibid.*, Arts. 2 (1), 2 (5) and 3 (1).
- <sup>3</sup> *Ibid.*, Art. 2 (4).
- <sup>4</sup> *Ibid.*, Arts. 1 (1) and 2 (1) and (4).
- <sup>5</sup> *Ibid.*, Arts. 1 (2), 2 (2) and 17; Court of Justice of the European Union (CJEU), C-367/16, **Dawid Piotrowski**, 23 January 2018, paras. 36–37.
- <sup>6</sup> Council of the European Union (2009), **Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (Text with EEA relevance)**, OJ 2009 C 295, 4 December 2009.
- <sup>7</sup> **Directive (EU) 2016/800** of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 4.
- <sup>8</sup> *Ibid.*, Art. 7.
- <sup>9</sup> *Ibid.*, Art. 8.
- <sup>10</sup> *Ibid.*, Art. 6.
- <sup>11</sup> *Ibid.*, Art. 18.
- <sup>12</sup> **Directive (EU) 2016/343** of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ 2016 L 65, Chapter 2.
- <sup>13</sup> **Directive (EU) 2016/800** of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 2 (6) and recitals 14–16.
- <sup>14</sup> UN, General Assembly (1989), **Convention on the Rights of the Child (CRC)**, 20 November 1989, Arts. 1 and 40; UN, Committee on the Rights of the Child (2007), **General Comment No. 10 (2007) – Children’s rights in juvenile justice**, CRC/C/GC/10, 25 April 2007, para. 37, p. 12; UN, Committee on the Rights of the Child (2019), **General Comment No. 24 (2019) on children’s rights in the child justice system**, CRC/C/GC/24, 18 September 2019, paras. 29–30, p. 7; UN, Committee on the Rights of the Child, General Comment No. 12 (2009): The right of the child to be heard, CRC/C/GC/12, 20 July 2009.
- <sup>15</sup> CoE, **European Convention on the Exercise of Children’s Rights**, CETS No. 160, 1996, Art. 1 (1).
- <sup>16</sup> CoE, Committee of Ministers (2011), **Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum**, Strasbourg, October 2011, Chapter II, Section A, p. 17.
- <sup>17</sup> **Directive (EU) 2016/800** of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 3, last sentence.
- <sup>18</sup> UN, Committee on the Rights of the Child (2007), **General Comment No. 10 (2007) – Children’s rights in juvenile justice**, CRC/C/GC/10, 25 April 2007, para. 39, p. 12; UN, Committee on the Rights of the Child (2019), **General Comment No. 24 (2019) on children’s rights in the child justice system**, CRC/C/GC/24, 18 September 2019, paras. 33–34, p. 7.
- <sup>19</sup> **Directive (EU) 2016/800** of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 2 (3).
- <sup>20</sup> UN, Committee on the Rights of the Child (2007), **General Comment No. 10 (2007) – Children’s rights in juvenile justice**, CRC/C/GC/10, 25 April 2007, para. 38, p. 12; UN, Committee on the Rights of the Child (2019), **General Comment No. 24 (2019) on children’s rights in the child justice system**, CRC/C/GC/24, 18 September 2019, paras. 31–32, p. 7.
- <sup>21</sup> **Directive (EU) 2016/800** of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 2.
- <sup>22</sup> UN, Committee on the Rights of the Child (2007), **General Comment No. 10 (2007) – Children’s rights in juvenile justice**, CRC/C/GC/10, 25 April 2007, para. 39, p. 12; UN, Committee on the Rights of the Child (2019), **General Comment No. 24 (2019) on children’s rights in the child justice system**, CRC/C/GC/24, 18 September 2019, paras. 33–34, p. 7.
- <sup>23</sup> **Directive (EU) 2016/800** of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 3 and recital 1.
- <sup>24</sup> *Ibid.*, Art. 2 (5).
- <sup>25</sup> Austria, **Juvenile Courts Act 1988** (*Bundesgesetz vom 20. Oktober 1988 über die Rechtspflege bei Straftaten Jugendlicher und junger Erwachsener (Jugendgerichtsgesetz 1988 – JGG)*), *Federal Law Gazette* No. 599/1988, 18 November 1988, paras. 1 (1–2) and 4 (2).
- <sup>26</sup> Bulgaria, **Penal Procedure Code** (*Наказателен кодекс*), 2 April 1968, Arts. 31 (2) and 32 (1).
- <sup>27</sup> Estonia, Criminal Code (*Karistusseadustik*), 6 June 2001, para. 33.
- <sup>28</sup> Germany, Criminal Code in the version published on 13 November 1998 (*Federal Law Gazette* I, p. 3322), as last amended by Article 2 of the Act of 19 June 2019 (*Federal Law Gazette* I, p. 814) (*Strafgesetzbuch in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I S. 3322), das zuletzt durch Artikel 2 des Gesetzes vom 22. November 2021 geändert worden ist*), 15 May 1871, Section 19.
- <sup>29</sup> Italy, Criminal Code (**Regio Decreto 19 ottobre 1930, n. 1398: Approvazione del testo definitivo del Codice Penale**), 1 July 1931, Art. 97.
- <sup>30</sup> Malta, Act No. XVIII of 2020, an Act to further amend the Criminal Code, Cap. 9 (**Att Nru XVIII tal-2020, Att li jkompli jemenda l-Kodiċi Kriminali, Kap. 9**), 10 June 1854 (as amended), Art. 35 (1).
- <sup>31</sup> Belgium, Youth Protection Act (**Loi relative à la protection de la jeunesse, à la prise en charge des mineurs ayant commis un fait qualifié infraction et à la réparation du dommage causé par ce fait**), 8 April 1965, Art. 36 and 36bis; Dumortier, E., Christianens, J. and Nuytiens, A. (2017), ‘Belgium’ in: Decker, S. H. and Marteache, N. (eds.), *International Handbook of Juvenile Justice*, Cham, Springer, pp. 239–265.
- <sup>32</sup> Poland, Penal Code (*Kodeks Karny*), 6 June 1997, Art. 10.
- <sup>33</sup> Portugal, Criminal Code (*Código Penal*), 23 September 1982, Art. 19.
- <sup>34</sup> See the Child Rights International Network (CRIN) web page on **minimum ages of criminal responsibility in Europe**.
- <sup>35</sup> Bulgaria, Penal Procedure Code (**Наказателно-процесуален кодекс**), 29 April 2006, Art. 387.
- <sup>36</sup> Italy, Youth Criminal Procedural Code (*Codice processo penale minorile*), 22 September 1988, Art. 8 (1).
- <sup>37</sup> Austria, Juvenile Court Act 1988 (*Bundesgesetz vom 20. Oktober 1988 über die Rechtspflege bei Straftaten Jugendlicher und junger Erwachsener (Jugendgerichtsgesetz, JGG)*), *Federal Law Gazette* No. 599/1988, 20 October 1988, Section/para. 37a (1).
- <sup>38</sup> *Ibid.*, Section/para. 1 (2).
- <sup>39</sup> Estonia, Child Protection Act (*Lastekaitseadus*), 19 November 2020, para. 3(2).
- <sup>40</sup> Germany, Youth Courts Law (**Jugendgerichtsgesetz, JGG**) in the version of the promulgation of 11 December 1974 (*Federal Law Gazette [BGBl.]*) Part 1 p. 3427, most recently amended by Article 1 of the Act of 8 July 2008 (*Federal Law Gazette* Part 1 p. 2099), 11 December 1974, Section 1 (3).
- <sup>41</sup> Italy, Youth Criminal Procedure Code (*Codice processo penale minorile*), 22 September 1988, Art. 8(2).



- <sup>42</sup> Malta, Act No. XVIII of 2020, an Act to further amend the Criminal Code, Cap. 9 (*Att Nru XVIII tal-2020, Att li jkompli jemenda l-Kodiċi Kriminali, Kap. 9*), 10 June 2020 (as amended), Art. 534AGB.
- <sup>43</sup> Portugal, Code of Criminal Procedure (*Código de Processo Penal*), 17 February 1987, Arts. 61 (5) and 250 (5) (c).
- <sup>44</sup> CoE, Committee of Ministers (2011), *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum*, Strasbourg, October 2011, pp. 34 and 94–95.
- <sup>45</sup> UN, Committee on the Rights of the Child (2019), *General Comment No. 24 (2019) on children's rights in the child justice system*, CRC/C/GC/24, 18 September 2019, paras. 113–115, p. 19; UN, Committee on the Rights of the Child (2007), *General Comment No. 10 (2007) – Children's rights in juvenile justice*, CRC/C/GC/10, 25 April 2007, paras. 98–99, pp. 25–26.
- <sup>46</sup> Germany, Draft Act to strengthen the procedural rights of accused persons in juvenile criminal proceedings (*Entwurf eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten in Jugendstrafverfahren*), Drucksache 19/13837, 9 October 2019, p. 42.
- <sup>47</sup> Höynck, T. and Ernst, S. (2020), 'Das Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren: Die Umsetzung der Vorgaben der EU-Richtlinie 2016/800 und ihre Auswirkungen auf das deutsche Jugendstraf-(verfahrens-)recht', *Zeitschrift für Jugendkriminalrecht und Jugendhilfe*, Vol. 3, pp. 245–258; see p. 258.
- <sup>48</sup> For more information, see the web page of Italy's Ministry of Justice (*Ministero della Giustizia*) on **statistics of the penitentiary administration**.
- <sup>49</sup> For more information, see the Italian National Institute of Statistics (*Istituto Nazionale di Statistica*) web page on **documents concerning minors**.

# 2

## INFORMATION RIGHTS: THE RIGHT OF CHILDREN AND THEIR PARENTS OR GUARDIANS TO BE INFORMED ABOUT PROCEDURAL RIGHTS

This chapter discusses children's right to be informed of their procedural rights once they are suspects or accused persons, according to the directive. It also discusses their parents or guardians' right to be informed of these rights.

This chapter sets out some of the issues related to the provision of information. These include whether information is given in a child-friendly way, what information is provided and when, and whether children understand the information they receive.

This chapter also examines how holders of parental responsibility are informed of rights. The directive uses the term 'holder of parental responsibility'. This report will use the same term and/or 'parent' and 'guardian' for readability.

### 2.1. INFORMING CHILDREN OF THEIR RIGHTS AND CONDUCT OF THE PROCEEDINGS

#### Legal overview

Member State authorities should promptly inform children suspected or accused of having committed a crime of their procedural rights, Article 4 (1) of the directive stipulates. These include their rights to access a lawyer and be accompanied by their parents or another adult. They should also be informed of the general aspects of the conduct of the proceedings.



Other directives on criminal procedural rights still apply in proceedings against children. This includes Directive 2012/13/EU on the right to information in criminal proceedings and **Directive 2013/48/EU**.<sup>1</sup> Directive 2013/48/EU covers the right to access a lawyer in criminal proceedings and in EAW proceedings. It also covers children's rights to have a third party informed and to communicate with third persons and consular authorities when deprived of liberty.

Directive (EU) 2016/800 provides additional guarantees. Information should be given in writing, orally or both, and in simple and accessible language, according to Article 4 (2) and recital 18. This should consider the provisions of other directives and the specific needs and vulnerabilities of children. All defendants must be informed of the accusation against them in sufficient detail, considering the stage of criminal proceedings.<sup>2</sup>

National authorities must, as far as possible, explain to child defendants the next procedural steps and the roles of the authorities involved, recital 19 of the directive provides. The letter of rights provided to a child deprived of liberty should include clear information on their rights, Article 4 (3) and recital 21 of the directive prescribe.

Children have the right to be informed of their procedural rights, the ECtHR emphasises. If the police do not inform child defendants of their rights to receive legal assistance and to have a family member or other adult present to assist them during questioning, this violates Article 6 of the ECHR.<sup>3</sup> Authorities must take an active approach to informing children of such rights.<sup>4</sup>

Children should be provided with information promptly and adequately, the CoE's guidelines on child-friendly justice recommend. This includes information on their rights; the system and procedures involved, including review proceedings; existing support mechanisms, protective measures and alternatives to court settings; the charges against them; and reasons for detention.<sup>5</sup> This applies to their first involvement with the justice system and throughout the process. Information must be adapted to the child's age and maturity, in a language that they understand, and gender and culture sensitive.<sup>6</sup>

Children must be informed promptly and directly of the charges against them, the **UN CRC** requires. This should be done through their parents, if suitable. To participate in the proceedings effectively, the child must be informed of the charges, the juvenile justice process and possible measures, according to General Comments No. 12 and No. 24.<sup>7</sup> Possible measures include diversion measures, such as community service, supervision and guidance by, for example, social workers.

### **Findings: national laws, professionals' perspectives on and children's experiences of the right to information**

Member States generally provide for child defendants' rights to information. However, gaps in effective implementation of the directive remain, research findings reveal. These gaps are both in the legal framework (some Member States) and in practice (all Member States).

The findings point to trends in this regard in all nine Member States. For example, most child defendants receive information about several of their procedural rights to varying degrees. However, it is not necessarily in a child-friendly manner and early on in the proceedings. Information should be "in simple and accessible language", Article 4 of the directive stipulates.

Furthermore, not all rights are explained to the same degree. For example, the right to privacy is explained less than procedural rights.

This seems to be largely implemented in practice for more novel aspects of the directive. For example, information on the child's right to have the holder of parental responsibility informed is provided. However, there are certain challenges in this area, the research reveals.

#### *National laws*

Gaps remained regarding the incorporation of the directive in some Member States at the time of the desk research. For example, as no special rules exist on the right to information when the accused person is a child, Article 4 of the directive was not fully incorporated into Bulgarian law.<sup>8</sup> In Poland, there is no obligation to inform child or adult suspects of many of the rights described in Article 4 (1) of the directive in criminal procedures.

The current legal framework in Belgium makes a few references to the information rights included in the directive. A suspect has the right to talk to a lawyer before police questioning, have a lawyer present during questioning, have a written record of interrogations and ask the police to investigate, among others.<sup>9</sup>

#### *Implementing the right to information of child defendants in law and in practice*

National authorities must inform children who are suspects and accused persons of their rights, as Article 4 of the directive sets out.

During questioning, the police inform child defendants of their procedural rights orally, in writing (letter of rights) or both, even if national laws do not fully incorporate the directive, the police in all Member States say. How children suspected or accused of a crime receive information about their procedural rights depends on whether or not they are deprived of liberty.

For example, in Austria, children who remain at liberty are summoned for police interrogation by letter. It contains information on the child's procedural rights. Children who are deprived of liberty are informed orally on arrest that they are under suspicion of committing a crime, and that they have the right to mandatory assistance from a lawyer and the right to have a person of trust present. This is generally the case across Member States.

#### *Explaining rights to children in a child-friendly way*

There is little difference in the way police inform children and adults of their procedural rights, findings show. Children receive information about their rights, although not always in a child-friendly manner, the police officers interviewed say. This is in contrast to what the children interviewed say.



The letter of rights is not adjusted to children's needs, as a police officer in Belgium points out.

Some Member States are trying to improve how they convey information about procedural rights. However, they do not yet account adequately for children's needs.

For example, Poland introduced a new letter of rights template for suspects and accused persons in 2020. This considers the need to ensure that people who do not have assistance from a defence lawyer or legal representative understand the letter of rights.<sup>10</sup> Despite this, a template in simple language for children should be introduced in accordance with the directive's guidelines, the Ombudsman for Human Rights indicates.<sup>11</sup>

Many of the children interviewed knew about some of their rights and the general functioning of proceedings before their first contact with public authorities, they said. Most of them share a common understanding of some basic rights. These include their rights to legal assistance (but not necessarily legal aid), to have parents informed and to remain silent.

They did not find out about their rights in criminal proceedings from criminal justice professionals, children say. Rather, they know by other means, such as personal or peers'/activists' experience, the internet or television.

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**"I know that I can have an official lawyer. I knew that from before, but they did not tell me."**

Child, Bulgaria.

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**"No, those documents are not at all adapted to a child [...] It's hard enough for an adult to understand these rights, let alone a child. Children will not at all understand what it says."**

Police officer, Belgium.

## PROMISING PRACTICE

### Child-friendly declaration of rights in Estonia

Authorities in Estonia created a template for declaring the rights of children, while they were incorporating the directive into law in 2019. It is a new declaration, separate from the general declaration of rights of suspects and accused persons. It explains procedural rights in simple, child-friendly language. It also outlines additional rights, such as the right to be informed of the progress of the proceedings.

*Sources: For more information, see Estonia, Minister of Justice (Justiitsminister), Establishment of form of declaration of rights (Õiguste deklaratsiooni näidisvormi kehtestamine), 17 July 2014; and Annex 3, Declaration of the rights of the minor (Alaealise õiguste deklaratsioon).*

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Most children interviewed received little information about their rights or the conduct of the proceedings during their first police contact.

Children would appreciate receiving as much information as possible as early as possible, they state consistently. In particular, they would like to know about the accusation, incriminating evidence, key procedural rights and the next steps in the proceedings.

#### *Informing children with particular vulnerabilities of their rights*

Authorities in most Member States recognise at least that they need to help children understand their rights if they do not speak the national language. This includes children from migrant backgrounds. However, language barriers make it challenging to provide information as the directive requires, most interviewed authorities in Germany highlight.

Interpreters are not always available, interviewees report. When they are available, they often do not speak in a child-friendly way or in a dialect that the child understands, one social worker emphasises. Poland has a similar systemic problem in accessing interpreters, according to interviewees.

Some Member States try to tackle vulnerabilities other than language barriers, as professionals detail. For example, the police in Estonia use simplified language without legal jargon to inform children with special needs of their rights, say several professionals interviewed.

In Bulgaria, an educational specialist or psychologist is present during questioning if the investigative authority decides it is needed, police officers mention. This may be if the child has a mental health problem, for example. The specialist/psychologist can be either external or from the police.

The Austrian police's behaviour changes depending on the social background of a child, one lawyer observes. Children from middle-class families with a strong social network who attend school are treated better than street children, the lawyer argues.

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**"We already have general experience and see differences in how the police deal with the young people, so we already have that. It happens from time to time [...] these are individual cases, but you notice them because of the severity: the young people report racist insults, clearly derogatory behaviour towards them. This is very often reported by young people of a migration background. The young people also often report very traumatic experiences with the police, especially when the Cobra [tactical unit under the control of the Ministry of the Interior] is involved. But it has to be said that these are mostly offences that also involve weapons and things like that, so it is not surprising to a certain extent. But the interventions of the Cobra are also very violent, yes? So, we do have young people here who really suffer significant consequences of the Cobra's treatment."**

Social worker, Austria.

The police are often impatient with children with a migration background who do not immediately understand information about their rights, a probation officer notes. The police sometimes pressure such children to sign that they understand their rights, the officer claims.

Treatment is worse for those with certain backgrounds or characteristics, such as children from a low socioeconomic or migrant background, as perceived by some children.

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**"I received the summons. After an eternity, I received an appointment at the police where they didn't actually listen to me, because of my status as a refugee. I wanted to be treated equally, but they didn't do it. I made my statement, and they didn't note everything that I said, and they didn't really care about it. At some point, I received a letter from the prosecutor's office, in which they imposed community service on me to close the proceedings. I expected to be invited for a hearing, so that they can listen to my side of the story, but they didn't allow it. They just stamped me as a foreigner and refugee who, irrespectively of the truth, should receive their punishment."**

Child, Germany.

Authorities do not always take account of vulnerabilities such as illiteracy (a child from Bulgaria) or language barriers (a child from Afghanistan living in Germany who received written information), interviewees claim.

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**"They gave me lots of sheets to sign, a lot of paper. They did not tell me what was on them. Why? They knew I was illiterate, that's why. They just said, 'Sign here' and I signed. They told me some things, but I could not remember."**

Child, Bulgaria.

#### *Verifying that children understand their rights*

As well as providing information in a child-friendly way, professionals try to ensure that children actually understand their rights, they claim in interviews. For example, in Bulgaria, all interviewed police officers say they try to ensure that the child understands the information. They do so by using simple language, asking children whether they understand and inviting them to ask questions.

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**"I am actually very bad in reading and writing. The only thing I am able to do is a bit of speaking. And they gave me a lot of paper. I really don't know what they were writing [...] Because of that I was very annoyed and didn't know anything. Then I just got the letter, saw how many pages there were and just signed it and left."**

Child, Germany.





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**“The matter of explanation depends on the age and cognitive ability of the child [...] Sometimes drawings and other different tools and means are used when interacting with children.”**

Social worker, Malta.

In Estonia, a number of methods are used to verify whether children understand their rights, one police officer mentions. The reference method, for example, associates complex terms with easier words that the child knows. Other police officers mention simple repetition or asking the child whether they understood. Children are told their rights using simple language and are usually asked whether they understood, all interviewed lawyers say.

Malta has more child-friendly and age-appropriate means to inform child suspects and accused persons of their rights, such as drawings, as one social worker describes.

Professionals disagree on the actual comprehension and awareness of the children involved in criminal proceedings in some Member States.

Police officers in Germany doubt if children understand the information provided in the first stage of the proceedings. They partly attribute this to the amount of information and the stress that the children experience. However, lawyers interviewed doubt that the police try to provide information in a comprehensible way.

In Austria, the police try to ensure that child defendants understand their procedural rights, lawyers acknowledge. However, other lawyers doubt if children can effectively understand the information provided.

Foreign children in Italy are often confused, especially those who do not have a close relationship with their lawyers, one lawyer argued. Some children believe that proceedings are finished when the court releases them after a validation hearing. However, that is only a type of preliminary hearing. They find out about the next steps months or even years later, if proceedings are particularly lengthy.

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**“Children under our care have difficulties in understanding the text they are reading. It is not because of their age, but rather their poor education. In my opinion, most of them don’t read the letter of rights at all. If they did, they would not understand half of it.”**

Psychologist, Poland.

Children in **Poland** usually claim that they do not receive any information about their rights because they do not understand the information. This was one interviewee’s experience working for a non-governmental organisation in **Poland**, providing legal assistance and support to children.

## PROMISING PRACTICE

# Effective provision of information at CPAs for children who are arrested in Italy

The CPA in Italy has a role in providing information to children, several professionals and children interviewed mention. Professionals working at the CPA include penitentiary police officers, educators, social assistants and psychologists trained to communicate with children. They explain the situation to children who arrive at the CPA. They describe the type of facility, the purpose of the validation hearing, the crime they are charged with, etc.

The children are informed of their right to appoint a lawyer or be assisted by a public defender. They are also informed

of their right to remain silent, to have the holders of parental responsibility contacted and informed, and to medical assistance.

The CPA provides information orally or in writing. It uses multimedia, such as DVDs in multiple languages, to explain things to foreign children. The CPA in Genova developed a graphic booklet using the well-known story of Pinocchio to explain juvenile criminal proceedings to children detained in the centre. The booklet is available in various languages.



Children do not fully understand what the police are explaining to them, some children report. Almost no child interviewed remembers easily understanding any letters or written information from the authorities. Any leaflets or infographics that help explain basic steps in the proceedings in a more child-friendly way are usually provided at a later stage. Juvenile court and social assistants mostly provided these materials.

Children rarely recall anyone checking whether they understood the information about their rights, or considering specific vulnerabilities when giving them the information. This contradicted the interviewed professionals.

#### *Which rights are explained/not explained?*

Regarding the content of the information children receive, some procedural rights are always communicated and explained to children, such as the right to appoint a lawyer, evidence in most Member States indicates. Other rights are implemented in practice, but not always communicated to children. For example, none of the children interviewed mentions the right to have hearings held behind closed doors to protect the defendant's privacy.

Judges in Italy explain technical aspects to children during the first hearing, or the child observes them in use, according to interviewees from various professional groups. In Malta, professionals disagree whether or not children are informed of the right to privacy and to hold proceedings involving children behind closed doors (see Section 5.2).

Lawyers interviewed in Poland were unsure whether children receive information on the right to privacy. The letter of rights does not include this information, they claim. The judges, prosecutors, police officers and non-legal specialists were unsure whether children receive information on their right to privacy and to have their case heard *in camera*, that is, with no public presence.

The rights to remain silent, to be assisted by a lawyer and to have their parents informed are explained, children consistently claim. The police briefly inform children orally or in writing of the accusation and the next steps in criminal proceedings in most cases.

Some of the interviewed children were informed of other procedural rights, they mention. For example, they knew their rights to be accompanied by a person of trust at the trial and to participate in the trial. They also knew their rights to exclude the public from the trial and regarding detention. However, typically the appointed lawyer informed children at a later stage in the proceedings.

Children were unaware of child-specific rights such as the right to have questioning audiorecorded (see Section 5.3) or to an individual assessment (see Section 5.1). Children were sure that they were not informed of those rights in many cases.

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**"They didn't explain anything, they gave me a letter with all these rights on it and they said, 'You have to read that'. The first time I've asked for some information because I did not really understand some of the things in it and the police officer said, 'It's all in there', so I replied, 'OK never mind, it will manage'. Now, I already know them a bit by heart, because my lawyer has explained it all to me."**

Child, Belgium.



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**"When they arrested me, they said 'anything you tell me will be used against you' and that I can bring my lawyer or my father there. I can tell the authorities what I want and what I don't want. And they also asked me if I wanted an interpreter and I said no. I didn't want anyone to be there, not even my father and the lawyer."**

Child, Austria.

### *Advising child defendants of their rights: the key role of lawyers*

Member States should ensure that lawyers assist children, according to Article 6 of the directive. Defence lawyers' pivotal role at the earliest stages of proceedings is advising child defendants of their rights and gaining the child's trust, professionals and children interviewed highlight. FRA highlights similar evidence in reports on the rights of suspects and accused persons.<sup>12</sup> Parents and social workers also help children understand their rights, they highlight.

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**"We do not have any specific system for checking [that a child knows their rights], everything is very subjective [...] We mostly rely on the lawyer, qualified lawyers are appointed, they are our biggest guarantee. And parents too."**

Prosecutor, Bulgaria.

For example, lawyers and social workers accompanying children in Malta should explain the procedural rights to them and check they understand the information the police provide, many interviewees agree. In Bulgaria, a lawyer must be present; that is the main guarantee that children are properly informed of their rights, a prosecutor mentions.

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**"There is no big difference between young people and adults. The rule is to read the paper. The magistrates say 'If you have any doubts ask your lawyer'."**

Lawyer, Portugal.

The police or judicial authority in Portugal will just read the defendant their rights when the lawyer is present, according to some interviewees. The lawyer will explain the rights later, the police say.

Lawyers providing information on procedural rights and safeguards is vitally important, according to interviewees in all other countries the research covers.

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**"No, police officers do not care about it. The lawyer informed me, and, unfortunately, I had already previous contacts with the police, and so I was aware [...] I had other troubles before; but that night, as far as I remember, they [the police] did not tell me anything. I did not know, maybe they assume the lawyer informs you etc."**

Child, Italy.

Defence lawyers are the main sources of detailed information on their rights, according to children and professionals. Appointed juvenile court or social assistants, or social workers, are sources at a later stage in proceedings, they mention.

### *Information about the general conduct of proceedings*

Authorities must also inform children of the general conduct of the proceedings, according to Article 4 of the directive. Depending on the circumstances, they should also explain to children the role of the authorities involved, according to recital 19.

Member States must inform children promptly of general aspects of the conduct of the proceedings, the second part of Article 4 of the directive states. However, in contrast to information about rights, this is only partly implemented in practice – at least by the police, judges and prosecutors.



Professionals in several Member States are uncertain about the provision of information on the conduct of proceedings in practice. For example, in Germany, several interviewed professionals were unsure whether the police provide information about the general conduct of the proceedings, or juvenile court assistance and/or lawyers do so later.

Children in Poland are not informed of the general conduct of the proceedings, as the law does not require it, most interviewees say. The exceptions were some police officers.

The Directorate-General for Reintegration and Prison Services (*Direção-Geral de Reinserção e Serviços Prisionais*, DGRSP) in Portugal provides professional guidelines on how to act and what to do during interventions with children. They are used while conducting individual assessments or assisting children during trials.

The directive was incorporated into Portuguese law in 2019. The guidelines were then modified to clarify the need to explain the general conduct of the proceedings and the role of each professional. This applies when the DGRSP professional is asked to be present at the trial. However, this does not occur often, interviewees claim.

In many Member States, providing such information is typically left to defence lawyers, probation officers, social workers or juvenile court assistance. For instance, in **Belgium**, lawyers are expected to provide information about the next procedural steps, different people's roles, possible outcomes, children's rights during the proceedings and so on.

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**"Explaining what happens after the police interrogation is the responsibility of the lawyer [...] Given that there has to be a lawyer, that is also a bit of a task for a lawyer to explain all this."**  
Police officer, Belgium.

All the lawyers interviewed in Malta acknowledged that it is their responsibility to inform the child of the process and explain it to them.

There are reasons why children may not promptly receive comprehensive information about the general conduct of proceedings, some interviewees explain.

For example, in Estonia, nobody explains the details of the proceedings to child suspects and accused persons, two of the four lawyers interviewed say. That is because, at the beginning of the proceedings, police officers do not know whether they have a case. There is no point explaining the nuances to everyone at an early stage without clarifying the facts, so they tell everyone individually if they proceed further, one of those two lawyers says.

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**"Regarding information about the proceedings before the court hearing, it would be entirely up to the lawyer. For example, I've had the majority of juveniles asking me what the possible outcomes and charges are."**  
Lawyer, Malta.

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**“There was a policeman who laughed at us while putting the handcuffs on and said, ‘now, you go to jail!’ But when we arrived at the first-reception centre, the staff carefully explained everything to us, not the rights, but they explained the possibilities, what would happen next. They made us an outline on a sheet of paper, maybe it was a psychologist, took a sheet of paper and made us a diagram where it was written like, ‘you are now here, at the first-reception centre, you have to undergo the proceedings, and then they will send you either to the prison,’ they drew a line-up, ‘or to the community centre, or to home custody, or something else, you are free but you have restrictions.’”**

Child, Italy.

The uncertainty whether a complete criminal proceeding will take place is concerning, as a judge in Germany echoes.

Lawyers and social workers provide information on the general conduct of the proceedings, children indicate.

Lack of information increased children’s insecurity and stress during the proceedings. For instance, children did not know to whom to turn for support or legal assistance, what came next and when, what could happen after a court hearing or what was expected of them.

Children in Belgium and Estonia have quick and consistent access to legal assistance. Children in Austria, Germany, Italy and Portugal can become part of support programmes. These opportunities mean they know more about the proceedings, at least at a later stage. They also feel less insecure.

Children in all eight Member States were unsure when their trials would take place and what the outcome might mean for their futures. This means they could not plan summer holidays, sports activities, the next school year or job applications.

## 2.2. INFORMING THE HOLDER OF PARENTAL RESPONSIBILITY

### Legal overview

Holders of parental responsibility must be informed of the child’s rights, the accusation and the general aspects of the proceedings, according to Article 5 (1) of the directive. The authorities should inform them as soon as possible and in detail. This should be done in writing, orally or both, using simple language. Parents might not be informed when:

- this would not be in the child’s best interests;
- they cannot be reached or their identity is unknown;
- doing so would jeopardise the proceedings.

Examples are when the parent is accused of participating in the crime, or suspected of influencing witnesses or destroying evidence, as recital 23 of the directive states. In such cases, the child can nominate another adult to be informed. When the child does not nominate an adult or the adult is deemed unsuitable, authorities designate another person, considering the child’s best interests.<sup>13</sup>

The child’s parents or legal representatives should directly receive all information on the child’s rights, the system and the applicable procedures, the CoE Committee of Ministers’ guidelines on child-friendly justice recommend.<sup>14</sup> They should be informed of the charges, the child’s arrest and its reason. If there are conflicting interests, the authorities should appoint another person to represent the child. Informing the parents should not replace informing the child, the guidelines note.



Informing parents or other legal representatives of charges against the child is all that the UN CRC requires.<sup>15</sup> However, parents should be present at all stages of the proceedings and be informed of the charges and possible consequences, General Comments Nos. 10 and 24 of the Committee on the Rights of the Child explicitly state.<sup>16</sup>

### **Findings: national laws, professionals' perspectives on and children's experiences of the right to have the holder of parental responsibility informed**

#### *National laws*

The right to have parents or guardians informed, Article 5, is one of the more novel aspects of the directive. Most Member States studied amended their criminal codes to comply. Parents/guardians have the same right to information as the child suspect/defendant in six of the EU countries studied: Austria, Estonia,<sup>17</sup> Germany,<sup>18</sup> Italy,<sup>19</sup> Malta<sup>20</sup> and Portugal.<sup>21</sup>

In Austria, the EU Criminal Law Amendment Act 2020 introduced § 38 (1a) of the Juvenile Courts Act (*Jugendgerichtsgesetz*, JGG) to implement Article 5 of the directive. The child's legal representative must be given any information the child receives in accordance with § 32a of the JGG as soon as possible, § 38 (1a) provides.

Germany introduced Section 67a of the JGG in the Act to Strengthen the Procedural Rights of Accused Persons in Juvenile Criminal Proceedings (*Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren*) to implement Article 5 of the directive.

There are still gaps in some Member States' implementation of the directive. For example, the investigative authority in Bulgaria must inform the parents only when the accused child is detained, or the investigation is over and the results are presented to the child.<sup>22</sup> The law does not require the child's consent to inform the parents.<sup>23</sup>

The law in Poland does not guarantee that parents will be informed when criminal proceedings against their child begin. Nor are parents guaranteed to find out about children's detention or to receive the letter of rights.<sup>24</sup>

Belgium's legal framework does not mention parents' right to be informed of their child's rights. However, it does refer to their right to be informed of the procedure.<sup>25</sup> This would indirectly inform them of their children's rights.

Holders of parental responsibility may not be informed in most Member States where FRA conducted interviews. Article 5 (2) and recital 23 provide reasons for this, as outlined above. In Germany, reasons include if the child's well-being is endangered, the parent is suspected of involvement in the crime or the parent cannot be reached in reasonable time.<sup>26</sup>

#### *Informing the holders of parental responsibility in practice*

Parents and children receive the same information in Member States where the law requires informing parents, professionals interviewed indicate.

For example, parents in Bulgaria are always informed regardless of any reasons not to do so, all prosecutors interviewed say.

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**"Our criminal procedure is very formal and we are obliged to call the parent no matter what relationship they have with the child. The possibility not to notify the parent is not in our legislation."**  
Prosecutor, Bulgaria.



Judges and prosecutors mention only one exception. They can delay the provision of information when there are reasons to believe the parent is involved in the criminal activity. This may happen with very serious crimes, but only within the time frame the law specifies. Interviewees mention this exception in all Member States studied.

Interviewee responses in Poland are mixed regarding whether parents are informed.

Despite the lack of legal clarity in Belgium, professionals interviewed mention certain relevant practices. For example, the police should inform parents if their child is arrested, they all say.

The police do not have to explain the procedure or procedural safeguards to parents when informing them of the arrest. However, police officers who specialise in youth affairs, such as youth inspectors, usually provide more information, a police officer and a prosecutor indicate. This information is about not only the case, but also the child's rights.

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**"They told me to sleep it off and sober up, because I was in an intoxicated state. I believed what they were saying and thought I would sleep in and then I could leave again tomorrow. The next day I was told that I was provisionally arrested and could be detained for 48 hours until a public prosecutor gave further instructions on whether I could go out or not. Inside, however, they did not treat me nicely or humanely, I must say. Everything I wanted to say to the police officers at the police station there didn't interest them at all. I also asked them there to inform my mother that I was here [in detention] and I found out later that they didn't do that, although they told me that they had. My mother didn't know where I was for over a week and since I had an addiction at the time, she assumed that I had passed away."**

Child, Austria.

In Austria, one child's parents were not informed of their whereabouts, the child says. This is contrary to the practice most professionals describe.

Improvements are needed to ensure that parents understand the information they receive, interviewees highlight. This is particularly the case when parents have a migrant background and do not understand the national language(s). Formal language should be simplified because of the large proportion of children from migrant backgrounds, the Ombudsperson for Children in Austria suggests. Multilingual information in simple language is helpful, they add.

#### *Having a nominated/designated person informed*

Children can nominate another adult to receive information about rights if their parents cannot be informed, Article 5 (2) states.



Authorities will involve another adult person to protect the child's interests in most Member States where interviews took place. This happens if a child does not nominate someone, the parents cannot be identified or the parents cannot be informed without possible danger to the child. This can be another relative. However, it is often someone from the social services or probation/parole services.

The particular circumstances often determine who becomes involved. Youth services and lawyers in Austria become responsible for the child's protection if the parents cannot be identified, according to professionals interviewed. This also happens if parents are not informed because of the exceptions described above.

The police must inform probation services if a child defendant is already on probation. The probation officers are then support persons in the proceedings. The child may nominate other persons of trust if their parents cannot take part in the procedure. This can be a sibling or any other person.

The police may interrogate child defendants without a parent or person of trust present in emergencies, prosecutors interviewed say. The defence lawyer takes over parental responsibility in these cases. The interrogation must be audiovisually recorded if no defence lawyer is available, judges, prosecutors and lawyers interviewed mention.

In Italy, in the parents' absence, other adult family members support children and deal with public authorities. This includes elder siblings or grandparents. Children or, after communicating with the children, their lawyers nominate these adults. Children cannot take part in criminal proceedings if such an adult does not legally represent them.

Similarly, children in Malta can nominate another family member to notify instead of a parent, police officers confirm. If they do not, the police notify the appointed social worker from the Foundation for Social Welfare Services.

In Bulgaria, the law does not require informing other persons of proceedings against a child. However, grandparents and other relatives are informed when children live with them rather than their parents, all police interviewed mention. The director of an institution was informed in one case when a child lived there, one judge also mentions.

Similarly, in Portugal, it is most often when child defendants live in an institution that they indicate someone other than a parent and the competent judicial authority accepts them, according to interviewees. It is common to inform the institution and appoint someone to accompany the child in these cases. Courts always try to find the best solution to inform and involve whoever will provide a child with the best support, one social worker explains.

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**"Imagine that we have a grandmother who is very old and is legally responsible for this child, or that the child is adopted and has not been with the adoptive family for a long time. In these situations, we always find a person who is trusted by the child (teachers, godparents) [...] We always manage to find someone with whom the child feels confident [...] In those circumstances, and since it was the child who suggested [these people] to us, it is with them that we work and whose names we provide to the court."**

Social worker, Portugal.



Most of the children interviewed wanted their parents or other relatives they live with to receive information about children's rights when the police first contacted the children. Police officers inform parents or other suitable adults at this stage in most cases. This happens either just after the arrest or, if the child is not arrested, through a letter addressing them and the child. Police officers typically ask children for their parents' telephone numbers.

However, not all children interviewed knew that they could name someone to be informed instead of a parent or the relative they lived with.

Children mostly appreciated having their parents informed. In Belgium, a child's sister was designated as the holder of parental responsibility, as the mother was living outside Belgium. However, the child would have liked their mother to be contacted and told about their pre-trial detention.

Depending on the type of charges, sometimes parents could be not informed so as "not to worry them too much" (child, Germany), children suggest. However, their parents would learn about the more serious charges anyway. It is better that they are informed in these cases, preferably by the children themselves, children say.

#### *Challenges in identifying parents or persons of trust to inform them*

Few interviewees mention problems identifying parents in practice. However, some parents do not live in the city or country in which the child is accused of committing a crime, some interviewees in Bulgaria and Austria mention. The police call the Youth Welfare Authority if the child cannot name a holder of parental responsibility or person of trust. The Youth Welfare Authority must represent the child defendant when the parents cannot do so.

Children in Belgium rarely use a support person, eight interviewees from various professional groups indicate. They suggest various reasons for this. For example, the right to a person of trust is not clearly embedded in law yet. In addition, children may not receive information about this right and may lack the social networks to find such a person.

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**"I have had different experiences accompanying children and especially adolescents in criminal proceedings. The official guardianship is usually responsible for [unaccompanied child refugees]. And I have sometimes experienced that the police did not inform the official guardianship in time about the questioning, so that the young person was questioned without the declaration of consent of the official guardian and thus without assistance. And whether that is legally possible, I cannot judge conclusively. I have not checked whether the police have a legal right to do so."**

Social worker, Germany.

The police do not provide timely information to persons of trust or holders of parental responsibility appointed to unaccompanied minor refugees. This is a concern for a social worker in Germany and a probation officer in Austria.

**Concerns about persons of trust or holders of parental responsibility of unaccompanied children receiving information**

FRA (2014), *Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*.

This handbook provides guidance on how to establish and run national guardianship systems. Most considerations apply to all guardianship situations. They relate primarily to guardianship systems for children deprived of parental care in general. Some are specific to child victims of trafficking, such as issues relating to the child's involvement in criminal procedures against traffickers. [...still to add: specific reference to information...]

FRA (2019), *Children deprived of parental care found in an EU Member State other than their own: A guide to enhance protection of children without parental care focusing on victims of trafficking*.

This guide sets out the legal framework governing the protection of children deprived of parental care and/or in need of protection in an EU Member State other than their own. The latter includes child victims of trafficking. The guide suggests practical ways of responding to these children's protection needs. [...still to add: specific reference to information...]

FRA (2017), *Child-friendly justice – Perspectives and experiences of children and professionals – Summary*.

The research includes extensive interviews with professionals and children involved in judicial proceedings as victims and witnesses. This summary covers two reports. One presents professionals' views. The other focuses on the perspectives of children, outlining their views on factors that impede their full participation and on efforts that can help overcome such barriers.

## Endnotes

- <sup>1</sup> Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294.
- <sup>2</sup> Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings, OJ 2012 L 142, Art. 6 and recitals 26–29.
- <sup>3</sup> European Court of Human Rights (ECtHR), *Panovits v. Cyprus*, No. 4268/04, 11 December 2008, paras. 70, 73 and 77; ECtHR, *Blokhin v. Russia* [GC], No. 47152/06, 23 March 2016, paras. 205–206.
- <sup>4</sup> ECtHR, *Blokhin v. Russia* [GC], No. 47152/06, 23 March 2016, para. 206.
- <sup>5</sup> CoE, Committee of Ministers (2011), *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum*, Strasbourg, October 2011, Chapter IV, Section A.1, Guideline Nos. 1–2 and 5, pp. 20–21; Guideline No. 25, p. 25; and Guideline No. 28, p. 26.
- <sup>6</sup> *Ibid.*, Guideline No. 2, p. 21.
- <sup>7</sup> UN, Committee on the Rights of the Child (2019), *General Comment No. 24 (2019) on children's rights in the child justice system*, CRC/C/GC/24, 18 September 2019, paras. 47–48; UN, Committee on the Rights of the Child (2009), *General Comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, paras. 59–60.
- <sup>8</sup> Bulgaria, Ministry of Justice (*Министерство на правосъдието*) (2020), Table of compliance of Bulgarian legislation with Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (*Таблица на съответствието на българското законодателство с Директива (ЕС) 2016/800 на Европейския парламент и на Съвета от 11 май 2016 година относно процесуалните гаранции за децата, които са заподозрени или обвиняеми в рамките на наказателното производство*).
- <sup>9</sup> Belgium, Criminal Procedure Code (*Code d'Instruction Criminelle*), 21 November 2016, Art. 47bis, §§ 1 and 2.
- <sup>10</sup> Poland, Regulation of the Minister of Justice of 14 September 2020 on defining the template for the letter of rights and duties of the accused person in criminal proceedings (*Rozporządzenie Ministra Sprawiedliwości z dnia 14 września 2020 r. w sprawie określenia wzoru pouczenia o uprawnieniach i obowiązkach świadka w postępowaniu karnym*), 21 September 2020.
- <sup>11</sup> Poland, Ombudsman for Human Rights, *Letter to the Minister of Justice*, 11 March 2019.
- <sup>12</sup> For example, see FRA (2021), *Presumption of innocence and related rights – Professional perspectives*, Luxembourg, Publications Office.
- <sup>13</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 5 (2–3) and recitals 23–24.
- <sup>14</sup> CoE, Committee of Ministers (2011), *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum*, Strasbourg, October 2011, Chapter IV, Section A.1, Guideline No. 3, p. 21, Guideline No. 5, p. 21, Chapter IV, Section C, Guideline No. 28, p. 26, and Guideline No. 42, p. 27.
- <sup>15</sup> UN, General Assembly (1989), *Convention on the Rights of the Child* (CRC), 20 November 1989, Art. 40 (2) (b) (ii).
- <sup>16</sup> UN, Committee on the Rights of the Child (2019), *General Comment No. 24 (2019) on children's rights in the child justice system*, CRC/C/GC/24, 18 September 2019, para. 67; UN, Committee on the Rights of the Child (2007), *General Comment No. 10 (2007) – Children's rights in juvenile justice*, CRC/C/GC/10, 25 April 2007, para. 53.
- <sup>17</sup> Estonia, *Explanatory memorandum to the bill (Karistusseadustiku ja teiste seaduste muutmise seadus (Euroopa Liidu finantshuvide kaitse direktiivi ja alaealiste menetlusõiguste direktiivi ülevõtmise)*, 12 December 2019.
- <sup>18</sup> Germany, Youth Courts Law (*Jugendgerichtsgesetz*, JGG) in the version of the promulgation of 11 December 1974, (*Federal Law Gazette* [BGBl.]) Part 1 p. 3427, most recently amended by Article 1 of the Act of 8 July 2008 (*Federal Law Gazette* Part 1 p. 2099), 11 December 1974.
- <sup>19</sup> Italy, Decree of the President of the Italian Republic (*Decreto del Presidente della Repubblica 22 settembre 1988, n. 488: Approvazione delle disposizioni sul processo penale a carico di imputati minorenni*), D.P.R. No. 448/1988, 22 September 2015, Art. 7.
- <sup>20</sup> Malta, Act No. XVIII of 2020, an Act to further amend the Criminal Code, Cap. 9 (*Att Nru XVIII tal-2020, Att li jkompli jemenda l-Kodiċi Kriminali, Kap. 9*), 10 June 1854 (as amended), Art. 534AGE.
- <sup>21</sup> Portugal, Code of Criminal Procedure (*Código de Processo Penal*), 17 February 1987. Last amended by Law 57/2021, 16 August, Art. 58 (7).
- <sup>22</sup> Bulgaria, Penal Procedure Code (*Наказателно-процесуален кодекс*), 29 April 2006, last amended 18 May 2021, Art. 386.
- <sup>23</sup> *Ibid.*, Art. 389.
- <sup>24</sup> Poland, Penal Code (*Kodeks Karny*), 6 June 1997, Art. 145 (3) in conjunction with Arts. 261 and 300 (1).
- <sup>25</sup> Belgium, Youth Protection Act (*Loi relative à la protection de la jeunesse, à la prise en charge des mineurs ayant commis un fait qualifié infraction et à la réparation du dommage causé par ce fait*), 8 April 1965, Art. 48bis, Art. 11, § 1er.
- <sup>26</sup> Germany, Youth Courts Law (*Jugendgerichtsgesetz*, JGG) in the version of the promulgation of 11 December 1974 (*Federal Law Gazette* [BGBl.]) Part 1 p. 3427, most recently amended by Article 1 of the Act of 8 July 2008 (*Federal Law Gazette* Part 1 p. 2099), 11 December 1974, Section 67 a, para. 3, No. 1.

# 3

## ACCESS TO A LAWYER: THE RIGHT TO BE ASSISTED BY A LAWYER AND LEGAL AID

This chapter examines children's procedural rights to defend themselves with a lawyer's assistance when accused or suspected in criminal proceedings. Directive (EU) 2016/800 builds on the right to a fair trial enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union and Directive 2013/48/EU.<sup>1</sup> It reinforces children's procedural rights by making a lawyer's assistance mandatory, with limited exceptions.

This chapter provides an overview of European and international law on children's right to access legal defence. It also analyses research and interview findings on the practical application of this right in the Member States the research covers.





### 3.1. THE RIGHT TO BE ASSISTED BY A LAWYER AND LEGAL AID

#### Legal overview

The right to a lawyer is probably the most important fundamental procedural right ensuring effective participation in criminal proceedings. The ECHR guarantees this right in Article 6 (3) (c), and the Charter of Fundamental Rights of the European Union guarantees it in Article 48 (2). The ICCPR also enshrines it in Article 14 (3) (b) (c).

The right to access a lawyer is the subject of Directive 2013/48/EU. Directive (EU) 2016/800 refers to that directive and largely reproduces it, adding some further safeguards for children. FRA (2019) *Rights in practice: Access to a lawyer and procedural rights in criminal and European arrest warrant proceedings* deals specifically with this issue. Mandatory assistance from a defence lawyer is the most important measure during questioning, its findings highlight.<sup>2</sup>

Children have the right to be assisted by a lawyer without undue delay, under Article 6 (3) of Directive (EU) 2016/800 and Article 3 (2) of Directive 2013/48/EU. Assistance must start from the earliest of the following:

- before police, other law enforcement or judicial authority interrogation;
- when authorities carry out certain acts, such as identity parades, confronting the accused with witnesses or reconstructing a crime scene;<sup>3</sup>
- without undue delay after the deprivation of liberty;
- when the child is summoned to appear before a criminal court, but before their court appearance.

This does not apply to preliminary questioning aiming to identify the person concerned, or verify the possession of weapons or other safety issues, recital 20 of Directive 2013/48/EU specifies. It also does not apply to preliminary questioning before the subject is identified.

Children should be able to meet their lawyer in private and communicate with them confidentially. This includes before police questioning. They should also be able to have their lawyer participate effectively during questioning.<sup>4</sup> When a child becomes a suspect or accused person during questioning as a witness, questioning should be suspended until the child is informed of this and assisted by a lawyer.<sup>5</sup>

Authorities may temporarily deny access to a lawyer with a reasoned decision in exceptional circumstances. There are only two purposes for this. The first is obtaining information essential to avert serious adverse consequences for the life, liberty or physical integrity of a person. The second is preventing substantial jeopardy to criminal proceedings.<sup>6</sup>

Member States' national laws must ensure that children accused or suspected of a crime have legal aid, where necessary, so that a lawyer effectively assists them, Directive (EU) 2016/800 requires.<sup>7</sup> Directive (EU) 2016/1919 further regulates legal aid in criminal proceedings.<sup>8</sup>

Directive (EU) 2016/800 provides more protection for children than Directive 2013/48/EU. It prohibits depriving them of liberty, other than police detention, unless a lawyer assists the child. Children who do not have assistance during trial hearings cannot have a criminal sentence imposed on them. Children must have a lawyer's assistance when brought before a judge deciding their detention and during detention.<sup>9</sup>

Member States may derogate from the obligation to provide a lawyer's assistance in limited cases. This may depend on whether the alleged offence is serious or not, how complex the case is or the possible punishments.<sup>10</sup> When a lawyer's presence or assistance is not mandatory, a valid waiver must meet the requirements Directive 2013/48/EU sets out.<sup>11</sup>

Directive (EU) 2016/800 largely reflects the case law of the ECtHR on Article 6 of the ECHR regarding children accused or suspected in criminal proceedings. The state should provide these children with greater protection, the ECtHR holds. In addition, a lawyer should be appointed to provide children with assistance. This is especially the case when children are arrested or otherwise deprived of their liberty, save in very exceptional circumstances.<sup>12</sup>

A child confessing to the police without the presence and assistance of a lawyer violates the ECHR, it finds.<sup>13</sup> So does convicting a child *in absentia* without legal representation at the hearing. Another violation is when the offence the child is charged with prevents a juvenile court from trying them and prevents the state from assigning a lawyer to them.<sup>14</sup>

Children should be given access to a lawyer when the police apprehend them, the CoE Committee of Ministers' guidelines on child-friendly justice stipulate. A child taken into custody should not be questioned or asked for a confession unless a lawyer or parent is present.<sup>15</sup>

The right to access a lawyer applies from the outset of custody, according to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). It should include the right to talk privately with a lawyer and to access legal advice on residence, detention and deportation.

The police investigation's legitimate interests may delay the detained person's access to a lawyer of their choice. However, the right to access a lawyer should not be totally denied during this period. Access to a different independent lawyer should be arranged in such cases, according to the CPT.<sup>16</sup>

Children charged with a crime have the right to the assistance of a lawyer in preparing and presenting their defence, Article 40 (2) (b) (ii) of the **UN CRC** provides. This assistance should cover every proceeding until all appeals and/or reviews are exhausted, the UN Committee on the Rights of the Child underlines. It should be free of charge, and communications between a lawyer and child should be confidential. The committee calls for expert training for lawyers defending children (for further details, see Chapter 7).<sup>17</sup>

### **Findings: national laws, professionals' perspectives on and children's experiences of the rights to be assisted by a lawyer and to legal aid**

#### *National laws*

A lawyer's assistance is mandatory for children accused or suspected of a crime from their first contact with authorities in all Member States the research covers, findings show. Austria, Germany and Malta have certain exceptions for less serious crimes not involving a prison sentence. National courts annul proceedings where a lawyer does not represent the child defendant.<sup>18</sup> This reinforces the application of the directive's requirements.

## National case law on mandatory legal representation

Austria: Conducting the juvenile defendant's main hearing in the District Court of Leopoldstadt without representation by a defence lawyer violated § 39 (1) Z4 of the JGG, the Supreme Court ruled. The Supreme Court set aside the judgment and referred the case to the Leopoldstadt District Court for a new hearing and decision.\*

Estonia: No lawyer was appointed to represent an underage defendant in county court proceedings and the defendant was only represented by his mother. Therefore, the county court judgment was annulled because of the material violation of the criminal procedural law, the Supreme Court ruled.\*\*

Sources:

\*Austria, Supreme Court (Obersten Gerichtshof der Republik Österreich), judgment 12 Os 118/202, 12 November 2020.

\*\*Estonia, Supreme Court (Riigikohus), Case No. 1-17-8281, 7 February 2018, p. 10.

In the Member States studied, legislation provides mandatory legal assistance for children from the moment they become suspects. This is the case in Belgium,<sup>19</sup> Bulgaria,<sup>20</sup> Estonia,<sup>21</sup> Germany<sup>22</sup> and Poland.<sup>23</sup> In Portugal, people aged under 21 must receive a lawyer's assistance in questioning during an investigation.<sup>24</sup>

Children in Austria,<sup>25</sup> Germany<sup>26</sup> and Malta<sup>27</sup> are generally represented by a lawyer. However, the law lists a number of exceptions.<sup>28</sup>

In Austria, cases involving less serious crimes that do not require mandatory assistance by a lawyer are listed as exceptions.<sup>29</sup> These cases are juvenile criminal proceedings for a misdemeanour.

In Germany, exceptions include situations in which the best interests and circumstances of the child require otherwise. Others are when preliminary questioning of children without a lawyer is needed to protect another person or the integrity of investigations for serious offences; or when juvenile detention (*Jugendarrest*) may be imposed.<sup>30</sup>

In Malta, the right to a lawyer can be similarly restricted. This only applies in cases with an urgent need to protect another person or to take immediate action to prevent jeopardising investigations.<sup>31</sup>

National law in all countries studied provides free legal assistance to children accused or suspected of a crime.<sup>32</sup> In Austria and Portugal, a lawyer is appointed free of charge when a child cannot afford one.<sup>33</sup>

Children who are accused persons in Poland are entitled to legal aid when they cannot afford a lawyer. However, the children bear the cost if they are found guilty.<sup>34</sup> When children do not appoint a lawyer, the police or judicial authorities must postpone questioning them before trial or at court hearings so that a lawyer can attend as quickly as possible.

In Estonia, the state appoints a lawyer free of charge to represent children who do not have one. This applies even when children have the resources to hire a lawyer.<sup>35</sup>

In Italy, lawyers who can be appointed as legal aid lawyers for children accused or suspected of a crime are called public defenders. They must first complete specialised training or gain substantial professional experience in criminal proceedings involving children.<sup>36</sup>



### *Legal assistance and participation by a lawyer in practice*

Legal defence and the presence of a lawyer are mandatory at all stages of criminal proceedings involving children accused or suspected of a crime, interview findings confirm. There are limited exceptions for minor offences. The rule applies from the first questioning by police or judicial authorities before trial and at trial hearings. Nevertheless, informal questioning happens before legal representation, interviewed children and lawyers report.

Authorities in Belgium cannot question children before trial or at court hearings without a lawyer present, except in exceptional circumstances, as judges note. Any questioning of children without a lawyer present is considered null and void and can be challenged.

This is usually respected in practice, all interviewed professionals in Austria, Belgium, Bulgaria, Estonia, Germany, Italy, Malta and Portugal confirm. However, children report the opposite in each of the Member States studied.

In Italy, a specialised and trained public defender is always present in the courtroom, a judge explains. The public defender replaces the appointed lawyer if they do not show up. This ensures that children accused of a crime are always assisted by a lawyer.

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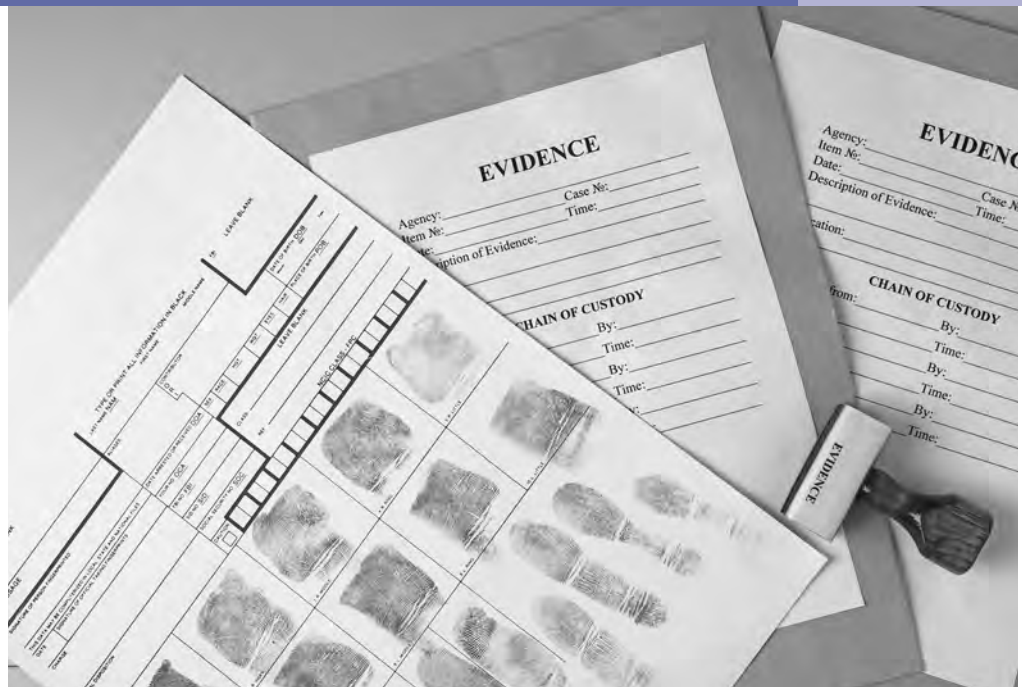
**“It is automatic. If [a defence lawyer is not present], it is null and none of that is worth it. The accused cannot be harmed by this failure of justice [...] given their age, having less information and maturity, they have to have more rights than other [people].”**

Prosecutor, Portugal.

In Belgium, Bulgaria and Portugal, the right to be assisted by a lawyer cannot be waived, professionals note.

### *Effective legal representation of children*

Overall, lawyers can effectively assist and represent children who are accused or suspected in criminal proceedings, and they often do in practice, according to all groups interviewed in all Member States studied. Lawyers receive information about the case, have access to the case file and are present throughout all stages of the proceedings, according to most of the interviewed judges, prosecutors and police officers in the Member States studied.



Interviewed professionals across all Member States studied also appear to have a similar understanding of what effective legal representation of a child entails. This includes exercising defence rights, participating actively in procedural actions, having a preliminary conversation with the child and advising them on a defence strategy.

Having access to the case file and effective access and contact with the child are important, interviewed lawyers emphasise. A lawyer's early participation is essential, a lawyer, a judge and a social worker in Germany state.

A lawyer's job is to ensure that proceedings involving children are fair, lawyers interviewed in Estonia say. It is important for the lawyer to observe how the child describes the event and to ask clarifying questions, another Estonian lawyer mentions. This ensures that the event can be recorded accurately.

Lawyers should also be able to communicate effectively with children to establish a rapport, understand their individual needs and pursue their best interests. Building a trusting relationship, treating children respectfully and examining their social background and life circumstances are important. This ensures the effective representation of children, as many lawyers and children interviewed across the Member States emphasise.

Effective legal assistance also involves supporting children during proceedings and making sure that they properly understand what is going on, many lawyers note. Avoiding legal jargon helps, a German lawyer notes. Lawyers must also actively take on "the role of educator" and "have the ability to empathise", according to an Estonian judge, a Portuguese lawyer and several children interviewed.

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**"It is important, on the one hand, to somehow convey to the juvenile what it means to be a person who has sworn to professional secrecy and confidentiality [...] That is a very important basis for being able to communicate confidentially, which one has to explain much more than with adults."**

Lawyer, Germany.

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**"The problem is fundamentally to make the young person realise the seriousness of the act committed. They do not have the maturity to understand this. Insulting a police officer is nothing for them... Destroying something or painting street furniture is meaningless to them. There is this role of explaining why it is prohibited and why the act is a crime or not [...] It is necessary to find their language, put them at ease and try to establish communication ... a bond of trust".**

Lawyer, Portugal.

It is important to take the children seriously, acknowledging their fears and insecurities to reassure them that they are being listened to, one German lawyer notes.

Providing effective legal assistance also depends on the lawyers' personal attitudes. Some lawyers actively support their child clients even after the conclusion of proceedings, several interviewees in Estonia note. They continue to support them during probation, for example. Others merely do their job without getting too involved in the child's situation.

Legal representation should pursue "what the child wants", some professionals interviewed in Belgium claim. Others argue that it should pursue what would be objectively good for the child. Defending the child's objective interest against their will risks not establishing a trusting relationship between the lawyer and child, a judge, a lawyer and a prosecutor argue.

#### *Free legal aid for children*

Children who do not appoint or cannot afford a lawyer obtain legal aid, as the directive requires, all interviewees confirm. Lawyers are mostly appointed regardless of experience or expertise in dealing with children, the findings suggest. The exception to this is Italy. There, public defenders can defend children only after receiving specialised training.

#### *Challenges in ensuring quality assistance by state-appointed lawyers*

Free legal assistance from state-appointed lawyers is a concern to many interviewees, including lawyers, parents and children. For example, they worry about the quality of legal assistance, as legal aid lawyers do not typically specialise in representing children in criminal proceedings. The quality of service that legal aid lawyers provide varies considerably, several interviewees note. Some state-paid legal aid lawyers are not as committed as privately paid lawyers, judges, prosecutors and non-legal experts interviewed in Austria argue.

State-appointed lawyers in Italy and Bulgaria have close relationships with the authorities and are not willing to be openly combative in court, two lawyers claim. This is especially the case in smaller places, where there are also few legal aid lawyers.

In addition, some parents do not trust state-appointed lawyers. They believe the lawyers are part of the 'system', as one non-legal expert in Bulgaria explains. Parents often presume that legal aid lawyers will not properly represent their child, several interviewees note, including a probation officer in Austria. Thus, they hire a private lawyer even if they cannot really afford it.

All children in Austria, Belgium, Bulgaria, Estonia, Italy and Portugal were assisted by legal aid or privately hired lawyers, they report. Children speak positively about their communication with their lawyer throughout the proceedings. They say they felt well prepared because of the meetings before the actual hearing.

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**"In the worst-case scenario, the so-called state-appointed lawyers sit at the café beside the police station, and the investigator, with whom they are friends or relatives, calls to appoint them."**

Lawyer, Bulgaria.

However, there are also accounts of negative experiences when lawyers were in a rush, did not take enough time or were even “useless”. More importantly, these negative accounts were mostly about legal aid lawyers.

Experiences with privately hired lawyers tend to be more positive, according to children interviewed. This is especially the case in Austria, Germany, Italy and Poland. Private lawyers are trusted from the beginning, as family members usually hire or recommend them, interviewees state.

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**“[...] my lawyer, I tell you honestly, this is the worst lawyer in the whole world. She is a lawyer from the state. She never came to see me. Before the main trial she came, but before other activities she didn’t come. She doesn’t tell me anything. She is not only like that with me, ask other youths here. We talk to each other; we get along well. I even said to the prosecutor, ‘please, I’d rather be alone than with that lawyer’. And then, thank God, my parents took a private lawyer. But other people can’t afford a private lawyer. That’s the worst: you ask people ‘what’s happening to me?’ And everyone says, ‘talk to your lawyer’. And the lawyer doesn’t come. I’ve been here for three or four months [in detention] and she doesn’t come. That’s not right, that’s not fair.”**

Child, Austria.

Children interviewed in Germany did not have a lawyer supporting them or the lawyer only stepped in at the trial stage. Children are often initially suspected of less serious offences that do not require mandatory legal assistance. They waive their right to be assisted by a lawyer even when police inform them of it. This is because they or their family cannot pay a lawyer, do not know how to find one or are not aware that they may be able to access legal aid.

Several interviewed children did not want a legal-aid lawyer’s assistance.

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**“Yes, but I am not interested in it [public defender]. I rather have someone [a lawyer] who cares for me [...] But once I had a public defender, and it was weird, we didn’t know each other at all. How should he help me when we don’t know each other? We met each other for the first time at court [...] that just doesn’t work.”**

Child, Germany.

In Belgium, the same legal aid lawyer does not assist the child throughout the procedure, many lawyers emphasise. An interviewed child confirmed this, noting a difference in the quality of assistance received. The child linked this to some lawyers’ lack of commitment, particularly those replacing the lawyer officially assigned to their case when they are unavailable. Lawyers without specific training also vary in competence.

#### *Confidential and private consultations*

Member States should ensure that children have the right to meet and communicate with their lawyers in private, according to Article 6 (4) (a) of the directive. All communication between children and their lawyers is confidential, Article 6 (5) adds.

Lawyers generally have the opportunity to meet privately with children accused or suspected of a crime, lawyers in all Member States studied report. This includes children deprived of their liberty.

For example, children arrested in Belgium are entitled to a 30-minute confidential consultation with their lawyer before police questioning, interviewed professionals, including lawyers and police officers, confirm. Interviewees consider this sufficient.

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**“One time, my lawyer proposed something to the judge as an alternative measure and the judge corrected the lawyer saying that that kind of measure was not available in my situation and that he should have known that.”**

Child, Belgium.



One Italian lawyer, in over four decades of professional experience, had seen only two cases in which public prosecutors suspended all communication with children, including with the lawyer, for 24 hours. Both involved the Mafia. Article 6 (6) of the directive allows authorities to derogate from providing legal assistance without undue delay, when it is proportionate to the circumstances of a case and they have considered the child's best interests.

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**"Yes [confidential consultation takes place], but it is sometimes in dire circumstances. For example, we don't always have the space for it [...] the opportunity is there, but the infrastructure is not ideal."**

Judge, Belgium.

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**"I had to speak once in the passageway with the child. I said: 'No, I don't do that, nothing like that. I want a space where we can speak in a normal way.'"**

Lawyer, Belgium.

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**"When the lawyer comes, they [the police] start with the questioning right away [...] that also depends on the personality of the lawyers. If they say 'OK, I insist that I hear the allegations and that I can talk to the client confidentially before the questioning', then of course that will be done."**

Lawyer, Austria.

Nevertheless, some interviewees mentioned obstacles. Visiting children detained in facilities that are far away is difficult, an Italian lawyer mentions. Some Belgian lawyers and a judge criticise the lack of rooms for private meetings. Consultations sometimes take place in corridors while standing, in lifts, in the cells or in the basement of the courthouse, they indicate.

The police do not always offer private meetings before questioning, lawyers from Austria and Belgium and probation officers from Austria say. Lawyers must request and sometimes even insist on private meetings.

In Austria, it is often impossible to meet privately with children deprived of liberty before the trial starts, one lawyer comments. This is because guards accompany the children and are always present. In addition, there is usually no room available to talk in private.

The police officers interviewed report the opposite. They say defence lawyers are offered up to 15 minutes' private talk with arrested child defendants before the police examination starts. These consultations must often take place very quickly, and having half an hour is not guaranteed, another lawyer states.

In youth detention centres in Italy, penitentiary officers are always around, monitoring the facility's security, a social worker reports. This compromises the confidentiality of the conversations between lawyers and detained children.

in Poland, telephone communication between detained children and their lawyers is difficult, some lawyers note. Detention facilities rarely make it possible for detainees to call their lawyer confidentially, one lawyer observes. Pre-trial contact between the lawyer and children can take place under a prosecutor's supervision and their correspondence can be censored, a Polish judge notes. These meetings are monitored, police officers interviewed in Poland admit.

Communicating with children was challenging during the COVID-19 pandemic, according to many professionals, principally lawyers, across all Member States studied. Telephone or video calls replaced in-person meetings between detained children and lawyers. This troubles the interviewees. For example, telephone conversations might be easily recorded, two lawyers in Bulgaria point out.

In Italy, officers such as guards are allowed in the detention centres while lawyers are not. A lawyer finds that unfair.

#### *Questioning without the presence of a lawyer*

Children should be assisted by lawyers when questioned, and lawyers should be able to participate effectively during questioning, according to Article 6 (4) (b) of the directive.

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**"Unfortunately, the pandemic had a big impact, so for example the local juvenile detention facility was literally off limits to lawyers [...] prison officers entered in the morning and returned home in the evening to their families [...] we [as lawyers] find this hard to understand that lawyers were potentially more infectious than those professionals."**

Lawyer, Italy.

### **Informal questioning without a lawyer present**

FRA's 2019 report on **access to a lawyer** revealed concerns among lawyers about the use of statements that suspects make without a lawyer present. They were especially worried about statements made outside formal questioning.

That report discusses the practice of 'informal questioning' by the police. In informal questioning, suspects may not know that they are suspects, or what their rights are, including the right to a lawyer. This can have a detrimental impact on the procedural rights of suspects and the subsequent development of proceedings.

The practice can also occur with child suspects, judging from evidence FRA collected as part of that research.

*Source: FRA (2019), **Rights in practice: Access to a lawyer and procedural rights in criminal and European arrest warrant proceedings.***



The laws of the Member States studied require a lawyer's presence when the police question a child, interviewees state. In exceptional cases children may be examined without a lawyer's assistance in some countries. For example, averting an imminent danger or investigative considerations may require it, an Austrian prosecutor notes.

#### *Informal questioning of child defendants*

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**"Police may well say that they do not need a lawyer, that they are only going to talk and that it is a procedure under the police law and not a criminal case [...] Children tell that as a story, they do not understand that this is wrong, that this is done to scare and manipulate them."**

Social worker, Bulgaria.

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**"We do make a distinction between a 'talk' and questioning. The so-called talk is practically questioning, it is misleading to call this questioning a talk, whereas it is then reproduced by the police officer as a witness."**

Lawyer, Bulgaria.

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**"Sometimes, they start talking to the defendants and extract information. The defendants are not told that they don't have to talk [...] Just recently it happened [...] They had been talking to the kid before I arrived, and everything was already arranged for the kid to talk."**

Lawyer, Portugal.

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**"[O]f course, there are such interesting things, I have sometimes cases where the child has already been in the police station and has already been questioned [...] and has already managed to write some sincere regrets and confessions there. Well, by law, in fact, such a thing should not happen."**

Lawyer, Estonia.

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**"That's when you admit you did it. Yes, before the interrogation. Already in the car, the police suggested it. They said the punishment would be reduced if you made a sincere confession."**

Child, Estonia.

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**"They came to my house and took me to the station. Then they started grilling me and then I was forced to sign things and write a confession. Then after that I met my lawyer and we started to give statements and only then they told me my rights."**

Child, Estonia.

Informal police questioning of children is an issue of concern, interview findings indicate. It especially worries professionals and children from Bulgaria, Estonia, Germany, Poland and Portugal, including lawyers and non-legal experts. For example, police officers in Bulgaria reproduce statements from this questioning as witness evidence when testifying in court, according to interviewed lawyers and non-legal experts.

In Portugal, such conversations have no formal legal value, but are used to lead to a confession, a lawyer argues.

The police in Estonia can pressure children to write a sincere confession without their lawyer being present, most lawyers and children note. The pretext is that the police want to understand what happened and whether the child should become a suspect or not, according to these lawyers.





Children in Germany who are caught in the act are immediately questioned informally by the police without a lawyer present. This is a problem, a judge argues. Lawyers in Germany complain that they are often only called after the suspected child is questioned and has confessed. This is because the police officers did not know about the new legal provisions incorporating the directive or they intentionally question the child to get a confession.

'Informal talks' in Poland are similar, lawyers observe. Some police officers tend to informally question or intimidate suspects or force them to plead guilty, according to a lawyer and a judge. These conversations are not recorded, and suspects are not advised of their rights beforehand.

#### *Experience of violence at first contact with authorities*

In all Member States apart from one, children report physical violence when they were arrested or questioned. For example, they were pushed, hit, beaten or thrown on the ground. Twenty out of the 49 children interviewed across all Member States report physical violence. Fifteen of those were questioned without a lawyer present.

Police officers also verbally abuse children, many children report. These violent incidents always happen when the police arrest, search or question children without a lawyer present, or when children are in detention. Particularly severe incidents in Austria and Italy include being held at gunpoint. In Belgium, Bulgaria, Germany, Poland and Portugal, children were verbally and physically assaulted while handcuffed, they report.

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**"I would say that in 80 % of the cases the rights are not guaranteed. Full interrogations are conducted, and extended statements are provided without legal representation, also in cases of serious offences/felonies."**

Lawyer, Germany.

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**"I learned about the right to be assisted by a lawyer during the questioning after the questioning ended. And I learned it from other people. So, I went to the questioning alone and remained alone during the entire proceedings. My only comfort was the right to remain silent."**

Child, Poland.

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**"[Tactical police unit] came in armed, like I was a criminal or something. My parents were asleep. They kicked the door open and then they all woke up and the [tactical police unit] pointed guns towards them. Then one of them came to me and said, 'I'll handcuff you. If you don't do anything, I'll put the handcuffs away.'"**

Child, Austria.

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**"When I was arrested, no one verified my age. I told them that I was minor because they pointed a gun at me. Then I think that they were in doubt whether I could be around 18 or 19 but, in the end, they believed me."**

Child, Italy.

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**"I have had moments when I had [their] knees in my neck. When we would run away from the police, for example, and you would get floored, or they really sit on your back to hold you down. A friend of mine once was arrested in front of me and got a full punch in the face."**

Child, Belgium.

Physical force may be justified in certain police operations to ensure officers' safety. However, violent experiences are very traumatic for the affected children.

None of the children interviewed had officially reported these incidents at the time. Some had mentioned them only to a social worker and, in a few cases, their lawyer. Only a small proportion of the children who experienced particularly severe violent incidents had received information about their rights at first contact with authorities. The rest did not feel informed at all.

These negative experiences have a strong influence on children. This is clear from what the children say and how they talk about these incidents. Children talk about these violent incidents and how much they affect them throughout the proceedings, when asked about their most important experiences of engaging with different justice professionals.

## Endnotes

- <sup>1</sup> **Directive 2013/48/EU** of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294, Art. 3.
- <sup>2</sup> FRA (2019), *Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings*, Luxembourg, Publications Office, p. 57.
- <sup>3</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 6 (4) (c); **Directive 2013/48/EU** of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294, Art. 3 (3) (c).
- <sup>4</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 6 (5); **Directive 2013/48/EU** of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294, Art. 4.
- <sup>5</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132 and recital 29; **Directive 2013/48/EU** of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294, recital 21.
- <sup>6</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 6 (8) and recital 31; **Directive 2013/48/EU** of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294, Art. 3 (6) (a) and (b), and recital 32.
- <sup>7</sup> **Directive (EU) 2016/800** of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 18, and recitals 25 and 26.
- <sup>8</sup> **Directive (EU) 2016/1919** of the European Parliament and of the Council on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ 2016 L 297.
- <sup>9</sup> **Directive (EU) 2016/800** of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 6 (6), second and last sentences, and recital 30.
- <sup>10</sup> *Ibid.*, Art. 6 (6), first sentence, and recital 30.
- <sup>11</sup> **Directive 2013/48/EU** of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ 2013 L 294, Arts. 9 and 10, and recitals 39–41 and 55. See also FRA (2019), *Rights in practice: Access to a lawyer and procedural rights in criminal and European arrest warrant proceedings*, Luxembourg, Publications Office, pp. 39–40.
- <sup>12</sup> ECtHR, *Blokhin v. Russia* [GC], No. 47152/06, 23 March 2016, paras. 198–199; ECtHR, *Salduz v. Turkey* [GC], No. 36391/02, 27 November 2008, para. 60.
- <sup>13</sup> ECtHR, *Salduz v. Turkey* [GC], No. 36391/02, 27 November 2008, paras. 56–63; ECtHR, *Blokhin v. Russia* [GC], No. 47152/06, 23 March 2016, paras. 205–210; ECtHR, *Panovits v. Cyprus*, No. 4268/04, 11 December 2008, paras. 75–77 and 84–86.
- <sup>14</sup> ECtHR, *Vaudelle v. France*, No. 35683/97, 30 January 2001, paras. 58–66.
- <sup>15</sup> CoE, Committee of Ministers (2011), *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum*, Strasbourg, October 2011, Chapter IV, Section C, Guideline Nos. 28 and 30, p. 26.
- <sup>16</sup> CoE, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2010), *CPT standards*, CPT/Inf/E (2002) 1 – Rev. 2010, 8 March 2011, standards 31, 41 and 82.
- <sup>17</sup> UN, Committee on the Rights of the Child (2007), *General Comment No. 10 – Children’s rights in juvenile justice*, CRC/C/GC/10, 25 April 2007, paras. 49–50, p. 15; UN, Committee on the Rights of the Child (2019), *General Comment No. 24 (2019) on children’s rights in the child justice system*, CRC/C/GC/24, 18 September 2019, paras. 49–53, pp. 9–10.
- <sup>18</sup> For example, see Austria, Supreme Court (*Obersten Gerichtshof der Republik Österreich*), judgment **12 Os 118/20z**, 12 November 2020; and Estonia, Supreme Court (*Riigikohus*), **Case No. 1-17-8281**, 7 February 2018, p. 10.
- <sup>19</sup> Belgium, *Salduz-bis* Law on certain rights of persons interrogated, 27 November 2016; Belgium, Pre-trial Detention Act, Art. 2bis, § 5; Belgium, Criminal Procedural Code (*Code d’Instruction Criminelle*), 21 November 2016, Art. 47bis, § 6 (6).
- <sup>20</sup> Bulgaria, Penal Procedure Code (*Наказателно-процесуален кодекс*), 29 April 2006, last amended 18 May 2021, Art. 97.
- <sup>21</sup> Estonia, **Code of Criminal Procedure (Kriminaalmenetluse seadustik)**, 12 February 2003, § 34 (1) 3) and § 45; see also Estonia, Chancellor of Justice (*Õiguskantsler*) (2017), On the rights of the child upon primary contact with the police (*Laste õigustest esmasel kokkupuutel politseiga*), 22 August 2017; and Estonia, Prosecutor’s Office (*Orokuratuur*) (2018), Special treatment of juveniles suspected of crimes during the criminal procedure (*Kuriteo toime pannud alaealiste erikohtlemine kriminaalmenetluses*), Narva-Jõesuu, 21 February 2018.
- <sup>22</sup> Italy, **Decreto del Presidente della Repubblica 22 settembre 1988, n. 448: Approvazione delle disposizioni sul processo penale a carico di imputati minorenni**, D.P.R. No. 448/1988, 28 January 2015, Art. 11.
- <sup>23</sup> Poland, Code of Criminal Procedure (*Kodeks postępowania karnego*), 6 June 1997, Art. 79 (1) (1) and 79 (3).
- <sup>24</sup> Portugal, Code of Criminal Procedure (*Código de Processo Penal*), 17 February 1987, Art. 64 (d).
- <sup>25</sup> Austria, Juvenile Court Act 1988 (*Bundesgesetz vom 20. Oktober 1988 über die Rechtspflege bei Straftaten Jugendlicher und junger Erwachsener (Jugendgerichtsgesetz 1988 – JGG)*), Federal Law Gazette No. 599/1988, 20 October 1988, § 39 (1); Austria, National Council (2020), Explanatory remarks to the EU Criminal Law Amendment Act 2020 (*Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020*), 26 February 2020.

- <sup>26</sup> Germany, Youth Courts Law (*Jugendgerichtsgesetz*, JGG) in the version of the promulgation of 11 December 1974 (*Federal Law Gazette* [BGBl.]) Part 1 p. 3427, most recently amended by Article 1 of the Act of 8 July 2008 (*Federal Law Gazette* I p. 2099), 11 December 1974, Section 68, paras. 1 and 2; Germany, Criminal Code in the version published on 13 November 1998 (*Federal Law Gazette* I, p. 3322), as last amended by Article 2 of the Act of 19 June 2019 (*Federal Law Gazette* I, p. 844) (*Strafgesetzbuch in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I S. 3322), das zuletzt durch Artikel 2 des Gesetzes vom 22. November 2021 geändert worden ist*), 15 May 1871, Section 140.
- <sup>27</sup> Malta, Act No. XVIII of 2020, an Act to further amend the Criminal Code, Cap. 9 (*Att Nru XVIII tal-2020, Att li jkompli jemenda l-Kodiċi Kriminali, Kap. 9*), 10 June 1854 (as amended), Art. 534AGF (2).
- <sup>28</sup> Austria, Juvenile Court Act 1988 (*Bundesgesetz vom 20. Oktober 1988 über die Rechtspflege bei Straftaten Jugendlicher und junger Erwachsener (Jugendgerichtsgesetz 1988 – JGG)*), *Federal Law Gazette* No. 599/1988, 20 October 1988, § 39 (1) Z4. Germany, Youth Courts Law (*Jugendgerichtsgesetz*, JGG) in the version of the promulgation of 11 December 1974 (*Federal Law Gazette* [BGBl.]) Part 1 p. 3427, most recently amended by Article 1 of the Act of 8 July 2008 (*Federal Law Gazette* Part 1 p. 2099), 11 December 1974, Section 68. Malta, Act No. XVIII of 2020, an Act to further amend the Criminal Code, Cap. 9 (*Att Nru XVIII tal-2020, Att li jkompli jemenda l-Kodiċi Kriminali, Kap. 9*), 10 June 1854 (as amended), Art. 534AGF (4).
- <sup>29</sup> See Austria, National Council (2020), Explanatory remarks to the EU Criminal Law Amendment Act 2020 (*Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020*), 26 February 2020.
- <sup>30</sup> Germany, Youth Courts Law (*Jugendgerichtsgesetz*, JGG) in the version of the promulgation of 11 December 1974 (*Federal Law Gazette* [BGBl.]) most recently amended by Article 1 of the Act of 8 July 2008 (*Federal Law Gazette* Part 1 p. 2099), 11 December 1974, Section 68.
- <sup>31</sup> Malta, Act No. XVIII of 2020, an Act to further amend the Criminal Code, Cap. 9 (*Att Nru XVIII tal-2020, Att li jkompli jemenda l-Kodiċi Kriminali, Kap. 9*), 10 June 1854, Art. 534AGF (4).
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- <sup>33</sup> Austria, Juvenile Court Act 1988 (*Bundesgesetz vom 20. Oktober 1988 über die Rechtspflege bei Straftaten Jugendlicher und junger Erwachsener (Jugendgerichtsgesetz 1988 – JGG)*), *Federal Law Gazette* No. 599/1988, 20 October 1988, § 39 (2); Austria, Criminal Procedure Code 1975 (*Strafprozeßordnung 1975, StPO*), *Federal Law Gazette* No. 631/1975 (as currently in force), § 61 (2) (3); Portugal, Legal Aid Act (*Lei do Acesso ao Direito e aos Tribunais*), 29 July 2004, last amended by Law 2/2020, 31 March 2020, Art. 39.
- <sup>34</sup> Poland, Penal Code (*Kodeks Karny*), 6 June 1997, Arts. 78 and 627.
- <sup>35</sup> Estonia, *State Legal Aid Act (Riigi õigusabi seadus)*, 28 June 2004, § 6 (2).
- <sup>36</sup> Italy, Italian Criminal Procedure Code (*Codice di procedura penale, D.P.R. 22 settembre 1988, n. 477*), 22 September 1988 (last amended on 31 August 2021), Art. 97.

# 4

## PARTICIPATORY PROCEDURAL RIGHTS: CHILDREN'S RIGHTS TO EFFECTIVELY PARTICIPATE IN PROCEEDINGS AND TO BE ACCOMPANIED DURING PROCEEDINGS

This chapter examines the procedural rights of children that enable them to participate effectively in criminal proceedings with the support of their parents. Directive (EU) 2016/800 builds on the right to a fair trial enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union and in Directive 2013/48/EU. This has considerably reinforced the procedural rights of children.

This chapter provides a legal overview of European and international law on the participatory procedural rights that children should enjoy in practice. It also analyses research and interview findings on their practical application in the Member States studied.

### 4.1. THE RIGHT TO PARTICIPATE IN PROCEEDINGS

#### Legal overview

The right to be present at the trial and to a new trial are both elements of the right to a fair trial enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union. They correspond to Article 6 of the ECHR.<sup>1</sup> The ICCPR ensures these rights in Article 14 (3) (d) (5).

Children have the right to be present at their trial and participate effectively in it, with the opportunity to be heard and to express their views, Article 16 (1) of Directive (EU) 2016/800 stipulates.<sup>2</sup> They should have the right to a new trial or to another legal remedy when they are not present, according to **Directive (EU) 2016/343**.

Authorities should take the needs of vulnerable persons into account, recital 42 of Directive (EU) 2016/343 explains. This includes those who are not able to understand or effectively participate in criminal proceedings because of their age. Children are vulnerable and should be given a "specific degree of protection", recital 43 states. This should entail "specific procedural safeguards".

Those charged with a criminal offence are entitled to take part in the hearing, both the Court of Justice of the European Union (CJEU) and the ECtHR make clear. Defendants should be able to give evidence in their defence, hear the evidence against them, and examine and cross-examine witnesses, among other things. This is whether a lawyer represents them or not.<sup>3</sup>

National authorities should ensure that (a) children properly understand the general conduct of the proceedings, (b) they can confer with lawyers and support persons, (c) their rights to speak and to challenge any statement or fact are upheld, and (d) the court room setting does not intimidate them.<sup>4</sup> The ECtHR requires this.

Member States should ensure that children are given appropriate ways to access justice and be heard in proceedings involving or affecting them, the CoE guidelines recommend. They should give due weight to children's views, considering their maturity and any communication difficulties to make this participation meaningful.<sup>5</sup> Children should be entitled to exercise all their rights so their ability to form their own views and the circumstances of the case are considered properly.<sup>6</sup>

Children should be able to effectively participate in the trial by understanding the charges against them and exercising their defence rights, the UN Committee on the Rights of the Child confirms.<sup>7</sup> Proceedings should be conducted in an atmosphere that allows children to participate and express themselves freely.

The child's age and maturity may require modified courtroom procedures and practices. These include adaptations for children with disabilities, child-friendly layouts of interview spaces and courts, and removing intimidating legal attire.<sup>8</sup> Using child-friendly language that the child understands is also important.<sup>9</sup>

FRA's 2021 report on the presumption of innocence and related rights discusses in more detail the right to be present and effectively participate in a trial, and to obtain a retrial when tried *in absentia*.<sup>10</sup> Access to a lawyer is essential to ensure the defendant's effective participation and the effective exercise of their defence rights, the report finds.<sup>11</sup>

The report identifies many obstacles to ensuring defendants' effective participation. These include illiteracy or low level of education, language barriers and the complexity of legal proceedings. Others include intellectual and/or psychosocial disabilities that are not obvious, and some defence lawyers' poor quality of representation and/or preparation.<sup>12</sup> The report also presents many positive measures that Member States take to protect child defendants.<sup>13</sup>





## Findings: national laws, professionals' perspectives on and children's experiences of the right to effective participation in the trial

### *National laws on the effective participation of children*

Children in most of the Member States studied have the right to be present and to effectively participate in proceedings. They can comment on the charges and evidence, examine witnesses, present evidence, make closing statements, etc.

Austria prohibits trials of children *in absentia*. Hearings must be adjourned when a child defendant is not present.<sup>14</sup> Trials in Belgium, Bulgaria,<sup>15</sup> Estonia<sup>16</sup> and Malta<sup>17</sup> can take place *in absentia* under limited conditions, and children can apply for a retrial if they do. No decision can be taken in Belgium unless the youth court judge hears the child involved, Article 52ter of the Federal Youth Act stipulates.

Child defendants in Poland<sup>18</sup> and Portugal<sup>19</sup> have the right to be present and participate in the trial. However, they can decide against it and the trial can go ahead if they are properly notified.

In Germany and Italy, they can also waive the right to participate in the trial, with certain exceptions. In Germany, a severe penalty or a reformatory measure cannot be imposed if the child is absent, and violating this is grounds for appeal.<sup>20</sup> In Italy, children might be required to participate when the court needs this to assess their circumstances and accommodate their reintegration into society.<sup>21</sup> The court hears children when they ask for the opportunity.<sup>22</sup>

### *Professionals' and children's perspectives on effective participation of children*

Children have the right to be present at their trial and participate effectively, by having the opportunity to be heard and express their views, Article 16 (1) of the directive stipulates. In practice, the authorities largely observe this right and assist children's effective participation, according to interviews across the Member States studied. Exceptions are very rare, in the professionals' experience. However, several children did not have this type of assistance and had problems expressing their views, they report in interviews.

Children's trials focus on rehabilitation and prevention, not only on imposing penalties, many interviewed professionals across Member States note.

### *Creating a more friendly atmosphere at hearings*

Overall, judges generally conduct proceedings against children in a flexible manner, professionals interviewed agree, from all groups in all Member States studied. Judges use plain language with children. They also make an effort to communicate with children by encouraging them to speak and explaining proceedings and their possible consequences.

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**"Judges are extra careful about how they phrase their interventions and monitor carefully how other parties phrase their questions. I have heard many times judges reprimanding the lawyers about how they ask questions and how they behave in the court room during such cases."**

Psychologist, Bulgaria.

The children interviewed also report this and appreciate it greatly. However, this is not always the case and differs a lot, they report.

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**"Yes, I was really lucky. I really had a top youth judge. I am really very grateful to her myself [...] because of course I was imprisoned [...] and I unfortunately had someone else because my juvenile judge was on the bench, so I was really disappointed [...] My own youth judge is a really good one. She looked at what I needed. She also said at one point that being locked up was pointless."**

Child, Belgium.

Judges not only speak clearly to children, but also require this quality of communication from other parties, as professionals interviewed made clear.

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**"I draw the attention of the prosecutor and the lawyer to the fact that the defendant is a minor and that the questions should be phrased in a way that is unambiguously understandable for the minor."**

Judge, Estonia.

Judges want to learn about children's circumstances and background, interviewees also note.

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**"The trend is to deal with them as parents would do – peremptory tones or sentences are never used; the child is made to feel at ease. They are asked to tell the court about their life [...] the court asks them to express their points of view and to report about their life. The attempt is to make the conversation as little inquisitorial as possible."**

Lawyer, Italy.

Judges recognise how stressful the trial must be for child defendants, interviewees note. Hence, they try to avoid adding more pressure. Judges in Poland explain that they try to communicate with child defendants in a calm and relaxed way. The questioning of a child defendant is less formal and more empathetic than that of an adult, one lawyer in Poland observed.

In general, judges care about child defendants and have their best interests in mind, interviewees confirm.

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**"[M]agistrates I know speak about accused minors very differently [from] accused adults. They approach them in a more parental way; they form relationships with the accused, and they actually try to support them."**

Child protective services officer, Malta.

Children interviewed were typically heard directly at trial, which they appreciated.

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**"I spoke and I think it helped. I am even sure it helped, these explanations that I gave."**

Child, Bulgaria.

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**"Well, yes for sure. It [speaking during trial] influences the situation a lot. It is crucial [...] I chose to ask for another possibility, to redeem myself. Like any other child, because everyone makes mistakes, and we need another chance."**

Child, Italy.



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**“Yes, [the judge] listened to everything, also had such a recording device and repeated everything I said into it and what he asked [...] The judge was not so respectful, but he was correct. When I had questions, the interpreter interpreted for me. The interpreter said to me, ‘if you don’t understand something, you can ask me, and I will tell the court.’”**

Child, Austria.

Many children are positive about the way judges treat and talk to them. Judges show interest, listen, ask questions and try to understand. The children feel heard, respected and taken seriously as a result. However, some children have mixed feelings about their treatment.

In Austria and Bulgaria, social workers and psychologists are also on hand to facilitate questioning and serve as support persons, non-legal experts note. In addition, judges and prosecutors receive specialised training, including on ‘soft skills’, several professionals in Austria (all groups) and some Italian lawyers mention. The training is important for understanding children’s specific needs and ensuring their effective participation.



## Best practice

The Estonian Ministry of Justice has a website on child-friendly proceedings. It includes information and contacts for children and parents dealing with the legal system. The website also includes information on how a court hearing is conducted and how to behave during the hearing. The information is in child-friendly language.

*Source: For more information, see the Estonian Ministry of Justice (Justiitsministeerium) web page on child-friendly proceedings (Lapsesõbralik menetlus, Juhtumi lahendamise kohtus).*

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**“Judges are subject to working stress, and the same applies to the administrative staff. These professionals are at the limit of the physical and human resources [...] it is impossible to request people to be sensitive, careful, skilled, if they are subject to such working stress.”**

Educator, Italy.

## Challenges to effective participation

Barriers to effective participation are not uncommon. Judges in Belgium are unfairly portrayed as a threat, one judge claims. This makes children afraid to participate. Staff shortage at the courts in Italy compromises the attention children receive, judges, lawyers and social workers believe, as there is a huge judicial backlog.

Children in Belgium are not always taken seriously, one non-legal expert claims. Judicial authorities in Italy are suspicious of children who do not confess but offer different account of the facts, one lawyer says. A judge in Portugal admits to questioning children in the same way as adults. They only make an extra effort for children with special needs.

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**"We don't look at that person as a child. You cannot ask the judge to distinguish something, which the law has not distinguished [...] If I realise that a 17-year-old is especially confused and that they are not understanding what is happening, I try to make them understand. But that's it."**

Judge, Portugal.

Judges in Belgium and Germany can be impatient, some children say. They interrupt, shout or do not believe the children.

## **4.2. THE RIGHT TO BE ACCOMPANIED BY THE HOLDER OF PARENTAL RESPONSIBILITY**

### **Legal overview**

Children have the right to be accompanied by the holder of parental responsibility during court hearings, Article 15 of the directive provides. They may also be accompanied during other stages of the proceedings when this would serve the child's interests and would not jeopardise the proceedings.<sup>23</sup> The child has the right to be accompanied by all persons who hold parental responsibility, recital 57 of the directive stipulates.

Children can choose another adult to accompany them if it would be against their best interests to be accompanied by their parent (Article 15 (2) (a)). They can choose another adult when the parent cannot be reached or their identity is unknown (Article 15 (2) (b)) or when their parent's presence would jeopardise the proceedings (Article 15 (2) (c)). Recital 58 of the directive lists some of these circumstances, for example if the parent participated in the crime or interferes with witnesses.

Authorities should appoint another person when any of these issues regarding the parent or nominated adult occur. They should also do so when the child has not nominated an adult. Authorities should consider the child's best interests in all cases. The parent should accompany the child if these circumstances change, according to Article 15 (3) of the directive.

Children should be accompanied by their parents or, where appropriate, another adult they choose, the CoE's guidelines similarly recommend. This applies unless there is a good reason that such person should not accompany them.<sup>24</sup> This makes children more comfortable with the proceedings.<sup>25</sup>

Parents must have maximum involvement in criminal proceedings involving their children, under Article 40 (2) (b) (iii) of the UN CRC. This ensures the children have psychological and emotional assistance.<sup>26</sup> Parents should be present throughout the proceedings, the UN Committee on the Rights of the Child stresses. However, the judge can decide otherwise at the request of the child or their legal or other appropriate assistant, or if it is not in the child's best interests.<sup>27</sup>

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**"The juvenile judge was talking – and when I thought she was finished, I thought that it was my turn. When I started talking, she shouted 'SHUT UP' and so I kept my mouth shut and suddenly she said, 'Why don't you talk, it's obvious that you had no interest in this cooperation' or something like that, in those words, I don't know all that any more, just the decision that I must be put in detention 'et voilà'."**

Child, Belgium.



## **Findings: national laws, professionals' perspectives on and children's experiences of the right to be accompanied during the trial**

All Member States studied have legal provisions allowing children to be accompanied by the holders of parental responsibility, or other appropriate adults, during court proceedings.<sup>28</sup> However, some of the Member States (Austria, Belgium, Bulgaria, Germany and Poland) give parents the right of access to court proceedings instead of giving children the right to be accompanied.

### *The right to be accompanied during criminal proceedings in practice*

Children who are suspects or accused persons have the right to be accompanied by parents or other adults, according to Article 15 of the directive.

Parents or designated persons (hereafter 'parents') can be involved in all phases of criminal proceedings if they wish, interviewees in most Member States confirm. This must be in accordance with national law, where the roles/involvement of parents differ.

In practice, however, the degree of parental involvement varies significantly from one case to another, according to interviewees from different professional groups across Member States. Many parents show no interest in taking part.

Two out of three children interviewed had at least one person accompanying them. This was one or both of their parents, a holder of parental responsibility, a friend and/or a social worker.

All child interviewees were accompanied by either a lawyer or, in Germany, a juvenile court assistant. Juvenile court assistants cannot refuse if called as a witness, while lawyers can. In Germany, the presence of both lawyers and juvenile court assistants at the trial was positive, according to children interviewed.

Most practitioners support parents' involvement in criminal proceedings involving children. However, some interviewees doubted the desirability of parents' involvement during certain stages of proceedings, such as the interrogation phase. For example, involving parents in the interrogation phase is unhelpful, the police and some lawyers in some Member States find. It can even hinder proceedings, they stress.

### *Involvement of parents during the interrogation phase*

It is often preferable for parents not to be present during an interrogation, some police officers in Belgium explain. They believe that children can speak more freely without them. Parents sometimes try to answer the questions or stop the child answering.

Parents are more informed and involved in proceedings when they are interested in what will happen to the child, several interviewees in Estonia point out. However, this means that officials will not go out of their way to involve parents who show no interest in the child and their future.

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**"Well, this is complicated, we have everything. We have parents who come worried [...] and say 'we are here to help' [...] 'It was an isolated case, it has never happened before'. We see that they are active parents, parents who care [...] Other times we have truly absent parents who even object [...] who rebel [...]"**

Advisor, Portugal.

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**"My opening statement is always the same: 'Sir, Madam you can be here, but I don't want to hear you. I am going to address your son or your daughter. [...] It's also nice and easier for me and certainly also for your child that you don't intervene', because the parents sometimes have the courage to do so, they think a lot further. 'Yes, I did that', then the parents will say, 'Yes, but he/she hit you first'. So that really is a disturbing element, which sometimes causes young people to lose their bearings."**

Police officer, Belgium.

Parents are questioned as legal representatives in the pre-trial phase, according to most lawyers interviewed. They are asked to describe the child and if there have been any problems with them at home. Parents are invited to the court and are present during the hearing. They are also asked for their opinion, although the court is not bound by it.

Parents play an important role in the criminal proceedings, many interviewed children mention. Their support throughout the proceedings is very important, most children who lived with their parents said. Most parents accompanied children to or picked them up from the police station.

Different specialised professionals provide support, namely educators, psychologists and social assistants, many children mention. The psychological and social support children receive throughout the criminal proceedings and beyond is very important, according to nearly all children interviewed.

In Germany, a social worker from one child's neighbourhood helped during the proceedings by providing information about free legal aid, the child mentions. In another case, the social worker was familiar with their cultural background, a child notes.

#### *Involvement of parents during the trial phase*

The presence of parents during the trial is important, interviewees from all professional groups consider.

The children's well-being is the most commonly cited reason, as they usually feel more comfortable and supported with their parents present. Parents in Malta can provide moral support even when only informally involved in the proceedings, or they can choose not to intervene, one lawyer states. Parents can also aid the police investigation and defence strategy by providing information and important insights into the family background. For example, parents in Poland can suggest a good defence witness, according to one lawyer.

Parents' presence signals to the judge that the child is well supported, several interviewees in Austria argue. It is easier for the judge to impose alternative measures to detention if there is a strong family network supporting the child, one interviewee also observes. Judges in Malta welcome parents in the courtroom, according to two non-legal professionals. The judges can consult them and learn more about the child's background.

Most of the children interviewed knew that their parents or another relative or person of trust could accompany them in court. They often mention that at least one of their parents was present. However, some children did not want their parents to worry and preferred that they did not accompany them to court. In particular, some of the children who had experienced several trials wanted their parents there when they were younger, but not when they were older.

A few children did not know this was possible, but wished that they had known.

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**"I think that if there was more support, I'm not saying that a lawyer doesn't help, right, but more psychological support, I think that half of the things [I did] wouldn't even happen."**

Child, Portugal.

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**"So, the support from [juvenile court worker] is very important. None of the young people in [city] get along with any other social worker as well as with him. He is of Arab origin and he just has the right mentality. I would really recommend any young person who is involved in mischief to see him. He is simply the best."**

Child, Germany.

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**"The involvement of witnesses [in the process], for example, bothered me. But the positive thing was that you get support, for example from the social worker and from my mother, so people who support you. I couldn't have done it without them."**

Child, Germany.

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**“When you are talking about the parents, it’s another thing. You have to see whether the parents have any particular interests in the child, if the parents have any particular interest in the crime that went on, whether they are in control of the situation. It’s not the first time that we find a situation where we have to propose that the child is taken away from the parent and placed in a foster home or care home.”**

Lawyer, Malta.

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**“The role of the lawyer is always to defend their client and, in this case, the young person. It is often necessary to defend young people from their own parents [...] Our job is to defend the young person [...] Sometimes this is very difficult because afterwards, the father says to me ‘I am the one who pays you...’. But in those cases, if it is really impossible to continue, I say ‘then get another lawyer’. Often the lawyer abandons the case not because of the young person.”**

Lawyer, Portugal.

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**“If children grow up in a social environment that tolerates crime, they are naturally more inclined to commit such crimes themselves. And then, of course, these milieus play a role in so far as, for example, in a household in which, due to drug problems of the parents, addiction to narcotics and the like, the ability to educate is simply limited and, thus, the possibility to control the children is also only given to a limited extent.”**

Judge, Germany.

Lawyers are not always in favour of parents being present during confidential consultation or interrogation. Good cooperation with parents is important, interviewed lawyers across all Member States studied emphasise. However, this may depend on the attitude of the parents, they point out.

Lawyers’ professional loyalties lie with the child defendant, not their parents, lawyers interviewed in Belgium, Germany, Italy and Portugal stress. Confidentiality between the lawyer and their child client is also binding regarding parents, they add.

One lawyer in Belgium avoided cooperating with the parents of child defendants because of professional confidentiality. Two other lawyers in Belgium reported carefully selecting what information they pass on to the parents. A lawyer in Poland declined to give information to parents regarding their child, as the child turned 18 during proceedings, they mention.

Children are not always truthful and do not talk openly when their parents are present in meetings, many lawyers in Austria, Belgium, Germany, Italy, Poland and Portugal agree. Parents tend to dominate the discussion, while their children remain silent, two lawyers interviewed in Austria note. Lawyers may need to ask parents to leave the room so they can speak alone with the children, one Italian and some Polish lawyers observe. Children may feel ashamed or embarrassed to share information in front of their parents, the lawyers note.

Sometimes the parents’ presence may encourage children to be more open and thus aid effective legal assistance, a few lawyers interviewed in Germany and Poland argue.

There are also instances when parents are not involved in their children’s criminal proceedings, professionals mention.

Children’s difficult family and social environment is the most commonly cited obstacle to parents’ involvement.

However, parents from more privileged backgrounds can sometimes neglect their children, as they might have little time for them, according to one lawyer in Italy.

The parents’ knowledge of the national language can influence their involvement. Some interviewees in Austria and Belgium express concern that written and oral information is not always in a language that parents can sufficiently understand. This is because they do not have a good command of the national language(s), they do not understand the legal technical terminology or both.



For example, in Austria, interpreters are available for only the child defendants, not their parents, a judge explains. Thus, parents who do not understand German very well cannot effectively participate. In Bulgaria and Italy, parents of Roma children tend to be less involved, interviewees observe. This might be due to difficulties in understanding the national language or the formal legal language used in court.

Several children's parents were either illiterate or unable to understand the national language or legal terms. None of the parents received translated information or information in language they understand, according to these interviewees.

Even if interpreters are always present in Belgium, prosecutors say they do not always trust the quality of the interpretation.

Parents have less incentive to participate actively if they perceive and experience their rights and duties as holders of parental responsibility as insignificant. The relatively minor role parents have is little incentive to be more involved, one judge from Bulgaria suggests. Their role is "relatively passive" and little more than sitting "on the side lines", the judge explains.

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**"I agreed [to my mother participating in the proceedings], but she hardly understood them [...] my lawyer was with me [...] He read them [the documents handed at the end of the trial] and told me where to write my names, where to sign, and so on... And for my mother, because she could not write, I wrote her names, too."**

Child, Bulgaria.



# Endnotes

- <sup>1</sup> **Directive (EU) 2016/343** of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ 2016 L 65, recitals 33 and 47; CJEU, C-399/11, *Stefano Melloni v. Ministero Fiscal*, 26 February 2013, paras. 49–50; CJEU, C-688/18, *Criminal proceedings against TX and UW*, 13 February 2020, paras. 34–35.
- <sup>2</sup> **Directive (EU) 2016/800** of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 16 (2).
- <sup>3</sup> CJEU, C-688/18, *Criminal proceedings against TX and UW*, 13 February 2020, para. 36; ECtHR, *Murtazaliyeva v. Russia* [GC], No. 36658/05, 18 December 2018, paras. 91–95; ECtHR, *Hermi v. Italy* [GC], No. 18114/02, 18 October 2006, para. 59.
- <sup>4</sup> ECtHR, *V. v. the United Kingdom* [GC], No. 24888/94, 16 December 1999, paras. 86–88, 90; ECtHR, *T. v. the United Kingdom* [GC], No. 24724/94, 16 December 1999, paras. 84–86 and 88; ECtHR, *S.C. v. the United Kingdom*, No. 60958/00, 15 June 2004, paras. 29 and 35.
- <sup>5</sup> CoE, Committee of Ministers (2011), *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum*, Strasbourg, October 2011, Chapter III, Section A.1., p. 17.
- <sup>6</sup> *Ibid.*, Chapter III, Section A.2., p. 18.
- <sup>7</sup> UN, Committee on the Rights of the Child (2007), *General Comment No. 10 (2007) – Children’s rights in juvenile justice*, CRC/C/GC/10, 25 April 2007, paras. 45–46, p. 14; UN, Committee on the Rights of the Child (2019), *General Comment No. 24 (2019) on children’s rights in the child justice system*, CRC/C/GC/24, 18 September 2019, para. 46, p. 9.
- <sup>8</sup> *Ibid.*
- <sup>9</sup> UN, Committee on the Rights of the Child (2019), *General Comment No. 24 (2019) on children’s rights in the child justice system*, CRC/C/GC/24, 18 September 2019, para. 46, p. 9.
- <sup>10</sup> FRA (2021), *Presumption of innocence and related rights – Professional perspectives*, Luxembourg, Publications Office, p. 83, et seq.
- <sup>11</sup> *Ibid.*; see also **Directive (EU) 2016/800** of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, recitals 25, 30 and 33.
- <sup>12</sup> FRA (2021), *Presumption of innocence and related rights – Professional perspectives*, Luxembourg, Publications Office, p. 89, et seq.
- <sup>13</sup> *Ibid.*, pp. 61–62.
- <sup>14</sup> Austria, Juvenile Court Act 1988 (*Bundesgesetz vom 20. Oktober 1988 über die Rechtspflege bei Straftaten Jugendlicher und junger Erwachsener (Jugendgerichtsgesetz 1988 – JGG)*), Federal Law Gazette No. 599/1988, 20 October 1988, §§ 32 (1) and (2).
- <sup>15</sup> Bulgaria, Penal Procedure Code (*Наказателно-процесуален кодекс*), 29 April 2006, last amended 18 May 2021, Arts. 423–426.
- <sup>16</sup> Estonia, *Code of Criminal Procedure (Kriminaalmenetluse seadustik)*, 12 February 2003, § 35 (2).
- <sup>17</sup> Malta, Act No. XVIII of 2020, an Act to further amend the Criminal Code, Cap. 9 (*Att Nru XVIII tal-2020, Att li jkompli jemenda l-Kodiċi Kriminali, Kap. 9*), 10 June 1854 (as amended), Arts. 355AUI, 534AGO (1) and 366C.
- <sup>18</sup> Poland, *Act of 6 June 1997: The Code of Criminal Procedure (Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego)*, 6 June 1997, Arts. 374, 167, 169 (1), 171 (1) and 175 (1).
- <sup>19</sup> Portugal, Code of Criminal Procedure (*Código de Processo Penal*), 17 February 1987, last amended by Law 57/2021, 16 August, Art. 333 (1).
- <sup>20</sup> Germany, Criminal Code in the version published on 13 November 1998 (*Federal Law Gazette I*, p. 3322), as last amended by Article 2 of the Act of 19 June 2019 (*Federal Law Gazette I*, p. 844) (*Strafgesetzbuch in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I S. 3322), das zuletzt durch Artikel 2 des Gesetzes vom 22. November 2021 geändert worden ist*), 15 May 1871, Section 338, para. 5.
- <sup>21</sup> Italy, *Decreto del Presidente della Repubblica 22 settembre 1988, n. 448: Approvazione delle disposizioni sul processo penale a carico di imputati minorenni*, 22 September 1988, Art. 31.1; Mangione, A. and Pulvirenti, A. (eds.) (2020), *La giustizia penale minorile: Formazione, devianza, diritto e processo*, Milan, Giuffrè Francis Lefebvre.
- <sup>22</sup> Italy, *Decreto del Presidente della Repubblica 22 settembre 1988, n. 448: Approvazione delle disposizioni sul processo penale a carico di imputati minorenni*, 22 September 1988, Art. 31.5; Italy, Criminal Procedure Code (*Codice di procedura penale, D.P.R. 22 settembre 1988, n. 477*), 22 September 1988 (amended on 31 August 2021), Art. 494.1.
- <sup>23</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Arts. 15 (1) and (4).
- <sup>24</sup> CoE, Committee of Ministers (2011), *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum*, Strasbourg, October 2011, Guideline No. 58, p. 29.
- <sup>25</sup> *Ibid.*, Explanation No. 121, p. 84.
- <sup>26</sup> UN, Committee on the Rights of the Child (2007), *General Comment No. 10 (2007) – Children’s rights in juvenile justice*, CRC/C/GC/10, 25 April 2007, para. 54, p. 16; UN, Committee on the Rights of the Child (2019), *General Comment No. 24 (2019) on children’s rights in the child justice system*, CRC/C/GC/24, 18 September 2019, para. 57, p. 10.
- <sup>27</sup> UN, Committee on the Rights of the Child (2007), *General Comment No. 10 (2007) – Children’s rights in juvenile justice*, CRC/C/GC/10, 25 April 2007, para. 53, p. 16; UN, Committee on the Rights of the Child (2019), *General Comment No. 24 (2019) on children’s rights in the child justice system*, CRC/C/GC/24, 18 September 2019, para. 56, p. 10.
- <sup>28</sup> Austria, Juvenile Court Act 1988 (*Bundesgesetz vom 20. Oktober 1988 über die Rechtspflege bei Straftaten Jugendlicher und junger Erwachsener (Jugendgerichtsgesetz, JGG)*), Federal Law Gazette No. 599/1988, 20 October 1988, Art. 38 (1); Belgium, Youth Protection Act (*Loi relative à la protection de la jeunesse, à la prise en charge des mineurs ayant commis un fait qualifié infraction et à la réparation du dommage causé par ce fait*), 8 April 1965, Art. 52; Bulgaria, Penal Procedure Code (*Наказателно-процесуален кодекс*), 29 April 2006, last amended 18 May 2021, Art. 392; Estonia, *Code of Criminal Procedure (Kriminaalmenetluse seadustik)*, 12 February 2003, Art. 35<sup>2</sup> (3); Germany, *Youth Courts Act (Jugendgerichtsgesetz)*, 11 December 1974, Art. 67; Italy, Youth Criminal Procedure Code (*Codice processo penale minorile*), 22 September 1988, Art. 12; Malta, *Chapter 9: Criminal Code – To amend and consolidate the Penal Laws and the Laws of Criminal Procedure (Kapitolu 9: Kodiċi Kriminali – Biex jemenda u jikkonsolida l-ligijiet penali u l-ligijiet ta’ procedura kriminali)*, 10 June 1854 (as amended), Art. 534AGN; Poland, Penal Code (*Kodeks Karny*), 6 June 1997, Art. 76; Portugal, Code of Criminal Procedure (*Código de Processo Penal*), 17 February 1987, Art. 61.



# 5

## CHILD-SPECIFIC RIGHTS: THE RIGHT TO AN INDIVIDUAL ASSESSMENT AND THE RIGHT TO PRIVACY IN CRIMINAL PROCEEDINGS

This chapter outlines the interviewees' experiences and opinions relating to the rights to an individual assessment, to privacy in criminal proceedings and to have questioning audiovisually recorded.

Children who are suspects or accused of crime should be individually assessed, the directive provides. This ensures that children's specific needs concerning protection, education, training and social integration are taken into account. The scope of the assessment depends on the circumstances of the child and the case.<sup>1</sup>

### 5.1. THE RIGHT TO AN INDIVIDUAL ASSESSMENT

#### Legal overview

National authorities must assess children suspected or accused of crime individually to consider their specific needs, Article 7 of the directive states. Each child must be assessed on personality and maturity, economic, social and family background, and any specific vulnerabilities.<sup>2</sup>

Authorities should use the results of these individual assessments when examining three areas, according to Article 7 (4) of the directive and recitals 35 and 39:

1. any special measures, such as giving the child practical assistance or protection;
2. the child's criminal responsibility and the suitability of any precautionary measures, for example provisional detention or alternative measures;
3. any penalty or educative measure when sentencing.

Only qualified professionals can carry out such assessments. They use a multidisciplinary approach and closely involve the child and their parents or other holders of parental responsibility.<sup>3</sup>

The individual assessment should be completed as early as possible and before committing the case to trial. It may be conducted afterwards, but should be available for the trial hearing.<sup>4</sup>



Its extent depends on the circumstances and availability of past assessments. However, it should be updated when a significant change occurs.<sup>5</sup> The circumstances of the case and the child's best interests may allow the omission of an individual assessment, according to Article 7 (9) of the directive.

The **CoE guidelines on child-friendly justice** include similar recommendations. Member States should use multidisciplinary approaches to assess the best interests of children involved in judicial proceedings. They should take account of the child's legal, psychological, social, emotional, economic, physical and cognitive situation.<sup>6</sup> The UN Committee on the Rights of the Child also encourages states to carry out individual assessments of children using a multidisciplinary approach.<sup>7</sup>

Authorities must treat a child involved in criminal proceedings properly by accounting for their age, level of maturity and intellectual and emotional capacities, the ECtHR also stresses.<sup>8</sup> Children whose cognitive and emotional development requires special consideration deserve support and assistance to protect their rights. This is especially the case when coercive measures are in question.<sup>9</sup> In particular, children with disabilities may require additional safeguards.<sup>10</sup>

A case in which a child with a mental disorder was convicted of a crime *in absentia* violated the Convention, the ECtHR found. It pointed out that a psychiatrist's report had not been prepared.<sup>11</sup>

#### **Findings: national laws, professionals' perspectives on and children's experiences of the right to an individual assessment**

Children's specific needs concerning protection, education, training and social integration should be accounted for in criminal proceedings against them, according to Article 7 of the directive. Domestic legislation in Austria,<sup>12</sup> Belgium,<sup>13</sup> Estonia,<sup>14</sup> Germany,<sup>15</sup> Italy,<sup>16</sup> Malta<sup>17</sup> and Portugal<sup>18</sup> enshrines child defendants' right to an individual assessment and it is obligatory.

In Bulgaria, the individual assessment is limited to a 'social report (assessment)'.<sup>19</sup> In Poland, the right to an individual assessment is not regulated per se, but certain situations require a psychological evaluation regardless of the suspect's age. These are if there are justified doubts regarding the suspect's mental condition, personal characteristics and conditions, or past and current lifestyle, according to the Code of Criminal Procedure.<sup>20</sup> The court may order a community inquiry concerning the suspect in these cases.

### *Individual assessment in practice*

There is a lack of regulation in Poland and limited regulation in Bulgaria. Despite this, the general assessment Article 7 of the directive requires is widely used, interviewed professionals from all Member States confirm.<sup>21</sup> The scope, purpose and methodology of the assessment seem comparable across the nine Member States studied. However, its timing varies across the Member States studied.

In Austria, Bulgaria and Germany, the individual assessment is conducted during the investigation phase, professionals interviewed report.

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**"It always takes place when you realise that charges will be brought. Then, as a rule, the prosecution gives the order for an individual assessment. This is [...] a bit of a longer process. It takes a while, because you can certainly imagine: the young person may not come there the first time and the parents may not either – that always takes time. And, as a rule, we also try to complete the main hearing more quickly than with adults. A quick end to the proceedings is usually more likely to be crowned with success than if it takes time and drags on for years."**

Judge, Austria.

In Austria, the Juvenile Court Assistance (JCA) carries out individual assessments. The JCA has seats in the capitals of all nine provinces. The prosecutor or judge requests an individual assessment. It must be conducted and the report must be available by the time of the main trial, as this uses the assessment's findings.

Similarly, the JCA in Germany automatically conducts the assessment when the police or prosecutor informs it of the proceedings.

In Bulgaria, there are no specific provisions obliging authorities to conduct an independent individual assessment of the accused child. However, different tools are used during the proceedings to collect information about the child, the professionals interviewed say. They most often mention the obligatory forensic psychological and/or psychiatric assessment of accused children. This is done at the launch of proceedings, or before charges are brought when there is only an allegation.

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**"I think typical of working with children is not only investigating the facts, but also the living situation and upbringing. Those things are also looked into. About the home situation, school, free time, the friends they hang out with, those are the things which we ask the young person. A bit of a general framework."**

Police officer, Belgium.

In Belgium, Estonia, Italy and Portugal, more than one assessment is typically conducted during different stages of proceedings, findings from the interviews with professionals suggest. The police in Belgium and Estonia usually perform or request the first assessment during the investigation. The police in Belgium have a social department with social workers, police officers explain. Police officers focus on the offences in an investigation, while social workers focus on social aspects.

In Italy, the individual assessment is routinely conducted after children's first contact with the judicial system, professionals state. In most cases, this is on arriving at the CPA after the arrest. When children are not arrested, individual assessments can be conducted if judicial authorities decide that the children's social and family context is critical. However, it is automatically carried out for serious offences such as stalking and cyber-crimes, even when the child is not arrested, a public prosecutor reports.

In Belgium, Estonia and Portugal, the second assessment is typically conducted when the case is referred to a court, according to the professionals interviewed. In Italy, however, judicial social assistants develop the second assessment during the probation period. This is called the individual reintegration project. It is based on all the information collected about the child throughout the judicial proceeding.

In Malta and Poland, the individual assessment can take place at any time during the proceedings, interviewees report.

A prosecutor or judge in Poland can order an individual assessment in the form of a psychiatric/psychological report or community inquiry (see box below). A judge interviewed in Poland orders the community inquiry in almost every case. In contrast, one prosecutor claims never to order a community inquiry where it is not obligatory. This discrepancy is a result of Polish law having no mandatory individual assessment.

In contrast to what most professionals say, most children interviewed are not familiar with the individual assessment. The exceptions are in Belgium and Italy. This could mean that individual assessments did not happen or that they were carried out in such a way that children could not see their purpose or impact.

In Bulgaria and Poland, some children recall information about their situation being collected in a meeting with a psychiatrist or psychologist.

#### *Scope of the assessment*

A wide range of professionals conduct individual assessments across the Member States. In Austria, Belgium, Italy, Malta and Portugal, multidisciplinary teams are generally engaged, professionals interviewed confirm. This is contrary to what several of the interviewed children report.

In Bulgaria, Estonia, Germany and Poland, social workers, probation officers, psychiatrists or psychologists typically conduct the assessments.

The assessment seeks to understand the child's reasons for offending and the risk they pose to themselves or others. It does so by learning about the child's social background. This covers information about their family situation, educational background, the child's physical and mental health, and where relevant, any previous convictions.

Assessments include psychosocial assessment, socioeconomic data, socialisation and financial conditions, a professional from Austria explains. They cover the children's needs and vulnerabilities, personality, maturity, and social and family background, experts interviewed claim. Assessments in Belgium, Bulgaria, Estonia, Germany and Portugal apply this scope and methodology, other professionals confirm.

Besides interviews, the individual assessments may include information from other relevant sources, a social worker from Portugal adds. These include schools, associations, sports clubs, family members and neighbours, depending on the specialist's evaluation of the case. A deeper and multidisciplinary assessment is done during the first 60 days of a child's detention to prepare an individual rehabilitation plan. This must be updated annually.

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**"All teams have specialists with social work, psychology and law degrees [...] Depending on the type of crime and the child, the coordinator leans towards one specialist or another. When there are more complicated cases in terms of personality, a psychologist is appointed [...] who has greater know-how to deal with these cases. Now, for example, driving under the influence of alcohol or without a licence can be allocated to a specialist with a law degree [...]"**  
Advisor, Portugal.

## Assessment in Poland

In Poland, the typical individual assessment does not exist. Instead, there is a psychological evaluation, interviewed professionals mention. Psychiatrists and psychologists undertake it, focusing mainly on the child's mental state. It can also include an assessment of a child's family situation and background, according to some interviewees.

Another form of assessment is the community inquiry. This focuses more on the child's social and family background and not as much on individual characteristics. The report can also summarise the suspect's criminal history, especially juvenile delinquency. The community inquiry covers aspects such as the subject's maturity, personality and situation at school.

### *Updating the assessment*

The individual assessment must be updated if the child's circumstances change considerably, Articles 7 (3) and 7 (8) of the directive require.

Although the individual assessment should be updated when circumstances change, it seldom is, most professionals interviewed in all Member States report. Proceedings against children are usually quick, a judge in Portugal, a lawyer in Austria and two police officers in Bulgaria explain. Therefore there is no need to update the assessment. Updating every assessment is impossible because of the workload, interviewees in Belgium claim.

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**"Even in a few months, a young person's behaviour can change. Every little thing can affect a young person. The individual assessment is updated if the child's family moves or something changes in the child's family, e.g. a relative dies. I also may notice a change in the child, e.g. the child starts using new words."**

Police officer, Estonia.

The initial assessment is sometimes updated, a few interviewees say. For example, in Portugal an assessment was updated when one of the defendant's teachers delivered new information, a social worker reports. A police officer in Estonia also gave some examples of updating the existing assessment.

The assessment is also updated if a child reoffends and new proceedings begin, a judge from Austria and a police officer from Bulgaria mention.

### *When the individual assessment is not done*

Authorities may omit the individual assessment when the circumstances of the case and the child's best interests allow it, Article 7 (9) of the directive provides. Individual assessment is a standard procedure in criminal cases against children, interviewees tend to state. However, they were able to point to some exceptions. Individual assessments are not done when:

- the child is accused of a less serious crime (Belgium, Bulgaria, Malta);
- the proceedings are discontinued either provisionally or finally (Austria, Estonia, Germany, Italy and Portugal);
- the offender pleads guilty at the first court hearing (Malta);
- there is not enough time between the child's arrival at the institution and the first court hearing (Germany and Italy);
- a child who remains at liberty does not show up (Austria and Germany).

## Challenges

Authorities face several challenges to effectively assess children's particular needs and circumstances. For instance, language barriers may compromise the conduct and accuracy of individual assessments, according to professionals interviewed in Austria, Belgium, Bulgaria, Germany and Malta. Children from refugee or migrant backgrounds are particularly vulnerable and often need an interpreter. An interpreter could be helpful if children are fluent in the language of the proceedings but it is not their mother tongue, a non-legal expert from Belgium observes.

Nineteen interviewed children do not have the local language as their mother tongue. Of these, seven had not received an individual assessment. Only three of the remaining 12 received support through interpreters and/or translated documents.

The human resources available for conducting individual assessments are also a challenge, interviewees point out. This can compromise the quality of or cause delays in the assessment, says a lawyer interviewed in Portugal. In Belgium, Italy and Poland, lack of human and financial resources often means excessive workloads and no specialist knowledge, interviewees report.

In Poland, non-specialists sometimes perform the individual assessments. However, individual assessments for children with disabilities should be performed by a qualified psychologist familiar with the child's situation, one police officer argues.

*How and for what purposes are the results of the individual assessment used by national authorities in practice?*

Individual assessments should provide competent authorities with information about the child's characteristics and circumstances that might be useful in three situations, Article 7 (4) of the directive stipulates:

1. when determining whether any specific measure should be taken to benefit the child;
2. when assessing the appropriateness and effectiveness of any precautionary measures regarding the child;
3. when taking any decision or course of action in the criminal proceedings, including sentencing.

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**"Often, I have indeed noticed that the children speak our language better than the parents, who often do not speak our language at all, but if there are certain emotional things you want to say as a child, you see that the barrier is in the language, that they can do better in their mother tongue."**

Consultant, Belgium.





The individual assessment aims to avoid the child being involved in crimes in future. In practice, the report typically covers the child defendant's needs and includes recommendations on how to proceed in the case. The results of individual assessments inform the prosecutor's and court's decisions, including the measures or sanctions to be taken against the child. It is mainly police officers and judges who say this, in all nine Member States.

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**"In practice, as a prosecutor, I need this characteristic to assess the personality of the accused. [...] For example, if we see from this characteristic that this child is in an unfavourable environment, moves with some 'bad guys', etc., we will consider that the child is not a socially dangerous person and may even conclude that what they have committed is not a crime."**

Prosecutor, Bulgaria.

The findings might decide whether or not a case is forwarded to the court, a prosecutor in Bulgaria explains.

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**"These are really detailed and extensive reports. It is often tedious to read, but it pays off, because it really gives a comprehensive picture of the young person(s). On the one hand, you can see where the young person's developmental stage is, how they are integrated in the social environment, where the shortcomings or difficulties lie and where dangers could arise. If this is available, then it is usually already very, very well prepared."**

Judge, Austria.

Ultimately, the assessment serves to better understand the child, a lawyer and a judge interviewed in Austria argue. The individual assessment allows the judge to access information about the child's needs, such as anti-aggression training, drug therapy, coaching to find a job or occupational orientation.

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**"I can say that judicial authorities generally have a deep trust towards social services, and therefore use the assessment drafted by the professionals. Sometimes, I must admit that judges are even milder than social assistants: sometimes, the professionals believe that children are not ready for the individual rehabilitation project yet, whereas the court decides to suspend the hearing asking the social services to design the rehabilitation plan."**

Psychologist, Italy.

Judges in Italy rely heavily on the findings of the individual assessment, social workers interviewed observe.

In Malta, the individual assessment helps determine whether children who are, for example, also victims of crime require social assistance, a social worker states. This includes crimes such as sexual abuse.

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**"The judge took into account, in a good way, what the witnesses were saying about me and the information that was received from the sports club. School gave a horrible [assessment of character and behaviour], but the sports club gave a completely opposite one. Everything was bad, but then the judge saw that I was not completely bad."**

Child, Estonia.

Judges took the results of individual assessments into account, according to interviewed children who knew they had been assessed.

## 5.2. THE RIGHT TO PRIVACY IN CRIMINAL PROCEEDINGS

### Legal overview

Children's privacy should be protected by holding all criminal court hearings in closed settings or allowing the courts to do so, according to Article 14 of the directive. Records of these proceedings should not be made public. Protecting children's privacy allows their reintegration into society, although it does not keep judgments from being pronounced publicly. Member States should encourage the media to regulate themselves in this regard.<sup>22</sup>

Criminal hearings attracting public interest must be conducted in private to reduce the child's feelings of intimidation and inhibition as far as possible, the ECtHR holds.<sup>23</sup> Alternatively, where appropriate, courts could provide for only selected attendance rights and subsequent reporting.<sup>24</sup> Children's hearings should take place *in camera*, the CoE Committee of Ministers' guidelines on child-friendly justice similarly recommend.<sup>25</sup>

Access to children's data from proceedings should be limited and granted only when necessary. None of the children's information or personal data should be made available or published, particularly in the media, the guidelines further recommend. This includes images, descriptions of the child or their family, audio and video records, etc. Anonymity or pseudonyms, using screens or disguising voices, and deleting children's names and other data from documents can help ensure this.

Member States should protect children's privacy through legislative measures or monitoring self-regulation of the media, the guidelines further recommend. Moreover, strict confidentiality rules should be in place for professionals working with children, they propose.<sup>26</sup>

Every child accused in criminal proceedings "shall have his or her privacy fully respected", as the UN CRC requires.<sup>27</sup> This applies from the initial police questioning until the final court decision and any subsequent proceedings, for example release from supervision.<sup>28</sup>

No information that could identify the child should be published, to avoid stigmatisation, General Comments Nos. 10 and 24 state. As a rule, court hearings should take place in closed sessions, they also state. Court records should remain confidential and the professionals involved are bound to respect this confidentiality. Children's names should also be removed from criminal records once they turn 18.<sup>29</sup>

### **Findings: national laws, professionals' perspectives on and children's experiences of the right to privacy**

#### *National laws*

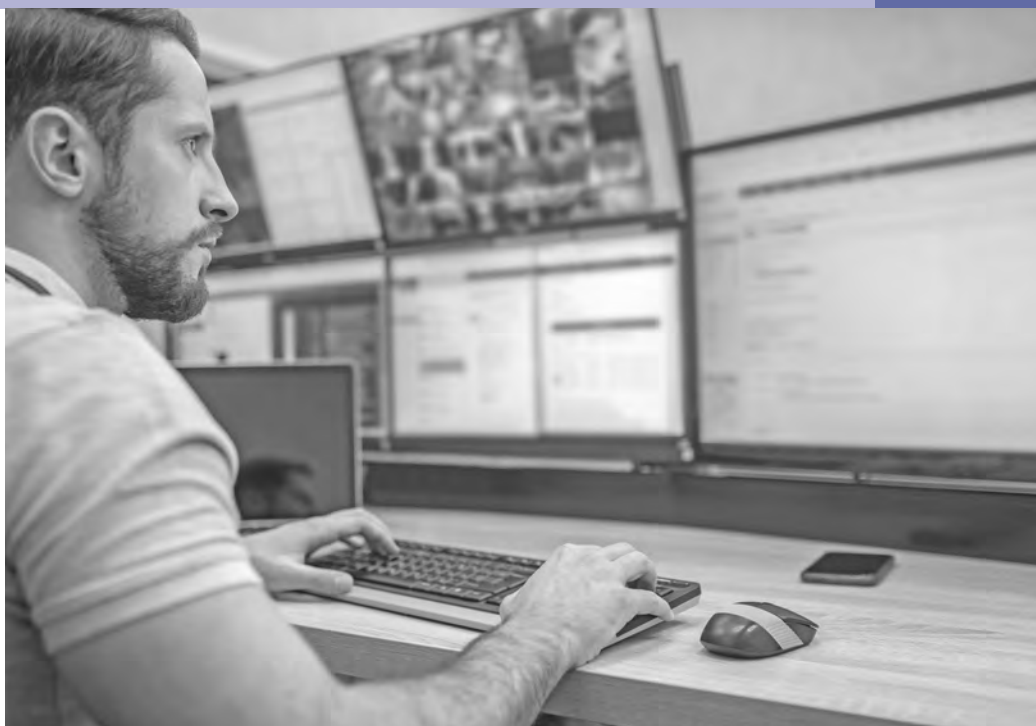
The picture regarding national laws on the right to privacy of accused children during criminal trials is mixed. Germany, Italy and Malta have strict laws providing closed hearings for trials against children, with only limited exceptions.<sup>30</sup> In Germany and Malta, only the victim, their parents and lawyer, social workers and probation officers can be present.<sup>31</sup>

Judges in Germany may admit other persons for exceptional reasons, such as training. Hearings can be public when there are adult co-defendants on trial. However, again, courts may exclude the public to protect child defendants.

In Italy, the only exception is that a child older than 16 can request a public hearing. All other defendants must agree and there must be no accused child younger than 16. The journalists' code of conduct forbids disclosing the names of children accused or suspected of a crime. They also cannot share any other information that may identify the child, for example a child's address or school.<sup>32</sup>

In Malta, revealing such information is punished with a fine and even imprisonment.<sup>33</sup>

In Austria, Bulgaria, Estonia, Poland and Portugal, courts can decide to hold trial hearings against children in public or behind closed doors.<sup>34</sup> In Austria and Poland, the public may be excluded from the whole or some parts of the hearing, but judgments are pronounced publicly.<sup>35</sup> Both these Member States prohibit publishing information from closed hearings.<sup>36</sup>



In Bulgaria, the court can open the hearing to the public if this would be in the interest of society.<sup>37</sup> In Portugal, courts can restrict or even exclude public access to trials against children, according to the law incorporating the directive. This can be either on their own initiative or at the child's request.<sup>38</sup> Hearings against children can be held in public, unless the court decides otherwise, a 2021 amendment allows.<sup>39</sup>

#### *Professionals' perspectives*

In Germany, Italy and Malta, closed hearings are the norm for trials against children, according to the law. Such trials are not public, interview findings confirm. The public is banned from such trials, according to most of the professionals interviewed from all groups in those countries. Malta makes an exception in "emergency situations", according to some interviewees. That is, children over 16 can be tried in the ordinary criminal court, where hearings are public.

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**"A court room is chosen, to which there is no free access, because for children the proceedings are usually held behind closed doors, i.e. without public access, except for close relatives and, exceptionally, with the consent of the parties, there may be other people."**

Judge, Bulgaria.

In Bulgaria and Portugal, courts have discretion on whether to make hearings open to the public. Closed hearings are the rule in practice, interview findings suggest.

However, in Bulgaria, information about cases is often leaked to the media, one defence lawyer points out.

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**"The transposition of the directive introduced a change. But it was something we were already doing [...] Which is the question of publicity, for the protection of the image [...] The idea is to avoid stigma for life [...]"**

Judge, Portugal.

In Portugal, hearings against children were not open to the public even before the changes from incorporating the directive, some judges interviewed note.

The situation is different in Austria, Estonia and Poland. In these countries, hearings may be open or closed to the public, depending on the case.

In Austria, public trials are important for the rule of law, many prosecutors, judges and psychologists interviewed maintain. For this reason, courts are occasionally reluctant to ban the public just because a trial involves a child defendant. In practice, the public is excluded from hearings of young defendants that involve crimes of a sexual nature or other sensitive issues, most professionals note.

In Estonia, hearings involving accused children are usually closed, most interviewed prosecutors and judges report. However, restricting public access depends on, for example, the age of the accused child, interviewed lawyers and one social worker claim. The restriction does not always happen in practice.

In Poland, lawyers have to ask the court to ban public access in cases involving accused children, many interviewed lawyers from Poland confirm. This also depends on their defence strategy.

### 5.3. AUDIOVISUAL RECORDING OF QUESTIONING OF CHILDREN

#### Legal overview

When police or other law enforcement authorities question children during criminal proceedings, they must record it audiovisually, under Article 9 (1) of the directive, read in the light of recital 42. It applies where it is proportionate to the circumstances of the case, and provided that the child's best interests are always a primary consideration. Relevant circumstances are, for example, the presence or absence of a lawyer during questioning and whether the child is deprived of liberty.

The questioning of a child defendant must be recorded in another appropriate manner in the absence of audiovisual recording, according to Article 9 (2) of the directive. Alternative methods include duly verified written minutes. Video or audiorecording of pre-trial hearings *in camera* should be used and considered as admissible evidence, the CoE Committee of Ministers' guidelines on child-friendly justice recommend.<sup>40</sup>

#### Findings: national laws, professionals' perspectives on and children's experiences of the right to have the questioning adequately recorded

The research found no evidence that the right to have questioning audiorecorded is fully incorporated into the legal systems of the Member States. Traditional recording in writing may still be the norm.



Only Austria and Germany introduced an obligation to audiovisually record the questioning of a child defendant if certain conditions are not met. In Austria, the questioning should be audiovisually recorded if a defendant does not have a defence lawyer, legal representative or other person of trust present. Questioning can be recorded in writing only if technical problems make audiovisual recording impossible.<sup>41</sup>

In Germany, the questioning of a child must be audiovisually recorded if legal representation is mandatory at the time but the lawyer is absent.<sup>42</sup> The absence must be due to urgent circumstances requiring immediate action.<sup>43</sup>

Estonia<sup>44</sup> and Malta also include this right in their laws. They repeat the directive's proportionality or necessity requirement. Malta also refers to the child's best interests.<sup>45</sup>

Belgium, Bulgaria, Italy, Poland and Portugal still rely on written minutes. They do not yet have legal provisions explicitly granting child defendants the right to have their questioning audiovisually recorded.

#### *Audiovisual recording in practice*

Even where Member States' laws make it possible to audiovisually record the questioning of child defendants, it is very rarely done, according to interviewees.

In Austria, there has not been any need for audiovisual recording yet, as others, such as lawyers, parents or persons of trust, are always present, police officers argue. Audiorecording would make them feel like their work is being monitored, they add. Moreover, police stations are still being equipped and training officers, interviewed police officers state.

In contrast, equipment for audiovisual recording of interrogations is already installed in interrogation rooms, all interviewees from Germany report. However, it is hardly ever used because defence lawyers are always present, police officers explain.

Child suspects in Estonia are not audiovisually recorded during questioning, all interviewees say. Audiovisual recording is used when the child is a victim, one police officer points out. The questioning is recorded in writing if the child is a suspect or accused person.

Only some interviewees in Malta have experience with audiovisual recording of questionings. They are mostly lawyers and police officers. However, this is not an established practice, the varying answers from the police officers indicate. Questioning of children is audiovisually recorded for more serious crimes, two police inspectors explain.

The remaining Member States studied have no relevant legal framework. Questioning of child defendants may be audiovisually recorded in very exceptional cases, interviewed professionals confirm. For example, audiovisual recording takes place in Italy when questioning is carried out in juvenile detention facilities.

In general, the lack of recording is justified by practical obstacles such as lack of equipment, professionals across the Member States argue.

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**"If you look at the records of the questionings, it usually says that the act is not recorded or filmed because there are no means to do so [...] That should be the rule, but unfortunately, we don't have the means [...] Yes, written minutes are used."**  
Prosecutor, Portugal.



Recording could actually make the child defendant less comfortable, lawyers in Austria and Italy argue.

Audiovisual recording is complex and time-consuming, according to professionals in Bulgaria, Belgium and Italy.

Audiovisual recording of questioning is still a novel concept, all professionals across all Member States studied indicate. It will take more time for it to become accepted and more widely used. There are benefits of such a practice, mainly as a safeguard for child defendants, some professionals interviewed understand.

Most of the children interviewed confirm that their questioning was not audiorecorded. In most cases, police officers took written minutes that usually, but not always, the children could read and sign. Some children say they could not read the minutes before signing them. Some others had the impression that important parts of their statements were not documented.

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**"In my experience, videorecording of the interrogation is rarely used, except for the most severe cases. Otherwise, I do not even ask for it, because the written transcription is more than enough, and it makes the children more comfortable [...] I never complained as a lawyer about the lack of videorecording, even if it could be useful to read the children's non-verbal communication."**

Lawyer, Italy.

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**"[T]he video recording procedure itself is not simple, because this thing has to be recorded on a magnetic carrier, the persons have to certify that things are OK, this action is quite demanding for the court and the pre-trial authorities, because there has to be full agreement with the parties."**

Judge, Bulgaria.

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**"Audiovisual interrogation really does have an added value. And that we as public prosecutors could then watch it. It is completely different to be able to see an interrogation, than when you only read it on paper. When you have seen it on DVD, it's different than when you read it. I also notice that when I watch an interrogation, I get a totally different picture."**

Prosecutor, Belgium.

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**"I made my statement, and they didn't write down exactly what I said, they just didn't care."**

Child, Germany.



## Endnotes

- <sup>1</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 7.
- <sup>2</sup> *Ibid.*, Art. 7 (2).
- <sup>3</sup> *Ibid.*, Art. 7 (7).
- <sup>4</sup> *Ibid.*, Art. 7 (5) (6).
- <sup>5</sup> *Ibid.*, Art. 7 (3) (8).
- <sup>6</sup> CoE, Committee of Ministers (2011), **Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe and explanatory memorandum**, Strasbourg, October 2011, Guidelines Nos. 2 and 4, p. 18, and Guidelines Nos. 16–18, p. 23.
- <sup>7</sup> UN, Committee on the Rights of the Child (2007), **General Comment No. 10 (2007) – Children’s rights in juvenile justice**, CRC/C/GC/10, 25 April 2007, para. 39, p. 12; UN, Committee on the Rights of the Child (2019), **General Comment No. 24 (2019) on children’s rights in the child justice system**, CRC/C/GC/24, 18 September 2019, paras. 33–34, pp. 7–8, and para. 109, p. 18.
- <sup>8</sup> For example, see ECtHR, *T. v. the United Kingdom* [GC], No. 24724/94, 16 December 1999, para. 84; and ECtHR, *V. v. the United Kingdom* [GC], No. 24888/94, 16 December 1999, para. 86.
- <sup>9</sup> ECtHR, *Blokhin v. Russia* [GC], No. 47152/06, 23 March 2016, para. 219.
- <sup>10</sup> *Ibid.*
- <sup>11</sup> ECtHR, *Vaudelle v. France*, No. 35683/97, 30 January 2001, para. 65.
- <sup>12</sup> Austria, Juvenile Court Act 1988 (**Bundesgesetz vom 20. Oktober 1988 über die Rechtspflege bei Straftaten Jugendlicher und junger Erwachsener (Jugendgerichtsgesetz 1988 – JGG)**), *Federal Law Gazette* No. 599/1988, 20 October 1988, § 43 (1) and 48 (1).
- <sup>13</sup> Belgium, Federal Youth Act of 2006, 15 May 2006, Art. 50.
- <sup>14</sup> Estonia, **Code of Criminal Procedure (Kriminaalmenetluse seadustik)**, 12 February 2003, § 34 (11) (3).
- <sup>15</sup> Germany, Youth Courts Law (**Jugendgerichtsgesetz, JGG**) in the version of the promulgation of 11 December 1974 (*Federal Law Gazette [BGBl.]*) Part 1 p. 3427, most recently amended by Article 1 of the Act of 8 July 2008 (*Federal Law Gazette* Part 1 p. 2099), 11 December 1974, Section 38.
- <sup>16</sup> Italy, **Decreto del Presidente della Repubblica 22 settembre 1988, n. 448: Approvazione delle disposizioni sul processo penale a carico di imputati minorenni**, 22 September 1988, Art. 9.
- <sup>17</sup> Malta, Act No. XVIII of 2020, an Act to further amend the Criminal Code, Cap. 9 (**Att Nru XVIII tal-2020, Att li jkompli jemenda l-Kodiċi Kriminali, Kap. 9**), 10 June 1854 (as amended), Art. 534AGG.
- <sup>18</sup> Portugal, Law no. 33/2019, of May 22, which makes the thirty-third amendment to the Code of Criminal Procedure, approved by Decree-Law no. 78/87, of February 17, 22 May 2019.
- <sup>19</sup> Bulgaria, Ministry of Justice (*Министерство на правосъдието*) (2020), Table of compliance of Bulgarian legislation with Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (**Таблица на съответствието на българското законодателство с Директива (ЕС) 2016/800 на Европейския парламент и на Съвета от 11 май 2016 година относно процесуалните гаранции за децата, които са заподозрени или обвиняеми в рамките на наказателното производство**).
- <sup>20</sup> Poland, **Act of 6 June 1997: The Code of Criminal Procedure (Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego)**, 6 June 1997.
- <sup>21</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 7 (4), and recitals 35 and 39.
- <sup>22</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 14 (4) and recital 56.
- <sup>23</sup> ECtHR, *V. v. the United Kingdom* [GC], No. 24888/94, 16 December 1999, para. 87; ECtHR, *T. v. the United Kingdom* [GC], No. 24724/94, 16 December 1999, para. 85.
- <sup>24</sup> ECtHR, *V. v. the United Kingdom* [GC], No. 24888/94, 16 December 1999, para. 87; ECtHR, *T. v. the United Kingdom* [GC], No. 24724/94, 16 December 1999, para. 85.
- <sup>25</sup> CoE, Committee of Ministers (2011), **Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum**, Strasbourg, October 2011.
- <sup>26</sup> CoE, Committee of Ministers (2011), **Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum**, Strasbourg, October 2011, Guideline No. 10, p. 22.
- <sup>27</sup> UN, **Convention on the Rights of the Child (CRC)**, 20 November 1989, Art. 40 (2) (b) (ii).
- <sup>28</sup> UN, Committee on the Rights of the Child (2007), **General Comment No. 10 (2007) – Children’s rights in juvenile justice**, CRC/C/GC/10, 25 April 2007, para. 64.
- <sup>29</sup> UN, Committee on the Rights of the Child (2007), **General Comment No. 10 (2007) – Children’s rights in juvenile justice**, CRC/C/GC/10, 25 April 2007, paras. 64–67; UN, Committee on the Rights of the Child (2019), **General Comment No. 24 (2019) on children’s rights in the child justice system**, CRC/C/GC/24, 18 September 2019, paras. 66–71.
- <sup>30</sup> Germany, Youth Courts Law (**Jugendgerichtsgesetz, JGG**) in the version of the promulgation of 11 December 1974 (*Federal Law Gazette [BGBl.]*) Part 1 p. 3427, most recently amended by Article 1 of the Act of 8 July 2008 (*Federal Law Gazette* Part 1 p. 2099), 11 December 1974, Section 48; Italy, **Decreto del Presidente della Repubblica 22 settembre 1988, n. 448: Approvazione delle disposizioni sul processo penale a carico di imputati minorenni**, D.P.R. No. 448/1988, 28 January 2015, Art. 33; Malta, Act No. XVIII of 2020, an Act to further amend the Criminal Code, Cap. 9 (**Att Nru XVIII tal-2020, Att li jkompli jemenda l-Kodiċi Kriminali, Kap. 9**), 10 June 1854 (as amended), Arts. 531 and 534AGD.
- <sup>31</sup> Germany, Youth Courts Law (**Jugendgerichtsgesetz, JGG**) in the version of the promulgation of 11 December 1974 (*Federal Law Gazette [BGBl.]*) Part 1 p. 3427, most recently amended by Article 1 of the Act of 8 July 2008 (*Federal Law Gazette* Part 1 p. 2099), 11 December 1974, Section 48; Malta, **Juvenile Court Act (Att dwar il-qorti tal-minorenni)**, 25 July 1980, Arts. 7 and 8 (1) (2).
- <sup>32</sup> Italy, Code of ethics relating to the processing of personal data in the exercise of journalistic activity (**Codice deontologico relativo al trattamento dei dati personali nell’esercizio dell’attività giornalistica**), 29 July 1998.
- <sup>33</sup> Malta, **Juvenile Court Act (Att dwar il-qorti tal-minorenni)**, 25 July 1980, Arts. 7 and 8 (1) (2).

- <sup>34</sup> Austria, Juvenile Court Act 1988 (*Bundesgesetz vom 20. Oktober 1988 über die Rechtspflege bei Straftaten Jugendlicher und junger Erwachsener (Jugendgerichtsgesetz, JGG)*), Federal Law Gazette No. 599/1988, 20 October 1988, § 42 (1); Bulgaria, Penal Procedure Code (*Наказателно-процесуален кодекс*), 29 April 2006, last amended 18 May 2021, Art. 391; Estonia, Ministry of Justice (*Justiitsministeerium*), Explanatory memorandum to the bill *Karistusseadustiku ja teiste seaduste muutmise seadus (Euroopa Liidu finantshuvide kaitse direktiivi ja alaealiste menetlusõiguste direktiivi ülevõtmine)*, 12 December 2019, Explanatory memorandum (*Eelnõu seletuskiri*); Poland, *Code of Criminal Procedure (Kodeks postępowania karnego)*, 6 June 1997 (as amended), Art. 360 (1) (2); Portugal, Code of Criminal Procedure (*Código de Processo Penal*), approved by Decree-Law 78/87 (*Decreto-Lei n.º 78/87*), 17 February 1987, **as amended by Law 102/2019**, of 6 September (*Lei n.º 102/2019, de 06 de Setembro*), last amended by Law 57/2021, 16 August 2021, Art. 87 (1) and (2).
- <sup>35</sup> Austria, Juvenile Court Act 1988 (*Bundesgesetz vom 20. Oktober 1988 über die Rechtspflege bei Straftaten Jugendlicher und junger Erwachsener (Jugendgerichtsgesetz, JGG)*), Federal Law Gazette No. 599/1988, 20 October 1988, § 42 (1); Poland, *Code of Criminal Procedure (Kodeks postępowania karnego)*, 6 June 1997 (as amended), Arts. 360 (1) (2) and 364.
- <sup>36</sup> Austria, Criminal Procedure Code 1975 (*Strafprozeßordnung 1975, StPO*), Federal Law Gazette No. 631/1975 (as currently in force), 30 December 1975, § 230a; Poland, *Code of Criminal Procedure (Kodeks postępowania karnego)*, 6 June 1997 (as amended), Art. 362.
- <sup>37</sup> Bulgaria, Penal Procedure Code (*Наказателно-процесуален кодекс*), 29 April 2006, last amended 18 May 2021, Art. 391.
- <sup>38</sup> Portugal, Code of Criminal Procedure (*Código de Processo Penal*), approved by Decree-Law 78/87 (*Decreto-Lei n.º 78/87*), 17 February 1987, **as amended by Law 33/2019**, of 22 May (*Lei n.º 33/2019, de 22 de Maio*), last amended by Law 57/2021, 16 August 2021, Art. 87 (1).
- <sup>39</sup> Portugal, Code of Criminal Procedure (*Código de Processo Penal*), approved by Decree-Law 78/87, 17 February 1987, **as amended by Law 102/2019**, of 6 September (*Lei n.º 102/2019, de 06 de Setembro*), last amended by Law 57/2021, 16 August 2021, Art. 87 (1) and (2).
- <sup>40</sup> CoE, Committee of Ministers (2011), *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum*, Strasbourg, October 2011, para. 59, p. 30.
- <sup>41</sup> Austria, Juvenile Court Act 1988 (*Bundesgesetz vom 20. Oktober 1988 über die Rechtspflege bei Straftaten Jugendlicher und junger Erwachsener (Jugendgerichtsgesetz, JGG)*), Federal Law Gazette No. 599/1988, 20 October 1988, § 36a (2) and (3).
- <sup>42</sup> Germany, Youth Courts Law (*Jugendgerichtsgesetz, JGG*) in the version of the promulgation of 11 December 1974 (*Federal Law Gazette [BGBl.]*) Part 1 p. 3427, most recently amended by Article 1 of the Act of 8 July 2008 (*Federal Law Gazette Part 1 p. 2099*), 11 December 1974, Section 70 c read in conjunction with Section 68 b.
- <sup>43</sup> *Ibid.*, Section 68 b.
- <sup>44</sup> Estonia, *Code of Criminal Procedure (Kriminaalmenetluse seadustik)*, 12 February 2003, § 75 (4).
- <sup>45</sup> Malta, Act No. XVIII of 2020, an Act to further amend the Criminal Code, Cap. 9 (*Att Nru XVIII tal-2020, Att li jkompli jemenda l-Kodiċi Kriminali, Kap. 9*), 10 June 1854 (as amended), Art. 534AGL.

# 6

## RIGHTS OF CHILDREN DEPRIVED OF LIBERTY: DEPRIVATION OF LIBERTY AS A LAST RESORT AND TREATMENT OF CHILDREN IN DETENTION

This chapter examines the views of professionals and children interviewed regarding deprivation of liberty. Depriving children of their liberty has specific requirements, considering their vulnerable position in these situations, which the directive introduces.<sup>1</sup> Deprivation of liberty should be used strictly as a last resort, and other measures should take priority. Furthermore, children deprived of liberty are entitled to a medical examination, special treatment and enhanced contact with their family members.

FRA has published information on criminal detention standards. For example, see the FRA [Criminal Detention Database 2015-2019](#) on EU Member States' detention conditions and FRA (2019), *Criminal detention conditions in the European Union: Rules and reality*. These publications are not child specific. However, they include some findings on the detention of children.

### 6.1. DEPRIVATION OF LIBERTY OF CHILDREN AS A LAST RESORT

#### Legal overview

The general rule is that children can be deprived of their liberty before trial, including in police custody, only when strictly necessary. This means when non-custodial measures are inappropriate or ineffective, according to Articles 10 and 11 and recitals 45 and 46 of the directive. The rule reflects the UN Committee on the Rights of the Child's recommendations in General Comments Nos. 10 and 24.<sup>2</sup>

Authorities should always consider alternative measures before deprivation of liberty. These include restrictions on movement and residence; restrictions on personal contacts; reporting obligations; participation in educational programmes; or, with the child's consent, participation in therapeutic or addiction programmes.

The decision to impose detention should be reasoned and taken without undue delay. It should be subject to judicial and periodic review automatically, or when children and their lawyers challenge the decision. Moreover, children should be deprived of their liberty for the shortest possible time, considering their situation and the circumstances of the case.<sup>3</sup>

These provisions of the directive reflect the requirements of Article 6 of the Charter of Fundamental Rights of the European Union and Article 5 of the ECHR. They also reflect the need to accommodate the children's best interests while they are deprived of liberty, according to Article 24 of the Charter. Children's "arrest, detention or imprisonment" must be used "as a measure of last resort and for the shortest appropriate period of time", Article 37 (b) of the UN CRC states.



The ECtHR applies the principle of depriving children of their liberty as a last resort consistently in its case law on Article 5 of the ECHR. National authorities must consider and assess the effectiveness of alternative measures before depriving children of their liberty, for example when ordering their pre-trial detention.<sup>4</sup> Similarly, children's deprivation of liberty should be "a measure of last resort" and used "for the shortest appropriate period of time", the CoE's guidelines and recommendations suggest. Special efforts must be undertaken to avoid pre-trial detention.<sup>5</sup>

States parties should delimit the pre-trial detention of children by effectively using the above alternatives, the UN Committee on the Rights of the Child stresses. The detention's conditions and duration should be clear, delimited by law and subject to regular review.<sup>6</sup> Furthermore, mandatory minimum sentences are incompatible with the principle of using detention as a last resort, it argues.<sup>7</sup>

### **Findings: national laws, professionals' perspectives on and children's experiences of deprivation of liberty and alternative measures**

The Member States studied have prioritised alternative measures. These include house arrest, placement in a suitable institution and educational measures aiming to rehabilitate rather than incarcerate the child.

Member States' laws rely on different principles for non-custodial measures.

Austria,<sup>8</sup> Germany,<sup>9</sup> Italy,<sup>10</sup> Malta<sup>11</sup> and Portugal<sup>12</sup> invoke the principle of proportionality. Children are not arrested, and pre-trial detention is not imposed or maintained if less severe measures can achieve or have achieved the same goal. Alternatives include home arrest, accommodation in an assisted living facility and changing the adult with parental responsibility, if necessary. These are combined with temporary probation assistance.

Legislation in Belgium<sup>13</sup> and Poland<sup>14</sup> refers to a range of measures, starting with the most lenient and ending with criminal detention. The Federal Youth Act explicitly anchors this idea in Belgium. In Bulgaria, children can be deprived of liberty only in exceptional cases.<sup>15</sup> In Estonia, a court may replace a child's criminal detention with placement in a closed childcare institution, the Code of Criminal Procedure provides.<sup>16</sup>

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**“Well, as I started here in 2008 [...] And it is already noticeable that far fewer juveniles are taken into custody. The juveniles who are taken into custody are to some extent very problematic, who are very delinquent, who have already had many main hearings before, where there have been many graduated sentences: so, it usually starts with diversion, probation, community service, then, it increases to a conditional custodial sentence with instructions and then another conditional sentence and, at some point, if [they do] not stop delinquent behaviour, [they are] taken into custody.”**

Prosecutor, Austria.

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**“It is very rare for us to resort to this most severe measure. We always aim to place the child under supervision of a parent, guardian, official from the respective institution. But the available remand measures do not provide many options. The range of measures is, I would say, at both extremes: either the lightest possible measure, or detention. There is not much in the middle. It is just that our law is imperfect, not up to date.”**

Judge, Bulgaria.

### *Application of detention and alternative measures in practice*

In Austria, Estonia, Germany, Italy, Malta, Poland and Portugal, deprivation of liberty both before and after trial is applied only as a last resort, most professionals confirm. Views are somewhat divided among interviewees in Belgium and Bulgaria. Nevertheless, children's deprivation of liberty is exceptional and applied when there are valid reasons, most professionals interviewed agree. This is contrary to some interviewed children's views.

In practice, only children who commit severe crimes or repeatedly commit crimes are deprived of liberty, professionals note. This too is contrary to the experience of some interviewed children.

### *Non-custodial measures*

The directive prioritises non-custodial measures.<sup>17</sup> These include restrictions on movement and residence; restrictions on personal contacts; reporting obligations; participation in educational programmes; or, with the child's consent, participation in therapeutic or addiction programmes.

An alternative measure is applied, both before and after trial, in most cases, prosecutors and judges across all Member States say. Non-custodial measures should be preferred, as detention means separation from family, school and friends, two judges and four non-legal experts in Belgium point out.

The availability of these measures differs across the Member States studied. In Austria, Belgium and Germany, their availability also differs across regions. Interviewees identified various measures, such as:

- not allowing the child to leave their place of residence (house arrest);
- electronic surveillance or an ankle monitor;
- placing the child in a closed childcare institution;
- community service;
- counselling;
- social programmes;
- learning programmes;
- addiction treatment;
- multidimensional family therapy;
- paying the victim for damage caused by the crime.

Electronic surveillance or ankle monitors are typical in Estonia when a child commits criminal offences repeatedly, has a suspended sentence and commits another offence during probation, interviewees mention.

Children may be placed under the supervision of another adult appointed to hold parental responsibility before the sentence. Supervision by someone other than parents, such as inspectors or social workers, tends to be more successful for re-education, a prosecutor in Bulgaria explains. “[A]fter an illegal act has been committed by the child, it may be a little late to exercise parental supervision”, they state. In Bulgaria, the available alternatives are not sufficient and the authorities have few options, the prosecutor and a judge also note.

Alternative measures to deprivation of liberty serve the public interest, a social worker from Malta explains. The court prefers measures aiming to give back to society, for example working with elderly people.



Belgium, Estonia and Germany and Italy have an in-between measure, shock imprisonment, that can sometimes be successful, practitioners mention. It deprives the child of liberty for a short time and then releases them. Non-custodial measures are used later in the proceedings. Children are locked up for two weeks pre-trial to achieve a quick reaction, two social experts in Belgium explain.

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**“We now have the short stay, which has not yet been legally anchored, but that is a kind of pilot project where young people are placed briefly and contextual guidance is then linked to it. And in my experience, this is often used to give a good shock, even though researchers have said 1,000 times that it doesn’t work. But in my experience, it does happen often.”**

Policy advisor on children’s rights, Belgium.

More than half of the children interviewed had experienced a non-custodial alternative measure. This is “a way to help us to find a way out of the criminal history [...] and it is much more useful than detention”, according to two children in Germany. Most of the interviewed children welcome non-custodial alternative measures. However, the effectiveness of these measures is only guaranteed when a control system is in place, they highlight.

Interviewees describe some alternative measures positively. These include participation in social competence and anti-aggression courses (as in Germany; see Germany promising practice box). Accommodation in community centres (as in Italy) and participation in innovative life-planning processes (as in Austria, see Austria promising practice box) are also described positively.

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**“Yeah, but I think that’s really a bit useless. It’s really a waste of time on the system you know. For example, they say that you have to go to school, but there is no one to check that. I also had it once, then I had to go to school, but I was just outside in the park. And even if the police saw me, they’d just come and chat, and then they’d say it would be better that I am back to school tomorrow. But that was it. If there is no consequence, why should I go to school?”**

Child, Belgium.

## PROMISING PRACTICE

### Germany: Social task force for an offensive through pedagogy (*Soziale Task Force für offensive Pädagogik, SToP*)

Sozius Hilfen Berlin is an institute for the prevention of youth violence and development of future perspectives (*Institut für Jugendgewaltprävention und Perspektivenentwicklung*). It developed SToP to help young habitual offenders (*Intensivtäter*). SToP focuses on preventing stigmatisation, criminality and violence.

The programme is based on cooperation between family, child protection services, police and other institutions that are in contact with the young offender. Specific professional intervention strategies focus on sustainably developing new forms of living, life aims, and structures of thought and action.

SToP has two modules.

The first module, the ‘clearing’ phase, focuses on building relationships with the offender and their family. It includes an initial assessment of the offender’s background and challenges.

The second module, the ‘assistance’ phase, focuses on creating a stable working relationship. This phase consists of individual and group sessions. It focuses on demonstrating alternatives and improvements, aiming to integrate the young person into their social network.

The Senate Department for Youth, Education and Family has financed the task force since 2008. SToP has been part of Berlin’s public prevention and security programme since 2017.



## PROMISING PRACTICE

# Austria: Promising practice to reduce pre-trial detention

Social Net Conferencing (*Sozialnetzkonferenz*, Soneco) in Austria is an interesting initiative to reduce the time child defendants spend in pre-trial detention. It is only available to children in pre-trial detention. The probation service Neustart offers and coordinates this.

Soneco consists of meetings between crucial members of the child defendant's social network and professionals. Members of the child's social network include parents, neighbours, friends, football coaches and priests. Examples of professionals are job coaches, residential facility staff, therapists and Youth Welfare Authority staff. The meetings aim to develop alternative measures to pre-trial detention, and they require the child's consent.

In the Soneco framework, a plan is developed for how children's entire social network can best support but also control them. This is so that they can manage their everyday lives without reoffending.

The plan involves committing to actions. For example, parents commit to waking the child up every morning.

Siblings commit to taking them to school or to the gym after school. In this sense, the plan consists of simple practical steps for everyday life. In addition, the child defendant must meet with a probation officer two or three times a week.

The plan is agreed with the child defendant. The judge takes this plan into account when deciding whether to release the child from pre-trial detention or keep them in custody. The child defendant, probation officer and defence lawyer are present at the hearing.

Soneco is a positive initiative, the probation officers and other experts interviewed agree. Recidivism rates are very low when children are released from pre-trial detention earlier through Soneco, the probation officers interviewed say. Soneco is an important instrument for helping reintegrate children deprived of liberty into society and prevent recidivism.

*For more information, see Neustart's web page on **probation services**.*

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**"I am dealing with the case of a child who is almost 18 who has perpetrated a ninth crime, and he ended up directly in the juvenile detention facility. Maybe, if he had been detained before, he would not be in this situation now. What I would like to stress with that is that we should not [automatically] acclaim alternative measures because they are not necessarily the right thing."**

Social worker, Italy.

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**"Community service would be preferred to restriction of liberty. However, we had two cases where juveniles were beyond help unfortunately. They were already in a cycle of crime. It was our plea as defence to request the restriction of liberty because it was safer for these two juveniles to be in prison rather than anywhere else."**

Lawyer, Malta.

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**"We try to only impose detention as an exceptional measure. But the most interesting aspect is that we have had parents saying 'We insist you detain them', because they think that this would help re-educate them to some extent. It does not happen very often, but it happens."**

Police officer, Bulgaria.

## Detention

In some cases detention of a child is unavoidable, all professionals interviewed agree. Some professionals even favour detention in certain cases.

There are cases when even the defence itself asks for deprivation of liberty, a lawyer in Malta recalls.

In some cases, parents understand and support the need to detain a child, a police officer in Bulgaria notes.

In Austria, Estonia, Italy and Portugal, detention is only used when all alternatives prove ineffective, some interviewees from all professional groups note. In Belgium, ‘last resort’ does not mean that all other measures must be exhausted before detention, professionals interviewed indicate. Placement in detention should be used with caution, but is sometimes necessary, they argue. It is not necessary to try alternative measures first, one social expert interviewed argues.

#### *When children are deprived of liberty*

Professionals were asked to elaborate on typical cases when children are deprived of liberty before and after trial. Various factors increase a child’s chances of being detained, professionals across all Member States note.

- The seriousness of the crime came up in Austria, Belgium, Bulgaria, Estonia, Malta, Poland and Portugal. In Bulgaria and Poland, there is a social expectation to detain someone accused of committing a serious crime that attracts public attention, lawyers add. FRA (2021), *Presumption of innocence and related rights – Professional perspectives* briefly discusses the relationship between social expectations and administering justice. This includes applying detention.<sup>18</sup>
- Reoffending and failure to comply with conditions for remaining at liberty is a factor in Austria, Belgium, Bulgaria, Estonia, Italy, Malta and Portugal.
- Lack of cooperation with authorities and probation services affects the outcome in Austria, Belgium, Bulgaria and Poland.

In practice, other factors also expose the child to a higher risk of being detained pending trial, interviewed professionals indicate. These are:

- low socioeconomic background (Austria, Belgium and Germany),
- no or a weak social network, and problematic family relations (Austria, Belgium, Bulgaria, Germany and Poland),
- not having legal residence status (Austria, Belgium, Bulgaria, Germany, Italy, Malta and Poland).

Children from minority ethnic backgrounds, migrant backgrounds, or disadvantaged family and social environments are generally more likely to be detained, professionals conclude. The main reason seems to be the lack of a solid and supportive family background. This prevents them from benefiting from staying at home under parental supervision. Unaccompanied refugee children are more likely to be detained before trial because they may abscond, many interviewees point out.

Roma children in Bulgaria, Italy and Portugal are more often deprived of liberty, some professionals argue. In Portugal, children belonging to an ethnic minority and to low-income groups receive less leniency and are treated differently, two lawyers interviewed add.

In Austria, Belgium and Germany, there are regional differences in the pre-trial detention of children, interviewees point out. Some judges and prosecutors may apply detention more often, they mention. This is probably because they lack experience with and specialised knowledge of juvenile justice.

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**“Do not get me wrong [...] but sometimes a deprivation is just necessary. If you are a doctor and someone is having a heart attack, you don’t first try to have a conversation with the patient about healthy eating habits, but you immediately start resuscitating. Actually, it’s the same with the response to juvenile delinquency. Sometimes it’s necessary to go for detention and there’s no point in resorting to alternatives at that point.”**

Member of the supervisory body for closed facilities, Belgium.

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**“Yes, especially with underage unaccompanied refugees, it has a strong influence on the part of the authorities, because there is usually no stable social environment here in Germany. [...] These are people who have usually been to many different European countries and have no language skills here. And there is always the assumption that there is a risk of flight. That is very unpleasant in this area, but it [pre-trial detention] is actually always done.”**

Lawyer, Germany.

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**“The hand of justice is heavier with Roma, with Africans and with the poor. There’s no doubt about it. Both in the option not to suspend prison sentences and in the range of the sentences. There are judges who are exceptions.”**

Lawyer, Portugal.

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**"I have not yet succeeded in convincing a court that the state's failure to provide such facilities [supervising children] in sufficient numbers cannot lead to pre-trial detention being imposed. I have not yet succeeded in having such a detention order lifted. From my point of view, it should happen, but it doesn't."**

Lawyer, Germany.

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**"Mind-blowing scenes! Six children sitting together in the garden, who are picked up after someone called it in and were put in a cell: three children in a cell for one person, for the whole night. They are then brought before the juvenile court the next morning. That is a clear example of abuse in that context. I am not saying that it always happens like that, but it happened a lot. Because of the corona measures, children sometimes spend 30 hours in a cell before coming before the juvenile court."**

Lawyer, Belgium.

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**"Well, I think especially for young people the time in the police detention centre is really shocking [...] actually, I think the police detention centre is worse than pre-trial detention. It looks like a prison from times of war or a concentration camp and the atmosphere over there is really extremely unpleasant. I got a strange mental state there; I sat down on the floor and the body automatically starts to rock back and forth because of the restlessness and this silence and that you can't talk to anyone. And the second time, I cut myself with a piece of broken glass to even get out of that cell."**

Child, Austria.

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**"The prison staff were very rude! Six or seven people enter the cell for the slightest wrongdoing and beat you with the batons. If you knock down an ashtray – the guard comes and beats you up. And then he writes a report for a punishment. If I collected five or six punishments, I was getting the 'internal sentence', that is, the correctional cell. I was there for 14 days, alone, no walks, nothing."**

Child, Bulgaria.

In Belgium and Germany, the lack of space in supervised facilities may result in placing children in detention, lawyers and social workers indicate.

In Austria, the COVID-19 pandemic decreased the number of children in prison, interviewees note. In contrast, in Belgium, children were detained in police custody and pre-trial detention for violating COVID-19 restrictions, one lawyer and one prosecutor recall.

Around two thirds of the children interviewed across all countries studied reported some experience of being deprived of liberty. These experiences include police custody, pre-trial detention and living in a closed community centre or in prison.

The most critical accounts of detention concern police custody, where children typically spent a few hours in pre-trial detention. In a very few cases, it was longer. The conditions are rough, and being in the police detention centre feels lonely, as a child from Austria vividly describes.

A child in Bulgaria had a particularly severe experience.



## 6.2. MEDICAL EXAMINATION OF CHILDREN DEPRIVED OF THEIR LIBERTY

### Legal overview

Children deprived of liberty have the right to be medically examined without undue delay to establish their mental and physical condition, Article 8 of the directive states. The medical examination should be as non-invasive as possible. A physician or another medical professional must carry it out.

Authorities should consider its results when determining the child's capacity to be questioned, or when ordering other investigative or evidence-gathering acts, or any other measures against the child. Authorities must initiate the medical examination when they see reasons for this, or at the child's, their parents' or their lawyer's request. Authorities must order a fresh medical examination when circumstances require it.<sup>19</sup>

A medical assessment should be used to determine whether a child can be placed in a juvenile detention centre, the ECtHR ruled.<sup>20</sup> The Council of Europe Guidelines on Child-friendly Justice also recommend providing medical care to children deprived of liberty.<sup>21</sup> This treatment should be provided "as soon as possible after admission". This is to ensure children's physical and mental well-being from the outset and throughout their deprivation of liberty.<sup>22</sup>

Prisoners are entitled to the same medical care as persons living in the community, the CPT states.<sup>23</sup> Children who are suspects or accused persons should have access to a doctor without delay after their admission and at any time on demand, regardless of their status.

Moreover, the healthcare service should be able to provide at least regular outpatient consultations and emergency treatment. Psychiatric care and preventive healthcare must also be provided for children, and privacy should be ensured. However, they are not always provided and privacy is not always ensured in practice'.

Patients' consent and medical confidentiality must be upheld. In addition, authorities must pay special attention to the needs of particularly vulnerable children. Any decisions taken by doctors should be governed by medical criteria only.

The same requirements regarding medical examination should be provided to children deprived of liberty, the UN Committee on the Rights of the Child advocates.<sup>24</sup>

### Findings: national laws, professionals' perspectives on and children's experiences of the right to a medical examination

Laws vary across the Member States studied. Some fully implement the obligation stemming from the directive and prescribe the conduct of detained children's medical examinations in detail. Austria insists on examination by a doctor on admission to pre-trial detention, and allows an examination on request.<sup>25</sup>



A medical examination must take place on admission to the penitentiary to determine whether imprisonment would overstrain the juvenile defendant, according to the explanatory remarks of the EU Criminal Law Amendment Act 2020.<sup>26</sup> The medical examination's results help assess whether the detained juvenile can participate in questioning, other investigative or evidence-gathering actions, or measures taken or planned. Estonia<sup>27</sup> and Malta<sup>28</sup> have similar legislation.

Other Member States resort to general rules that apply to all (adult) detainees. These detainees undergo a mandatory medical examination on arriving at the detention facility to establish their general health condition. This is the case in Bulgaria,<sup>29</sup> Poland<sup>30</sup> and Portugal.<sup>31</sup>

In Germany, the federal states are in charge of implementing the requirements concerning the medical examination. They are responsible for legislation on executing pre-trial detention and all deprivation of liberty.<sup>32</sup>

However, the federal states have not amended their corresponding enforcement legislation. It includes general provisions on medical care and provisions on the introduction procedure. The introduction procedure involves a medical examination.<sup>33</sup>

Prisoners have a right to necessary, sufficient and appropriate medical services, according to the laws on the execution of juvenile punishment (*Jugendstrafvollzugsgesetze*) in Bremen, Mecklenburg-Western Pomerania, Saarland, Saxony, Schleswig-Holstein, Brandenburg, Rhineland-Palatinate, Saxony-Anhalt, Thuringia, Berlin, Hesse, North Rhine-Westphalia and Baden-Württemberg.

Laws in Belgium and Italy do not provide for such obligation. Interviewees in Belgium do not know whether this is done. However, interviewees in Italy can explain the process in detail.

#### *The medical examination in practice*

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**"A medical examination is absolutely standard, even upon admission to pre-trial detention. The first thing is a presentation to a prison doctor. And the investigating magistrates also ask about it before the detention, or should do so. Are there any particularities to be considered? Are there any illnesses? Are they taking medication, etc.? That must be clarified beforehand. And there is always the right to request assistance."**

Prosecutor, Germany.

Children are always medically examined at the beginning of pre-trial detention, according to most professionals interviewed in all Member States studied who have relevant experience.

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**"Sometimes, the police request a medical examination if the minor has visible injuries, in order to document them. That is also to safeguard ourselves. This way we can prove the minor was not injured while in police custody."**

Police officer, Malta.

There was no consensus among practitioners on whether children are examined when taken into police custody. However, in Austria, Italy and Malta, the examination is usually carried out immediately after defendants are placed in police custody, according to police officers. Police officers in Malta often initiate medical examination themselves, a police officer explains. This is especially the case if the child has any injuries.

Medical examination on admission to a detention facility is common practice in all countries studied, according to the fieldwork.

In Belgium, a thorough medical examination on admission to detention centres is not standard practice, interviewees clarify. As interviews were conducted during the COVID-19 pandemic, children were tested for COVID-19, interviewees indicate. Apart from that, children are mainly checked for conditions that require medication, such as diabetes.

In other countries, children can be either examined on site or taken to a health centre.

In Estonia, detained children are not asked to consent to a medical examination, a police officer emphasises. Instead, a prison doctor automatically examines them. The scope of the examination appears fairly basic. Usually a doctor records any injuries, and asks the child about medications, use of alcohol and drugs, family doctor's information, etc.

The medical examination is merely a meeting with a doctor in which they talk and fill out a questionnaire, some interviewees across the countries studied say. However, a physical examination also takes place, according to other interviewees. It can reveal injuries that would have stayed hidden otherwise, an Austrian judge notes.

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**"I can't tell you [how it goes]. But I do think that they have to undress, because I have often had the experience that injuries were found by the medical officer, which are otherwise hidden under clothing. So, I do think that they are examined without any clothes on, at least externally."**  
Judge, Austria.

In Malta, the examination takes place in a separate, private room and is confidential like a normal medical examination, professionals interviewed claim. The physical examination is as non-invasive as possible and conducted in a highly ethical manner. A prison warden accompanies the child in the health clinic. In Poland, girls deprived of liberty may also undergo a gynaecological check-up, if necessary, a non-legal expert adds.

In Austria, Italy and Malta, both physical and mental health conditions are medically assessed, interviewees report. This includes if the child shows suicidal tendencies or self-harming behaviour, and if their mental state allows them to be detained. The assessment of mental condition is regularly updated.

Professionals interviewed in Estonia were unsure whether mental health is examined. In Poland, the process does not include an assessment of the child's mental health, interviewees state. However, children may be psychologically evaluated later in a detention facility. In Bulgaria, if mental health problems are observed, the child is either not detained or a psychiatrist is called, some lawyers point out.

Children, parents and lawyers have the right to request a medical examination at any time, interviewees in Austria, Bulgaria, Estonia, Italy, Malta, Poland and Portugal generally agreed. However, in Estonia, children or their parents may not be aware of this right, one lawyer notes. Most interviewees in Poland do not know whether children are informed of this right.

Children are informed of this right, one of the interviewed lawyers says. If a child is arrested and taken to hospital for examination, they explain every step of that procedure to the child in detail, one police officer states. This process, however, is informal and outside the official framework of informing children about their procedural rights.

Most interviewed children who had been detained could not recall whether they had been medically examined at the beginning of their detention, or whether they had received any information about this right. In Belgium and Italy, a medical examination or brief medical check-up is more consistently undertaken when children enter a facility, they report.





*How and for what purposes do national authorities use the results of the medical examination in practice?*

The medical examination's results should be considered when determining the child's ability to be questioned or undergo other investigative or evidence-gathering acts, according to Article 8 (2) of the directive. They should also be considered when determining any measures taken or envisaged against the child.

Medical examinations have various purposes, interviews with professionals indicate. They are primarily for determining if any further medical treatment is required. However, they also determine if a child can be detained, and are used in sentencing.

In Austria, Bulgaria, Estonia, Germany, Italy and Poland, the child's capacity to participate in the proceedings and be questioned is determined on the basis of the medical examination's results, professionals state. The results are also used to assess whether the child is psychologically fit to be detained. Moreover, they may be used to assess if the child can be held criminally responsible in sentencing.

The results of medical examinations are also used in case of complaints about maltreatment in police custody or detention. In these cases, the results are sent to a prosecutor to investigate if the authorities used violence, as a prosecutor from Bulgaria explains.

A police officer in Malta confirms that, and sees medical examinations as protection from false allegations of mistreatment.

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**"[...] if any traumatic injuries have been identified that the medical specialist has registered and the detainee says that they were caused during detention or by police officers while working with them, a copy of these documents is sent to us and we are investigating potential police violence. This applies to both adults and children."**

Prosecutor, Bulgaria.

## **6.3. TREATMENT OF CHILDREN DEPRIVED OF THEIR LIBERTY**

### **Legal overview**

The directive pays particular attention to children deprived of their liberty. The well-being of children demands special care and attention, under Article 24 of the Charter of Fundamental Rights of the European Union. It obliges authorities to make children's best interests a primary consideration and consider the children's views, according to their age and maturity.

There are requirements for the detention of children, as Article 12 of the directive spells out. Detained children must be held separately from adults, unless their best interests indicate otherwise. This also applies to police custody, except for extraordinary circumstances.

However, children may be detained with young adults under 24, unless this is contrary to their best interests. Young detainees who turn 18 may continue to be detained with children and separately from adults unless the best interests of other detained children dictates otherwise.<sup>34</sup>

The directive also requires that detained children must be treated in an appropriate manner, as they are in a particularly vulnerable position. Accordingly, national authorities should ensure:

- detained children's health, and physical and mental development;
- their right to education and training, including if they have physical, sensory or learning disabilities;
- the effective and regular exercise of their right to family life, that is, to maintain regular contact with their parents, family and friends through visits and correspondence, unless there are exceptional restrictions;<sup>35</sup>
- access to programmes that foster their development and reintegration into society;
- respect for their freedom of religion or belief, although this does not require actively assisting children in worshipping.<sup>36</sup>

The right to family life is protected by the specific requirement that children in detention can meet with their parents, as soon as possible, as Article 12 (6) of the directive states. This is provided that it does not jeopardise investigative and operational requirements.

The directive is aligned with Article 37 (c) of the UN CRC. Detained children must be separated from adults as a rule, unless their best interests dictate otherwise, the UN CRC states. Children deprived of their liberty must be treated with humanity and respect, and according to their age, Article 37 (c) of the UN CRC states. It further enshrines children's right to maintain contact with their family through correspondence and visits, save in exceptional circumstances.

Thus, imprisoning a child in an adult prison is inhuman and degrading treatment, the ECtHR found.<sup>37</sup> A short-term placement there can also be degrading and inhuman treatment when combined with other inadequate conditions.<sup>38</sup> The child's best interests should always guide national authorities, and the child should be guaranteed proper care and protection, the ECtHR's case law shows.<sup>39</sup>



The CoE's guidelines and recommendations include standards for detention conditions identical to those of the directive. For example, children deprived of their liberty should:

- be held in suitable premises and, as a rule, separately from adults, unless their best interests entail otherwise;
- be properly accommodated regarding their privacy, health and hygiene;
- have regular contact with their parents, family and friends, and contact should not be restricted as punishment;
- receive proper education and have access to leisure, for example physical education and sport;
- enjoy freedom of thought, conscience and religion;
- have access to educational and reintegration programmes;
- receive appropriate nutrition and medical care.

These standards apply in addition to those applicable to adults.<sup>40</sup>

The UN Committee on the Rights of the Child emphasises the need to observe similar standards. No disciplinary measures that could compromise the physical or mental health or well-being of children should be imposed, the committee notes. For example, this rules out corporal punishment, placement in a dark cell, solitary confinement, etc. Solitary confinement is only to be used to protect a child.<sup>41</sup>

For further information, see FRA [Criminal Detention Database](#) 2015–2019 on EU Member States' detention conditions, and FRA (2019), *Criminal detention conditions in the European Union: Rules and reality*.

### **Findings: national laws, professionals' perspectives on and children's experiences of the right to special treatment**

All Member States studied have legal frameworks regulating the detention of children. However, the details of these regulations and their comprehensiveness differ.

Laws in five of the Member States studied include the general rule that children should be detained separately from adults, unless this is against their best interests. These Member States are Austria,<sup>42</sup> Estonia,<sup>43</sup> Germany,<sup>44</sup> Malta<sup>45</sup> and Poland.<sup>46</sup> Legislation in Bulgaria,<sup>47</sup> Italy<sup>48</sup> and Portugal<sup>49</sup> also provides for separating children from adults in detention. However, it does not mention that children can be detained with adults if that is in their best interests.

Legislation in seven of the Member States studied provides rules ensuring that children in detention have access to healthcare, education, training and sport activities. These Member States are Austria,<sup>50</sup> Belgium,<sup>51</sup> Estonia,<sup>52</sup> Italy,<sup>53</sup> Malta,<sup>54</sup> Poland<sup>55</sup> and Portugal.<sup>56</sup> The Flemish Government has similar legislation for its regional facilities. In Germany, the federal states regulate this.

Laws in Bulgaria,<sup>57</sup> Malta<sup>58</sup> and Portugal<sup>59</sup> allow detained children to maintain contact with their families.

#### *Separation from adults*

Children are almost always separated from adults in police custody, children interviewed in all Member States studied indicate. They are always strictly separated from adults in detention. Of the professionals interviewed in Austria, Bulgaria, Estonia, Italy and Malta who had experience with children deprived of liberty, most confirm this.

Children are held in single cells in police custody, all interviewees in Austria elaborate. They are held in youth departments in pre-trial detention facilities, and in separate juvenile detention facilities when in criminal detention.

However, in Austria and Malta, the situation is different for girls, professionals interviewed point out. Girls are held with adult women in prison.

In Belgium, Germany and Poland, children are separated from adults in detention centres but not in police custody, interviewees state. There are different ways to separate children from adult prisoners depending on the detention facility, as the interviewees in Germany describe. For example, they can designate a detention facility exclusively for children and young adults, or establish a separate unit within an adult detention facility.

Generally, post-trial detention guarantees separation. In Belgium, separating children from adults is mainly a problem in police custody, interviewees point out. There are separate waiting rooms for children in courts, a lawyer adds. These rooms look like offices rather than cells.

Still, police stations in Belgium are not equally well equipped to achieve separation. Some police stations have special youth cells or youth rooms, but other areas do not, one prosecutor and three police officers clarify. Interviewees in Germany describe a similar situation.

Children in Portugal are separated from adults in police custody but not in detention, according to professionals interviewed. In police stations, both adult and child defendants are detained in a single room/cell, one police officer says. The situation is different for pre-trial detention or a prison sentence.

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**“In Portugal, we have a specific school prison [for children] in Leiria, which is called *Prisão Escola Leiria*. But in Lisbon, all the pre-trial detainees go to the EPL [Lisbon Prison Establishment] and above 16 years old they stay where the adults are.”**

Lawyer, Portugal.

In regional prisons in Portugal, cells are used for groups of inmates, a judge adds. It is very difficult to guarantee that children will be held separately. Placing a child in a prison other than the School Prison of Leiria is based on the proximity to their family's home, according to this interviewee. This facilitates family visits.

In the School Prison of Leiria in Portugal, children are held separately in individual detention cells in seven pavilions. They are split according to age, and depending on whether they are serving a sentence or detained before trial. In addition, the School Prison of Leiria has facilities for children at risk of suicide, where they are accompanied. Children aged 16 or under are held separately from older detainees, a specialist interviewed stresses.

#### *Access to healthcare during detention*

Detained children have access to healthcare in both detention centres and police custody, most professionals confirm in eight Member States: Austria, Belgium, Bulgaria, Estonia, Italy, Malta, Poland and Portugal. This healthcare is in addition to the initial medical examination.

In Austria and Portugal, children can always ask to see a doctor, and those using addictive substances see the doctor regularly anyway, interviewees elaborate. Children also continue any previous medical treatments.

In Italy and Malta, children are offered psychological support in addition to regular healthcare during their detention period, interviewees report.

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**“Psychological support is also aimed at preventing the risk of self-harm and suicide, because this is another recurrent phenomenon in juvenile prisons. It is understandable: deprivation of liberty for an adult is terrible and even more so for a child.”**

Prosecutor, Italy.

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**“There is already sufficient medical care. There is a separate hospital unit in the prison. I don’t know if there are any gaps, especially at night. What I know from the prison [Vienna] is that the juveniles are allowed to shower two or three times a week. I don’t think that’s enough, for example. In my opinion, showers should be possible every day.”**

Judge, Austria.

However, in Belgium, Estonia, Germany and Poland, only very basic healthcare care is provided, professionals interviewed claim. In Belgium and Bulgaria, medical examinations are sporadic, interviewees report.

In Estonia, there is a shortage of medical staff in detention facilities for children, a social worker indicates. Children are sent to support services or a family doctor outside the closed childcare institution. However, this is not always possible for logistical reasons.

There can be hygiene issues, one judge interviewed in Austria notes.

Several children across all Member States mentioned difficulties while in police custody due to lack of access to regular medications, or lack of

care for alcohol intoxication or drug-related withdrawal symptoms.

However, it seems that access to healthcare was ensured during detention, in contrast to police custody. Yet several children report issues. Not having access to a drug treatment programme while detained was odd, one child in Belgium thought.

#### *Education, reintegration measures and leisure activities*

Interviewee accounts of education, reintegration measures and leisure activities differ significantly. In some Member States, the professionals interviewed are sure that children in detention have access to education, reintegration measures and leisure programmes. In others, some argue that access depends mainly on the length of stay. Other professionals claim that such programmes are insufficient or simply do not exist at all.



In Italy, Malta and Portugal, all detention centres always ensure the right to education and professional training, professionals interviewed agree. There have been positive changes in this regard over time, some interviewees note.

The Prison School of Leiria offers a wide range of programmes, on which professionals interviewed in Portugal elaborate. Children detained there have access to education; vocational training such as cooking, bricklaying and gardening; and various sport activities.

In Austria, Belgium, Estonia and Poland, the availability of measures depends on the length of stay, professionals interviewed state.

In Austria, children in pre-trial and short-time criminal detention have no access to vocational training or reintegration measures. As children in pre-trial detention have not been convicted yet, there is no need for measures fostering reintegration into society, according to a judge interviewed. Still, some basic education is offered to children in pre-trial detention, particularly those of mandatory school age.

Children detained in Austria, Belgium, Estonia, Germany and Portugal can participate in outdoor activities and physical exercises to a certain extent, they state in interviews.

In Bulgaria, there are no specific programmes or measures for detained children, as far as the judges and prosecutors interviewed are aware. If a detained child wants education, someone, for example their parents, must bring them self-learning materials, a prosecutor mentions. Children confirmed this.

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**“Over the past few years, there has been an increase in services available for young offenders, especially programmes on education and training. They are usually encouraged to pursue some type of education and at least use the time they have in prison constructively.”**

Psychologist, Malta.

## PROMISING PRACTICE

### Opera project in Portugal

The Prison School of Leiria runs the Opera in Prison (*Ópera na Prisão*) project in three-year cycles. It involves the detainees, prison management, specialists, guards, an orchestra and professional opera singers.

Children develop artistic skills and learn about music. At the same time, they develop empathy and understand the value of effort and work. They are allowed to go and see the actual show, provided they behave well. They perform a show themselves at the end.

It is now part of the international **Traction project**, which focuses on opera co-creation for social transformation.

The Calouste Gulbenkian Foundation (**Fundação Calouste Gulbenkian**) finances the project as part of its Artistic Practices for Social Inclusion (*Práticas Artísticas para a Inclusão Social*, Partis) initiative.

*Source: For more information, see the SAMP web pages on the first cycle's performance of Don Giovanni (2015) and the second cycle's Mozart Pavilion (Pavilhão Mozart) (2016/2018).*

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**“Q: And what do you do when you go there [outside area]?”**

**“A: Nothing... For five months in this ‘square’ [prison jargon for the walking area] all I saw was one raven and one plane.”**

Child, Bulgaria.

## Challenges with access to programmes

Lack of funding and staff, and overcrowded facilities, can compromise the adequacy and quality of the opportunities offered to children during the detention period, professionals interviewed in Italy mentioned.

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**“Some activities are for sure offered in detention facilities. I cannot tell if these are adequate. They are not individually tailored, though. Also, because the high number of detainees, compared to the available teachers and staff members, makes it extremely difficult to actually benefit from these opportunities.”**

Lawyer, Italy.



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**"That's the big tragedy: the whole school career of a child threatens to come to a halt if children have to stay in a closed institution. And sometimes there are children who commit serious offences, but who actually went to school quite regularly, and detention jeopardises the whole school career. Now we do see that for some children distance learning is organised. What's more, there are children who come from Mol to Antwerp every day to attend their normal school and then return to the facility in the evening. They have to get up at 05.30 and they are on the train at 06.30 to attend their normal school and then return to the institution at 19.00. They are very motivated people, but those are the exceptions."**

Judge, Belgium.

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**"It really is a joke; 'education' they call it. Well, here in the facility, I have one teacher that is competent and whom I can go to for questions for physics and mathematics, that's it [...] Because it is expected that 'the girls from Beernem' are a bit dumb, and that they would want to become a hairdresser, a nail specialist, a cashier or a seamstress – yes, those are the four options to choose from. That's it."**

Child, Belgium.

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**"When he comes to prison at the age of 14 and leaves at the age of 22, he has not really reached the level of a 22-year-old mentally [...] This can be seen, for example, in their decision-making capacity. This is often seen in their sexual life, for example. They haven't seen the part where you, I don't know, flirt with girls. This part is completely missing from their lives there. In fact, a normal development is lacking."**

Therapist, Estonia.

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**"I think that someone who is in pre-trial detention or criminal detention should be resocialised rather than secluded from life. I think I would have liked to have had more tasks".**

Child, Austria.

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**"Employment, simply, not sitting here."**

Child, Austria.

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**"[T]he children should always have the right to have a chat with their parents as well. And my experience has taught me which of my colleagues I can persuade and say, 'Let mummy come in for a minute, let mummy be mummy for a minute to those little ones who did something stupid'. But I also know that with other colleagues that will not be possible. They will feel, 'No, a phone call is more than enough'. Yes, and then they call the parents, if it's voicemail, they don't even leave a message. So, again, it depends very much on the person who does the things."**

Police officer, Belgium.

Interviewees in Belgium raised a particular problem. Children do not obtain recognised diplomas or certificates from the education or training in institutional settings, one judge, two lawyers and two social experts claim.

In Belgium, the choice and quality of educational programmes is poor, one child complains. This confirms the professionals' accounts.

In Estonia, even when programmes are offered, the personal development of children held in detention for a long time suffers, according to one practitioner.

Children interviewed wish they had had access to not only quality education, but a better programme for their daily life while in pre- or post-trial detention. They would like to feel useful and be active while detained, many state. This could be by engaging in different tasks, work and physical

activities, and having more access to entertainment.

#### *Contact with parents, family and friends*

Children can call their parents immediately upon their arrest, across the Member States studied, unless the parents are also suspected or accused of the same crime. However, seeing parents might not always be possible.

In Belgium, contact with parents depends on the good will of individual police officers, professionals interviewed suggest.

Arrested children face a practical difficulty, professionals interviewed in Austria and Poland point out. They need to remember their family members' telephone numbers, as children have no access to their mobile phones. Moreover, they need to pay the telephone fees. The interviewed children confirm this.

In Austria, children are allowed to meet their girlfriends/boyfriends even if they are also accused, according to a judge interviewed. However, a guard is present during the meetings, listens to what they say and stops the meeting as soon as they talk about the offence.

In most cases, children in detention could contact their family members both remotely and in person. However, there were different degrees and frequencies of contact.

In all Member States, children in detention are allowed to see their family members during visiting hours.

In Bulgaria, parents can be appointed as children's defence counsels alongside professional lawyers, professionals interviewed mention. This allows them to visit their children at any time. Nevertheless, children in Bulgaria have few opportunities to maintain contact with family members, they all claim in interviews. This is partly due to practical challenges such as having access to phone cards.

In Belgium and Italy, there are strict rules regarding calls and visits, children mention. They found these quite harsh. In particular, they would like to be allowed to call their family members more than two or three times a week, and to choose the time and day of the calls.

Usually, relatives can visit child defendants in detention up to twice a week. As with telephone calls, there are practical difficulties such as travelling distance, professionals mention. This is particularly an issue in Belgium, Germany, Italy and Portugal.

The interviews were conducted in the winter and spring of 2021. Therefore, the COVID-19 pandemic restrictions caused hardships, which interviewees in all Member States mention. The lack of 'normal' visits over a very long time affected the young people, professionals observe. In-person visits were allowed later in the pandemic, with restrictions such as glass separation and prior COVID-19 testing.<sup>60</sup>

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**"Visits, of course, I could talk to my mother, somehow get rid of some of my pressure, because in detention you can't show weakness, otherwise you'll be put down, your things will be taken away from you and so on. So, you can't really talk things out with your fellow prisoners. My mother supported me in bearing the deprivation of liberty, even if it was only for half an hour a week."**

Child, Austria.

# Endnotes

- <sup>1</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, recital 45.
- <sup>2</sup> UN, Committee on the Rights of the Child (2019), **General Comment No. 24 (2019) on children's rights in the child justice system**, CRC/C/GC/24, 18 September 2019, paras. 19 and 86–88; UN, Committee on the Rights of the Child (2007), **General Comment No. 10 (2007) – Children's rights in juvenile justice**, CRC/C/GC/10, 25 April 2007, paras. 28 and 80–81.
- <sup>3</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Arts. 10 and 11, and recital 46.
- <sup>4</sup> ECtHR, **Azizov and Novruzlu v. Azerbaijan**, Nos. 65583/13 and 70106/13, 18 February 2021, paras. 60–62; ECtHR, **Güveç v. Turkey**, No. 70337/01, 20 January 2009, paras. 108–110.
- <sup>5</sup> CoE, Committee of Ministers (2011), **Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum**, Strasbourg, October 2011, Guidelines 19 and 20, p. 24, and explanatory memorandum, para. 73, p. 66; CoE, Committee of Ministers (2008), **Recommendation CM/Rec(2008) 11 of the Committee of Ministers to Member States on the European Rules for juvenile offenders subject to sanctions or measures adopted by the Committee of Ministers on 5 November 2008 at the 1040th meeting of the Ministers' Deputies**, Strasbourg, 5 November 2008, paras. 10 and 111.
- <sup>6</sup> UN, Committee on the Rights of the Child (2019), **General Comment No. 24 (2019) on children's rights in the child justice system**, CRC/C/GC/24, 18 September 2019, paras. 19 and 86–88; UN, Committee on the Rights of the Child (2007), **General Comment No. 10 (2007) – Children's rights in juvenile justice**, CRC/C/GC/10, 25 April 2007, paras. 28 and 80–81.
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- <sup>8</sup> Austria, Juvenile Court Act 1988 (**Bundesgesetz vom 20. Oktober 1988 über die Rechtspflege bei Straftaten Jugendlicher und junger Erwachsener (Jugendgerichtsgesetz, JGG)**), Federal Law Gazette No. 599/1988, 22 October 1988, §§ 35, 35a and 36. Austria, Criminal Procedure Code 1975 (**Strafprozeßordnung 1975, StPO**), Federal Law Gazette No. 631/1975, 30 December 1975, §§ 172 (2) and 173 (5).
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- <sup>10</sup> Italy, **Codice processo penale minorile** – D.P.R. 448/1988, 22 September 1988, Arts. 16–19.
- <sup>11</sup> Malta, Act No. XVIII of 2020, an Act to further amend the Criminal Code, Cap. 9 (**Att Nru XVIII tal-2020, Att li jkompli jemenda l-Kodiċi Kriminali, Kap. 9**), 10 June 1854 (as amended), Art. 534AGJ.
- <sup>12</sup> Portugal, Code of Criminal Procedure (**Código de Processo Penal**), approved by Decree-Law 78/87 (**Decreto-Lei n.º 78/87**), 17 February 1987, last amended by Law 57/2021, 16 August 2021, Art. 202.
- <sup>13</sup> Belgium, The Federal Youth Law, Art. 37 § 2, section 3.
- <sup>14</sup> Poland, **Penal Code (Kodeks Karny)**, 6 June 1997, Art. 32.
- <sup>15</sup> Bulgaria, Penal Procedure Code (**Наказателно-процесуален кодекс**), 29 April 2006, last amended 18 May 2021, Art. 386, para 1.
- <sup>16</sup> Estonia, **Code of Criminal Procedure (Kriminaalmenetluse seadustik)**, 12 February 2003, § 131 (32).
- <sup>17</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, recital 45.
- <sup>18</sup> FRA (2021), **Presumption of innocence and related rights – Professional perspectives**, Luxembourg, Publications Office, Chapter 2.
- <sup>19</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 8 and recital 4.
- <sup>20</sup> ECtHR, **Blokhin v. Russia** [GC], No. 47152/06, 23 March 2016, para. 138.
- <sup>21</sup> CoE, Committee of Ministers (2011), **Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum**, Strasbourg, October 2011, Guideline 21b, p. 24.
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- <sup>27</sup> Estonia, **Code of Criminal Procedure (Kriminaalmenetluse seadustik)**, 12 February 2003, § 34 (11) 4).
- <sup>28</sup> Malta, Act No. XVIII of 2020, an Act to further amend the Criminal Code, Cap. 9 (**Att Nru XVIII tal-2020, Att li jkompli jemenda l-Kodiċi Kriminali, Kap. 9**), 10 June 1854 (as amended), Art. 534AGH.
- <sup>29</sup> Bulgaria, Execution of Penalties and Detention in Custody Act (**Закон за изпълнение на наказанията и задържането под стража**), 3 April 2009, last amended 11 December 2020, Art. 242.
- <sup>30</sup> Poland, Minister of Justice, Organisational rules of application of pre-trial detention, 22 December 2016, § 9(3). Poland, Minister of Justice, Organisational rules of application of deprivation of liberty, 21 December 2016, § 9(1).
- <sup>31</sup> Portugal, Code of enforcement of prison sentences or measures involving the deprivation of liberty (**Código da Execução das Penas e Medidas Privativas da Liberdade**), Lei n.º 115/2009, 12 October 2009, last amended by Law 27/2019, 28 March 2019, Art. 32(1).
- <sup>32</sup> Germany, **Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland)**, 23 May 1949, Art. 70, para. 1 and Art. 74, para. 1.

- <sup>33</sup> Berlin, Art. 34, para. 1; Hesse, Art. 72, para. 1; North Rhine-Westphalia, section 24, para. 1; section 36, para. 1, in conjunction with Strafvollzugsgesetz, section 45, para. 1; Baden-Württemberg, Art. 31 para. 1 IV. book.
- <sup>34</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 12 and recitals 48–50.
- <sup>35</sup> *Ibid.*, Art. 12 (5) (c), and recital 51. See also European Parliament (2012), **Charter of Fundamental Rights of the European Union (2012/C 326/02)**, OJ 2012 C 326, Art. 24 (3).
- <sup>36</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 12 (5) (d), recital 52.
- <sup>37</sup> ECtHR, *Güveç v. Turkey*, No. 70337/01, 20 January 2009, paras. 91–98.
- <sup>38</sup> ECtHR, *Zherdev v. Ukraine*, No. 34015/07, 27 April 2017, paras. 92–93.
- <sup>39</sup> ECtHR, *Blokhin v. Russia* [GC], No. 47152/06, 23 March 2016, para. 138.
- <sup>40</sup> CoE, Committee of Ministers (2011), **Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum**, Strasbourg, October 2011, Guidelines 20–21, p. 24, paras. 74–77; CoE, Committee of Ministers (2008), *Recommendation CM/Rec(2008) 11 to member states on the European Rules for juvenile offenders subject to sanctions or measures adopted by the Committee of Ministers on 5 November 2008 at the 1040th meeting of the Ministers' Deputies*, Strasbourg, 5 November 2008.
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- <sup>46</sup> Poland, Criminal Enforcement Code (*Kodeks karny wykonawczy*), 6 June 1997, Arts. 84 (1) and (2), and 212 (1).
- <sup>47</sup> Bulgaria, Penal Procedure Code (**Наказателно-процесуален кодекс**), 29 April 2006, last amended 18 May 2021, Art. 386.
- <sup>48</sup> Italy, Decree of the President of the Italian Republic (**Decreto del Presidente della Repubblica 22 settembre 1988, n. 448: Approvazione delle disposizioni sul processo penale a carico di imputati minorenni**), D.P.R. No. 448/1988, 22 September 1988, Art. 18; Italy, **Decreto Legislativo 2 ottobre 2018, n. 121: Disciplina dell'esecuzione delle pene nei confronti dei condannati minorenni, in attuazione della delega di cui all'art. 1, commi 82, 83 e 85, lettera p), della legge 23 giugno 2017, n. 103**, 2 October 2018, Art. 20.
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- <sup>55</sup> Poland, Criminal Enforcement Code (*Kodeks karny wykonawczy*), 6 June 1997, Arts. 95 and 130.
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- <sup>57</sup> Bulgaria, Penal Procedure Code (**Наказателно-процесуален кодекс**), 29 April 2006, last amended 18 May 2021, Article 91. Bulgaria, Ministry of Justice (Министерство на правосъдието), Order on internal order in arrests (**Заповед за вътрешния ред в арестите**), 6 October 2016, Art. 48.
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# 7

## PROFESSIONALS' TRAINING ON CHILDREN'S RIGHTS IN CRIMINAL PROCEEDINGS



Member States must train professionals who deal with children accused or suspected of a crime, according to the directive. They must also monitor the implementation of this training.

This chapter outlines the legal framework of these issues, and the laws and practices of the Member States studied. It also analyses the views of professionals interviewed regarding the training available on issues the directive covers.

### 7.1. TRAINING FOR PROFESSIONALS DEALING WITH CHILDREN

#### **Legal overview**

Criminal justice professionals dealing with children accused or suspected of a crime must receive special training, the directive states. Law enforcement authority and detention facility staff dealing with children must receive this training, according to Article 20. This training includes child psychology and communication.

Furthermore, judges and prosecutors must have specific abilities in this, the directive states. Alternatively, they must at least have access to specialised training. In addition, Member States must promote providing training to criminal lawyers dealing with children. They must encourage training initiatives for professionals in support and restorative justice services.<sup>1</sup>

The European Commission's European judicial training strategy for 2021–2024 also addresses training for professionals dealing with children.<sup>2</sup> The **European Judicial Training Network** and the **European Union Agency for Law Enforcement Training** provide training opportunities for judges, prosecutors and police officers dealing with children.

Professionals dealing with children should receive interdisciplinary training on the rights and needs of children, the CoE Committee of Ministers' guidelines on child-friendly justice stress.<sup>3</sup> The UN Committee on the Rights of the Child also underlines that multidisciplinary, rights-based, continuous and systematic training of professionals is important to uphold children's rights and their best interests, in line with the UN CRC.<sup>4</sup>

FRA's report on child-friendly justice deals extensively with the training of professionals handling children's cases.<sup>5</sup>

## FRA opinions

EU Member States should ensure that all professionals in contact with children receive training on child rights, child-friendly verbal and non-verbal communication and language, child development, and child-related criminal and civil legislation. Professionals should be trained to identify the varying needs of children in different age groups so that they can address these and communicate with children appropriately.

General and specialist training for judges and prosecutors should be promoted. Training should be obligatory for front-line practitioners such as police officers and court staff. Specific modules should be developed that target different professionals' specific jobs.

EU Member States should ensure that only trained professionals carry out child hearings, and that training on child hearings is mandatory and continuous for professionals. This entails increasing opportunities for training; the number of professionals trained to carry out children's hearings; and the presence of specialised, trained professionals at hearings. Professionals carrying out children's hearings must be specifically trained on appropriate questioning techniques, existing guidelines on carrying out children's hearings and the relevant legal basis.

*Source: FRA, 2015*

## Findings: national laws, professionals' perspectives, and children's experiences regarding professionals' training

Almost all Member States studied have legal provisions referring to the directive's obligation to provide training for professionals dealing with children accused or suspected of a crime, research findings confirm. The exceptions are Poland and Portugal. National bar associations typically define the design and content of this training. The training is mandatory in Estonia and Italy. This section analyses these findings further.

Specialised training to deal with children accused or suspected of a crime is important, many professionals across all groups acknowledge. Some training is generally available to all criminal justice practitioners. However, the quality and effectiveness of training offered to professionals is mixed in practice, interview findings show. Table 2 outlines the laws on training and findings from professionals' interviews on its availability.

Mandatory training is an exception; training is usually on a voluntary basis. Only around half of professionals from across interviewed groups actually received training, they report.



Training is rarely multidisciplinary, and often focuses mostly on legal aspects, interviewees say. This is particularly the case for judges, prosecutors and lawyers. Many professionals in all the Member States are especially concerned about the lack of training on how to communicate with children.

Despite such concerns and challenges, some interviewees also outlined certain noteworthy training initiatives. This chapter describes them.

**TABLE 2: AVAILABILITY OF TRAINING ON CHILDREN SUSPECTED OR ACCUSED OF A CRIME IN LAW AND PRACTICE**

Member State	Training laid down in the law	Training available: judges	Training available: prosecutors	Training available: police officers	Training available: lawyers
Austria	Yes	Yes	Yes	No	N/A
Bulgaria	Yes (draft bill)	Yes	Yes	Yes	Yes
Estonia	Yes	No	Yes	Yes	Yes, mandatory for representing children
Germany	Yes	Yes	Yes	Yes	Yes
Italy	Yes	Yes	Yes	Yes	Yes, mandatory for legal aid lawyers representing children
Malta	Yes	No	No	No	N/A
Poland	No	Yes	No	No	No
Portugal	No	No	No	Yes	No

Source: FRA, 2021

▲ Note:

N/A, not applicable.

**“No, I actually got my lawyer as public defender. And he is really good. From five stars, I would give him four point eight. That’s really good [...] He is really nice and I can talk to him openly. He is about 70 years old and has more than 50 years of experience [...] I like] that he is defending me, that I can talk to him honestly, that he is nice to me and that he wants to help. But I mean this is also his job.”**

Child, Germany.

The interviews with children indicate which specific abilities training should develop. For instance, professionals should approach children in a respectful way, speak calmly to them, and take time to listen and explain processes, outcomes and legal jargon. This means children can follow the proceedings more easily and participate effectively.

**“But he [the judge] did not let me finish what I actually wanted to say [...] Then I just thought, never mind, just give me as many hours [community service] as you want and then leave me alone, otherwise I’ll freak out. In my eyes he was just like a Nazi to me.”**

Child, Germany.

It affects the quality of the proceedings when professionals are not skilled at communicating appropriately with children.

Professionals need training on child psychology and social development, and communication skills. Children’s negative accounts of professionals’ behaviour and many suggestions of changes to it confirm this.

In countries such as Austria and Estonia, police officers and prosecutors receive special training and specialise in working with children. Children in these countries have more positive experiences, according to their interviews.

### *National laws on providing training to professionals*

Austrian law provides for special training of judges, prosecutors and all juvenile penal system personnel.<sup>6</sup> These professionals also receive further mandatory training every two years.<sup>7</sup> There is no such obligation for lawyers. However, the law encourages the bar association to offer training to lawyers dealing with juvenile criminal cases.<sup>8</sup>

Bulgaria's draft incorporating legislation aims to reinforce this obligation further. Investigative authorities, prosecutors and judges in proceedings against children must have special training in children's rights, it specifies.<sup>9</sup> Italy and Malta also have laws requiring the provision of training.<sup>10</sup>

In Estonia, the law incorporating the directive did not lead to fundamental changes. Training activities and other development activities are already in place because of legal amendments in 2018. These are available for police officers, prosecutors, child protection workers and other professionals.<sup>11</sup> Moreover, in Estonia and Italy, training courses are mandatory for lawyers appointed as legal aid lawyers to children in criminal proceedings.<sup>12</sup>

In Germany, judges and prosecutors appointed to youth courts must by law have qualifications in both legal and multidisciplinary issues, for example children's psychological and social development.<sup>13</sup> There are similar requirements for child and youth welfare service staff working in juvenile criminal proceedings.<sup>14</sup> Still, there should be more binding qualification requirements, some commentators say.<sup>15</sup>

In Poland, the Ombudsman for Human Rights underlined the lack of legal obligations for training professionals in a letter to the Minister of Justice.<sup>16</sup> However, no follow-up action was noted at the time of research. Malta lacks specialised training for people who work with young offenders, official reports say. They call for more action in this area.<sup>17</sup>

### *Special training received by the professionals interviewed*

Law enforcement officers dealing with children should undergo special training, Article 20 of the directive provides. It also encourages such training for judicial authorities and lawyers.

As mentioned above, the picture of the training that professionals actually receive is mixed, interview findings indicate. Only about half of interviewees received any such training.



Malta, Poland and Portugal are examples of Member States where specialised training is not generally available. In Malta, only social workers had attended or were aware of any special training concerning the rights of children suspected or accused of a crime.

In Portugal, professionals never receive any training in this area and are not aware the training exists, judges, public prosecutors and lawyers say. The directive is poorly promoted, and legal seminars touch on it only slightly, some professionals mention.

In Poland, none of the lawyers, prosecutors or judges interviewed has ever received training. Only two judges know of some training on child psychology. The rest are not aware of any available training.

#### *Judges and prosecutors*

In Austria, special training on children is available and mandatory, all judges and one prosecutor interviewed confirm. Professionals must participate in regular training on juvenile criminal justice and the soft skills necessary to deal with child defendants, they report.

In Bulgaria, three out of the five judges and prosecutors interviewed had not received any training. Two prosecutors had attended legal training on the rights of accused children.

In Italy, specific training sessions are available to professionals, as prosecutors and judges interviewed confirm. These sessions are especially available to juvenile judges. They focus on judicial procedures and procedural rights of children accused or suspected of a crime.

Estonia has training courses on the rights of suspected or accused children, several prosecutors interviewed mention. Two prosecutors interviewed received training on the rights of children, including training on effectively communicating with children. Two interviewed judges received multidisciplinary training on children. However, this training is voluntary and the Judicial Training Council does not systematically offer it, one of them reports.

In Germany, none of the interviewed judges and prosecutors received special training before becoming a juvenile judge or prosecutor. Voluntary training is available from certain institutions, such as the German Judicial Academy and the German Association for Juvenile Courts and Juvenile Court Assistance, a judge and a prosecutor interviewed clarify. In Poland, the National School of Judiciary and Public Prosecution provides some training on child psychology, two judges report.

The way judges treat them is positive, most interviewed children say. Judges show interest when talking to them, listen, ask questions and try to understand. The children feel heard, respected and taken seriously. Children appreciate and, in most cases, understand the explanations judges give about their decisions, they say.

Some children found the judge could be impatient and interrupt, shout or not believe them. Such behaviour hinders children's effective participation.

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**"Yes, he explained it in his own words, OK. Really OK, this judge."**  
Child, Poland.



### *Police officers*

Specialised training is available for police officers in most countries researched. However, the picture emerging from the interviews is mixed.

In Austria, interviewed police officers had not participated in special training on the procedural rights of and safeguards for suspected or accused children. Their training is “learning by doing”, two officers claim. In contrast, most interviewed police officers in Bulgaria received special multidisciplinary training.

Most Estonian police officers interviewed who work with children were certified to do so or knew about certification. They receive standard training from lecturers with different backgrounds, one police officer explains. Lecturers include child protection staff, psychologists and prosecutors.

All police officers in Germany in departments for juvenile offences must complete special training concerning juvenile criminal investigations and child-friendly approaches, they confirm in interviews. Training courses are updated to include new legal developments such as the directive, three police officers confirm. Various professionals working in juvenile justice deliver training, including juvenile judges and prosecutors, social workers and the JCA, one police officer reports. However, no interviewee received or knows of training on effectively communicating with children.

Police officers in Portugal receive no specific training in this area, they report in interviews. Although the training exists, it is not yet widely available, they claim. Police officers in Poland receive training on juvenile justice, but not specifically on children’s rights, they report.

The negative attitude and behaviour of police officers is stressful and triggers uncooperative behaviour, according to most children interviewed. Children suggest improving the police officers’ interpersonal skills to help the proceedings. Children want to be respected, they often say.

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**“Well, they [the police] should observe the public order. That is why they are officials, not only to act important. More precisely, they are very rude, they offend. You behave with them like a human and they treat you like a dog.”**

Child, Bulgaria.

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**“I guess it’s not a rule, but I feel that policemen – more often than policewomen – treat young persons, especially young girls, with such a terrible disrespectful approach. They don’t pass [on] everything they should pass [on] about the right of the detained person, for example about this right to trial and so on. I think this is a big problem with how the police work in this case. They treat people who are particularly vulnerable or just younger from the position of power.”**

Child, Poland.

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**“The way they act, among other things, that’s it, and of communicating. If they are calm, we, on our side, will also think to answer with more calm, won’t be in so much pressure, like really nervous to answer. We try to understand what we have done wrong. But if they make an aggressive entrance, we will also reply in an aggressive way or will not answer only because they wanted us to. That’s what happens in most cases, they start to be aggressive, and we begin to be like them also.”**  
Child, Portugal.

There is a difference between appropriate and inappropriate treatment, one child notes. Each has an impact on the child’s behaviour during questioning.

#### *Lawyers*

Although training is generally available for lawyers, it is typically received and organised on a voluntary basis, interview findings confirm.

In Austria, only one of five interviewed defence lawyers attended training on the directive, they report. Their attendance was voluntary. In Bulgaria, two out of five lawyers received legal training on the directive. Again, this was on a voluntary basis.

Similarly, Germany has a special training course on juvenile criminal law that focuses on the specifics of juvenile criminal proceedings, some lawyers note. Again, participation in this training is entirely voluntary. In Malta, Poland and Portugal, no training on children’s rights is available for lawyers, they report in interviews.

Estonia and Italy are exceptions to this lack of training.

The Estonian Bar Association delivers interdisciplinary training on children’s rights, communication with children and children’s psychology to all lawyers. From 2021 onwards, lawyers who do not attend such training courses cannot represent children in criminal or in civil cases, one lawyer clarifies.

In Italy, lawyers in general do not have to train in children’s rights. However, public defenders must take part in legal training focusing on the juvenile judicial system. This training is not interdisciplinary and does not include how to communicate effectively with children, one lawyer interviewed says. Rather, it mostly focuses on technical aspects of the judicial proceedings.

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**“[These lawyers treat me] Very, very well [...] What I do not understand I ask them and they explain it to me better [...] for example, at the beginning we talked about my situation, about sending me home in home custody, and the private lawyer together with the public defender did everything they could to send me home [...] then they told me how to behave, not to get into fights with the centre’s staff, and then if I didn’t understand something they told me to write them on WhatsApp and call them at any time.”**  
Child, Italy.

In most cases, communication with their lawyer throughout the proceedings is positive, children say. Lawyers have a crucial role in explaining rights and procedures to them, children point out. This is not only before and after the trial, but also when participating in it. Children represented by a specialist lawyer describe what knowledge and skills they appreciate.

#### *Non-legal experts such as social workers, judicial assistants and staff in detention facilities for children*

Austrian non-legal experts, such as experts from the JCA, receive training on juvenile criminal justice, but not children’s procedural rights, they report. Probation officers receive training on every new legal instrument, including those applicable to children.

Most Bulgarian non-legal professionals receive specialised multidisciplinary training on children, they report. In Estonia, three out of seven non-legal professionals interviewed received specialised training of some kind.

All Italian non-legal professionals, such as social assistants, educators and psychologists, report participating in training. These include sessions on how to communicate with children. Training is needed on the particular needs of children from migrant backgrounds, including how best to communicate with them, one interviewee stresses. Children from migrant backgrounds form an increasing number of those involved in criminal proceedings.

In Malta, some social workers from the Foundation for Social Welfare Services attended training on children's rights. They are committed to attending compulsory continuous professional development sessions.

The rehabilitation professionals in Portugal received training on the individual assessment of children, they report in interviews. This included how to draft assessment reports of children.

Psychological and social support is important, children interviewed stress. As well as from close family members and other persons of trust, they want continuous social support from professionals, particularly diversion, probation, alternative or rehabilitation measures.

Overall, children provide many suggestions about the behaviour of professionals. They would like professionals to trust them, and show interest in their cases and personal situations. They would also like them to take time to listen, and be friendly and compassionate. Most of all, professionals should treat them with respect and not discriminate.

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**"Yes, be nice. Ask normally. You also have to let the boys think when they have something to say. Mrs [probation officer] knows me: if someone has respect for me, then I have respect for them. If I am treated respectfully, then I am also respectful. The two policewomen had respect indeed, only one of them had no respect for me."**

Child, Austria.



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**"I really hope for the future that the next time they really care for someone, no matter where he or she is from or what colour their skin has."**

Child, Germany.



# Endnotes

- <sup>1</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ 2016 L 132, Art. 20 (1-4) and recital 54.
- <sup>2</sup> European Commission (2020), **Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Ensuring justice in the EU – a European judicial training strategy for 2021–2024**, COM(2020) 713 final, Brussels, 2 December 2020, pp. 3 and 5.
- <sup>3</sup> CoE, Committee of Ministers (2011), **Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum**, Strasbourg, October 2011, Guidelines Nos. 14 and 15, p. 23, and Guidelines Nos. 67–69, p. 65.
- <sup>4</sup> UN, Committee on the Rights of the Child (2019), **General Comment No. 24 (2019) on children's rights in the child justice system**, CRC/C/GC/24, 18 September 2019, para. 39, p. 8, para. 95 (f), p. 16, and paras. 111–112, pp. 18–19; UN, Committee on the Rights of the Child (2007), **General Comment No. 10 (2007) – Children's rights in juvenile justice**, CRC/C/GC/10, 25 April 2007, para. 40, p. 13, and paras. 96–97, p. 25.
- <sup>5</sup> FRA (2015), **Child-friendly justice – Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States**, Luxembourg, Publications Office, pp. 97–108.
- <sup>6</sup> Austria, Juvenile Court Act 1988 (**Bundesgesetz vom 20. Oktober 1988 über die Rechtspflege bei Straftaten Jugendlicher und junger Erwachsener (Jugendgerichtsgesetz 1988 – JGG)**), Federal Law Gazette No. 599/1988, 20 October 1988, Art. 30, as amended by EU Criminal Law Amendment Act 2020 (**Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020**), Federal Law Gazette I No. 20/2020, 21 March 2020, Art. 3.
- <sup>7</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 (**Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020**), Federal Law Gazette I No. 20/2020, 21 March 2020.
- <sup>8</sup> *Ibid.*
- <sup>9</sup> Bulgaria, National Assembly (**Народно събрание**) (2020), Draft Amendments to the Criminal Procedure Code (**Законопроект за изменение и допълнение на Наказателно-процесуалния кодекс**), 10 November 2020.
- <sup>10</sup> For example, see Italy, Legislative Decree of 28 July 1989, No. 272, Implementation, coordination and transitional rules of the decree of the President of the Republic of 22 September 1988, no. 448, containing provisions on the criminal trial against underage defendants (**Decreto Legislativo 28 luglio 1989, n. 272, Norme di attuazione, di coordinamento e transitorie del decreto del Presidente della Repubblica 22 settembre 1988, n. 448, recante disposizioni sul processo penale a carico di imputati minorenni**), 28 July 1989, Arts. 5, 6 and 14; Malta, Act No. XVIII of 2020, an Act to further amend the Criminal Code, Cap. 9 (**Att Nru XVIII tal-2020, Att li jkompli jemenda l-Kodiċi Kriminali, Kap. 9**), 10 June 1854 (as amended), Art. 534AGQ; and Malta, **Act No. XVIII of 2019, an Act to substitute the Child Protection (Alternative Care) Act, Cap. 569, to provide for protection orders for minors, for alternative care and for suitable protection for those minors deprived of parental care or in the risk of being so deprived, and for matters that are ancillary or incidental thereto or connected therewith** (**Att Nru XXIII tal-2019, Att sabiex jissostitwixxi l-Att dwar il-Protezzjoni tat-Tfal (Harsien Alternattiv), Kap. 569, biex jipprovd i għal ordnijiet għall-protezzjoni tal-minuri, biex jistabbilixxi harsien alternattiv u protezzjoni xierqa għall-minuri m'caħħda mill-harsien tal-ġenituri jew li huma f'riskju li hekk jiġu m'caħħda, u l-hwejjeġ l-oħra kollha li huma ancillari jew incidental għal dan jew konnessi miegħu**), 10 July 2019, Art. 17 (2).
- <sup>11</sup> Estonia, Ministry of Justice (**Justiitsministeerium**), **Karistusseadustiku ja teiste seaduste muutmise seadus** (**Euroopa Liidu finantshuvide kaitse direktiivi ja alaealiste menetlusõiguste direktiivi ülevõtmise**), 12 December 2019, Explanatory memorandum (**Eelnõu seletuskiri**); Estonia, Ministry of Justice (**Justiitsministeerium**), **Establishment of specialised youth justice approach**; Estonia, Ministry of Justice (**Justiitsministeerium**), **Justiitsministeerium soovib kaasajastada alaealiste kohtlemist süüteomenetluses**, press release, 15 July 2020; Estonia, Prosecutor's Office (**Orokuratuur**) (2018), **Special treatment of juveniles suspected of crimes during the criminal procedure (Kuriteo toime pannud alaealiste erikohtlemine kriminaalmenetluses)**, Narva-Jõesuu, 21 February 2018, p. 16.
- <sup>12</sup> See the Estonian Ministry of Justice (**Justiitsministeerium**) web page on child-friendly proceedings (**Lapsesõbralik menetlus, Koolituste kontaktid**).
- <sup>13</sup> Germany, Youth Courts Act (**Jugendgerichtsgesetz, JGG**) in the version of the promulgation of 11 December 1974 (**Federal Law Gazette [BGBl.] Part 1 p. 3427**, most recently amended by Article 1 of the Act of 8 July 2008 (**Federal Law Gazette Part 1 p. 2099**), 11 December 1974, Section 37; see also Germany, Draft Act to strengthen the procedural rights of accused persons in juvenile criminal proceedings (**Entwurf eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten in Jugendstrafverfahren**), Drucksache 19/13837, 9 October 2019, p. 42.
- <sup>14</sup> Germany, Social Code (SGB) – Eighth Book (VIII) – Children's and Youth Aid – (Article 1 of the Law of 26 June 1990, BGBl. 1163) (**Sozialgesetzbuch (SGB) – Achtes Buch (VIII) – Kinder- und Jugendhilfe – (Artikel 1 des Gesetzes v. 26. Juni 1990, BGBl. I S. 163)**), 26 June 1990, Section 72.
- <sup>15</sup> Eisenberg, U. and Kölbel, R. (2020), '§ 37' in: Eisenberg, U. and Kölbel, R. (eds.), **Youth Courts Act (Jugendgerichtsgesetz)**, Munich, C. H. Beck, para. 6a.
- <sup>16</sup> Poland, Ombudsman for Human Rights, **Letter to the Minister of Justice**, 11 March 2019.
- <sup>17</sup> Pace, J. F. (2017), **Crime prevention: Keeping you safe – Crime Prevention Strategy for the Maltese Islands for the period 2017–2021**, Valletta, Ministry for Home Affairs and National Security, May 2017; Ministry of Education, Employment and the Family (2020), **Draft National Children's Policy (L-Abbozz Tal-Politika Nazzjonali Tat-Tfal)**, Valletta, 2020.

# Conclusion

This report examines the relevant legal provisions, and the views and experiences of practitioners in nine Member States and children in eight Member States, on the implementation of the directive. The research addresses aspects of criminal proceedings that apply to a special category of vulnerable suspects and accused persons: children. Findings and opinions are based on the observations of children who were subject to criminal proceedings, and of practitioners with in-depth knowledge and experience of juvenile justice.

There are still major gaps in law and practice concerning implementing the safeguards for child defendants that the EU legislator stipulates. This corroborates previous FRA findings on criminal procedural rights, applicable to adult and child defendants, identifying shortcomings in practice. For example, they encompass how defendants are informed of their rights, how access to a lawyer is facilitated, and how the criminal justice system perceives and treats defendants from underprivileged groups.

Children in criminal proceedings should be perceived and treated not as 'younger adults', but as children. They have the right to be treated according to the requirements of international, European and EU legal provisions in line with their particular needs. These needs are based on maturity level, social or cultural background and psychological profile. Representatives of all professional groups are generally aware of this, the current findings show.

However, this general awareness does not always translate into law and practice. This calls for efforts to address possible shortcomings. For example, information should be conveyed in a more understandable manner for children, both orally and in writing, particularly because some children and their parents need interpretation and translation.

The essential rights of defendants in criminal proceedings are to know their rights and what is happening to them and around them. These should be real, effective and not illusory for child defendants as well, in line with the case law of the ECtHR. It would be easy to induce child defendants to confess or disclose details to the police before they are informed of their rights and can speak to their lawyer, findings indicate.

The right to legal assistance seems to be generally well implemented. However, it is not always effective in protecting a child's rights. For example, a child may be encouraged to speak to police before speaking to a lawyer. Therefore, a balance must be found and maintained between the effective investigation of a crime and a defendant's procedural rights.

The directive affords parents and support persons new rights, such as the right to information. However, parents or support persons accompanying children in criminal proceedings have a relatively minor role, findings point out.

Proceedings are against a particular defendant and aim to punish wrongdoing. However, the roles of family members and other close persons should not be underestimated throughout the process, from investigating and trying the offence to punishing, rehabilitating and socially reintegrating the offender.

There are some positive findings. In general, authorities do their best to guarantee children's rights to be present at trial and to a new trial if they are absent. This is in line with previous research findings in criminal procedural rights.

Authorities try to prioritise non-custodial measures over detention, interviewees generally confirm. Children are treated differently from adult detainees when deprivation of liberty is required. In general, they are offered more educational and therapeutic activities. However, more could be done in this area beyond ensuring access to basic education and sports activities.

Overall, professionals working with children do not necessarily receive specialised training. This is especially the case for law enforcement officers, judicial authorities and defence lawyers. The lack of specialised training might explain why some professionals find it difficult to communicate with children effectively and understand their perspective. To address this, Member States should provide appropriate training for professionals working with children in the justice system.

Member States must take special measures to ensure that suspected and accused children can effectively participate in criminal proceedings and benefit from a fair trial, in accordance with the directive. The implementation of these measures should be closely monitored. Any shortcomings in implementing safeguards can severely limit children's possible rehabilitation and reintegration into society, whether they are proven guilty or not.

This report provides evidence-based advice to help policymakers and practitioners, at both EU and Member State levels, assess the application of the directive. It will also help them to consider the need for further action to ensure that children's rights are effectively upheld in practice.

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## PROMOTING AND PROTECTING YOUR FUNDAMENTAL RIGHTS ACROSS THE EU —

Every child has a right to be protected even when they are accused or suspected of committing a crime. The basic principles of justice apply to adults and children alike. But children face specific obstacles during criminal proceedings, such as a lack of understandable information about their rights, limited legal support and poor treatment.

The report looks at the practical implementation of Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings in nine Member States – Austria, Belgium, Bulgaria, Germany, Estonia, Italy, Malta, Poland and Portugal.

It draws on practitioners' and children's experiences of how the directive is applied in practice. In so doing, the findings presented support authorities and policymakers in gaining a better understanding of the fundamental rights challenges encountered and potential remedies to address these. The report also highlights good practices that countries could follow to uphold children's rights.



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