



MANUAL FOR EU MEMBER STATES

*How to ensure the rights of
children in conflict with the law?*

FOCUS ON THE ROLE OF THE LAWYER AT THE DIFFERENT
STAGES OF JUVENILE JUSTICE PROCEEDINGS

DEFENCE FOR CHILDREN INTERNATIONAL (DCI) - BELGIUM



PROJECT “MY LAWYER, MY RIGHTS: ENHANCING CHILDREN’S RIGHTS IN CRIMINAL PROCEEDINGS IN THE EU”

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COORDINATOR:

Defence for Children International (DCI)-**Belgium**

PARTNERS:

Child Circle (**Belgium**), Bulgarian Helsinki Committee (**Bulgaria**), Child Law Clinic of the University College Cork (**Ireland**), Defence for Children International (**Italy**), Helsinki Foundation for Human Rights (**Poland**), Defence for Children International (**the Netherlands**).

ASSOCIATED PARTNERS:

DLA Piper (Law firm, Pro Bono Europe section), The European Programme for Human Rights Education for Legal Professionals (**HELP Programme of the Council of Europe**), the European Criminal Bar Association (**ECBA**).

EXPERTS:

Thierry Moreau (**Belgium**), Eric Van der Mussele (**Belgium**), Anna D. Tomasi (**Switzerland**), Ton Liefwaard (**the Netherlands**), Shauneen Lambe (**the United Kingdom**).

ADVISORY BOARD:

Vicky De Souter (representative of **the Belgian Ministry of Justice**), Mirena Petkova Tsenova (representative of **the Bulgarian Ministry of Justice**), Niall Nolan (Barrister in **Ireland**), Antonia Bianco (representative of **the Italian Ministry of Justice**), Mikolaj Pawlak (representative of **the Polish Ministry of Justice**).

MEMBERS OF DEFENCE FOR CHILDREN INTERNATIONAL (DCI)-BELGIUM’S TEAM:

Benoit Van Keirsbilck (Director), Marine Braun (Project coordinator-Juvenile justice expert), Mia Magli (Juvenile justice assistant), Aurélie Carré (Project officer), Julianne Laffineur (Advocacy officer), Géraldine Mathieu (Researcher) as well as Timothée Geenens, Simon Mallet, Florence Bourton and Louis Triaille.



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AUTHORS & PROJECT

This Manual was drafted by **Marine Braun**, juvenile justice expert, who is also the coordinator of the “My Lawyer, My Rights” project and **Mia Magli**, juvenile justice assistant, under the supervision of **Benoit Van Keirsbilck**, Director of Defence for Children International (DCI)-Belgium and former President of DCI-International. Members of the team of DCI-Belgium have also strongly contributed to the conception and the production of this Manual, in particular **Aurélie Carré and Julianne Laffineur**. The development of this Manual was supported by the expertise of the ten partners and associated partners from across Europe and also of the five experts of the EU funded project “My Lawyer, My Rights”.

Defence for Children International (DCI)-Belgium is the lead partner of this project. The purpose of the work of DCI-Belgium is to protect and defend children’s rights in Belgium as well as in other countries. DCI-Belgium is part of the DCI Worldwide Movement, comprised of a network of 38 National Sections and other associated members spread out across the globe. DCI’s main actions include: training, education and awareness raising; taking action when children’s rights are being infringed and providing oversight and monitoring of Belgium’s respect for the fundamental rights of children. The main fields of intervention are: juvenile justice and children’s access to justice; children’s deprivation of liberty; the rights of children on the move; children’s right to participation and to freedom of expression.

This Manual is one of the main outputs of the project “**My Lawyer, My Rights**” (MLMR).

Even though the right to legal representation for children suspected or accused in juvenile justice proceedings is established by international, regional and national laws, in practice, it is often unevenly applied by European States or not guaranteed at all. This constitutes a serious obstacle for children to exercise their right to defend themselves in juvenile justice proceedings and is a threat to the fulfilment of all their other procedural rights. A child in conflict with the law deserves to be defended by a specialised lawyer. A specialised lawyer will play a crucial role in ensuring respect for due process principles, in influencing the measures taken by the judge and ultimately in contributing to the child’s ability to reintegrate and rehabilitate into society following juvenile justice proceedings.

The “**My Lawyer, My Rights**” project aims to **(1)** advocate for full and proper application of EU law and support EU Member States in particular in the application of the EU directives on the procedural rights of suspected or accused persons in criminal proceedings, with particular regard to the child’s rights of access to and assistance by a lawyer; **(2)** advocate for the establishment of national structures that specialise in free legal aid for children in compliance with the EU directives, the Convention on the Rights

of the Child (UNCRC), the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (the CoE Guidelines on CFJ) and with all the other relevant instruments mentioned in this Manual and assist EU Member States in establishing these structures; **(3)** provide lawyers for children with information and practical tools on their role, the basic training required and all the conditions for ensuring an effective right to defence for children suspected or accused of having infringed the criminal law¹. This Manual is dedicated, in particular, to the first and second goals of the project. All outputs of the project are available on the database accessible via its devoted website:

<http://www.mylawyermyrights.eu>.

¹ For this purpose, a *Practical Guide for Lawyers for children “How to defend a child in conflict with the law?”* is published as another main output of the MLMR project in order to help the lawyer to effectively defend a child suspected or accused in juvenile justice proceedings □□

DATA COLLECTION AND COVERAGE

This Manual is based on information collected by national research conducted as part of the “My Lawyer, My Rights” project, using a common methodology developed and drafted in October 2016 with the cooperation of all partners to and experts of the project. In particular, we have relied on 6 field studies in Belgium, Bulgaria, Ireland, Italy, Poland and in the Netherlands and 12 desk studies in Austria, England and Wales, Finland, France, Germany, Hungary, Luxembourg, Portugal, Romania, Slovakia, Spain and Sweden. The 18 national reports and their “country overviews”, summing up the reports, were published and available on our website.

The national reports briefly describe the juvenile justice systems in several European countries, verify the transposition, implementation and application (given the nature of the juvenile justice system) of the set of European directives on fair trial rights² and analyse whether specialised lawyers for children are available at national or local level, what their role is and how they work in practice.

All the field and desk studies were conducted with a view:

- To investigate the role, mandate and training of lawyers defending children in conflict with the law so that improvements can be made

in regard to their situation (see the Practical Guide “*How to defend a child in conflict with the law?*” □□);

- To verify the transposition and application of the set of European directives on fair trial rights ensuring the procedural rights that an individual has when he³ is a suspect or accused in criminal proceedings: the right to receive information concerning his rights and the procedure, the right to receive interpretation and translation in a language that he understands, the right to have access to a lawyer, the assistance by a lawyer and the right to receive legal aid.

The 6 field studies covered two main elements:

The perspectives of **77 juvenile justice professionals** who interact with children in juvenile justice proceedings: including **36 lawyers for children**, (youth) judges, (youth) prosecutors, (youth) court staff, psychologists, social workers, interpreters and police officers. These were gathered through semi-structured interviews or focus groups.

The perspectives of **55 children in conflict with the law** on their experiences within juvenile justice proceedings and with their lawyers were gathered in semi-structured interviews or focus groups.

² Directives 2010/64/EU, 2012/13/EU, 2013/48/EU, (EU) 2016/800 and (EU) 2016/1919.

³ In this Manual, persons are referred to as ‘he’ or ‘him’ for ease of reference, but these usages should be understood to mean ‘she’ and ‘her’ as well.

This work included a preparatory phase, undertaken in October 2016. It involved examining the requirements for conducting interviews with children; identifying appropriate and diverse channels to reach and contact children; and developing a methodology⁴ for interviewing children. The interviews followed semi-structured interview guidelines with open-ended and potential follow-up questions and supportive material explaining the project in a child-friendly way to the interviewee. The guidelines were based on the fundamental principles and general elements of the CoE Guidelines on CFJ.

In addition to this, **an awareness-raising video** has been released on the basis of the children's interviews collected during the research phase. The video is aimed at all juvenile justice professionals: lawyers, judges, prosecutors, police officers, social workers, etc. working with children in conflict with the law in order to increase their awareness on the importance of respecting the child's right to a lawyer at every stage of juvenile justice proceedings.

⁴ This includes procedural and ethical considerations in conducting a research study with children: safeguarding, consent, data protection, confidentiality, etc

ACKNOWLEDGMENTS

The authors would like to thank the partners, associated partners and experts of the project “My Lawyer, My Rights” for their extremely valuable contributions in reflecting, preparing, commenting and revising this Manual. We particularly appreciate the commitment and efforts as well as the flexibility of everyone involved.

We also thank the principal funder of this project – the European Union – as well as the co-funder – La Fédération Wallonie-Bruxelles (Belgium) – without whom this project would not have been possible.

Moreover, we would like to thank the partners such as the HELP Programme of the Council of Europe, the European Criminal Bar Association (ECBA) and the law firm DLA-Piper for their voluntary participation in the project as well as the national and local bar associations, lawyers, judges, organisations of the civil society, experts, researchers and other key actors who have provided their support to the research and the work carried out in the framework of this project.

We particularly thank Deirdre Kelleher for proofreading this Manual.

The pro-bono Europe section of DLA-Piper coordinated 12 desk studies conducted by their peer offices at national level. We wish to extend a special word of thanks to the 12 national teams and the pro-bono coordination team for their in-kind contribution to

organising the research, collecting the data at national level and contributing to national reports.

We wish to thank all the children who agreed to be interviewed as part of this project and in doing so, shared their experience about their lawyer(s) (when they had one or more) and on their procedural rights while facing juvenile justice proceedings.

Finally, a very special and sincere thank you to all the DCI-Belgium team and interns for their work and their dedication and endless investment in bringing this project to fruition over the last two years.

FOREWORD

There is no field where the demand for justice is stronger than that of juvenile justice. Inadequate responses, inappropriate for children in conflict with the law, can harm their future, sometimes forever, and even further contribute to insecurity. Lost lives, shameful societies. The stakes are fundamental and the responsibility of the decision-makers is enormous. Yet, paradoxically, juvenile justice is often neglected, if not forgotten.

Children in conflict with the law

For years, a variety of international and European texts (hard law, soft law) have been insisting on the same issue: children in contact with the criminal justice system are in an increased vulnerable situation and have the right to be protected by the State. The violation of their human rights is not a myth, but a reality, as I have had the occasion to observe in the (too) many cases that have reached the European Court of Human Rights and that reveal unbearable and intolerable situations. Yes, there are children who take their own life in prison⁵, who die in custody⁶ or who endure such ill treatments that these are sometimes qualified of torture⁷. Even slaps given by a police officer to a child who is entirely under his or her control constitute a violation of human dignity and can give birth to feelings of arbitrariness, injustice

and powerlessness⁸.

In a democratic society, ill-treatment is never an adequate answer to the difficulties, which are real and should not be minimised, faced by the authorities. In that regard, the situation of girls in detention cannot be ignored anymore⁹. The conditions of detention themselves often reach the gravity threshold set by Article 3 of the European Convention on Human Rights¹⁰. As for the very principle of deprivation of liberty and of detention of children, the limits of “educative surveillance” should be subject to an extreme vigilance for there is a risk of drift in the current security climate¹¹.

Children’s rights

Through all these very real cases, there is one essential need that arises: to ensure children’s rights time and again, and always more. In addition to the fact that children have access to the rights and liberties guaranteed “to everyone” by Article 1 of the European Convention on Human Rights, Article 24 of the Charter of Fundamental Rights of the European Union is a remarkable disposition for it expressly acknowledges children’s rights. It is indeed about “fundamental” rights, which means that these rights are in relation with the very foundations of democracy and of the rule of law. The Charter of Fundamental Rights has become “the compass of all policies decided at EU level” and acquired full legally

⁸ ECtHR (GC), 28 September 2015, *Bouyjid v. Belgium*.

⁹ ECtHR, 1 February 2011, *Yazgül Yılmaz v. Turkey*.

¹⁰ ECtHR, 3 March 2011, *Kuptsov and Kuptsova v. Russia*.

¹¹ ECtHR (GC), 23 March 2016, *Blokhin v. Russia*.

⁵ ECtHR, 13 June 2002, *Anguelova v. Bulgaria*.

⁶ ECtHR, 9 October 2012, *Çoşelav v. Turkey*.

⁷ ECtHR, 3 June 2004, *Bati and Others v. Turkey*.

binding nature with the entry force of the Treaty of Lisbon on 1st December 2009. Its incorporation into the Treaties marks a significant step in the constitutional order of the European Union.

Nonetheless, it is now urgent that these rights become “practical and effective”, rather than “theoretical or illusory” as the European Court of Human Rights keeps repeating. Declarations are not enough for children anymore, they need actions.

In the field of juvenile justice, the demands of the fair trial are at the centre of the debate. Children have the right to a judgment¹², given by an independent and impartial tribunal¹³ within a reasonable time. They have the right to the presumption of innocence and to all the procedural guarantees. Defence rights from the beginning of the procedure and at all stages of the juvenile justice proceedings are an essential part of the scheme¹⁴. As opposed to this, the practice of interrogating and holding a child in a context lacking procedural guarantees, including lack of legal representation, is regarded as an inhuman and degrading treatment¹⁵. The role of the lawyer, free and independent, is more necessary than ever, for he or she is responsible for the relationship of trust and for the confidentiality in the interest of the young litigant and of the justice. In a democratic society, lawyers are the first and last bulwark against arbitrariness.

Towards a European model

Against this background, the EU directive (EU) 2016/800 of the Europe-

an Parliament and of the Council of the European Union of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings is a valuable tool. It endorses and develops relevant European and international standards and principles, in particular: Non-retroactive juvenile justice; the right to be heard; the right to effective participation in the proceedings; prompt and direct legal assistance; free assistance of an interpreter; full respect for privacy. These are not merely criminal but constitutional guarantees. The directive (EU) 2016/800 is important and significant for in that it proposes a common European model for fair trials for children in conflict with the law.

If we are to take children’s rights “seriously”, it is obligatory for the EU Member States to transpose and implement the directives¹⁶. In this respect, the interest and the added value of this excellent handbook are to provide guidance to Member States to fulfil their legal obligations, including some recommendations to address common shortcomings and obstacles.

New horizons

A last issue arises and it might well be the most important. Indeed, juvenile justice must answer to the demands of fundamental rights, and be appropriate to the children’s needs and proportionate both to the circumstances and the offence. Yet, it is necessary to go further because rights are a necessary but insufficient condition. Historically, we can observe that, very often, it is youth justice that has paved the way

¹² ECtHR, 30 June 2015, *Grabowski v. Poland*.

¹³ ECtHR, 2 March 2010, *Adamkiewicz v. Poland*

¹⁴ ECtHR (GC), 27 November 2008, *Salduz v. Turkey*.

¹⁵ ECtHR, 3 February 2011, *Dushka v. Ukraine*.

¹⁶ *The partners and experts of the project agree with this statement and therefore refer to the sections of this Manual on “Recommendations and key directions for implementation”* □

towards new horizons. Today, should the “best interests” of a child in conflict with the law suffer the unavoidable negative effects of the punitive and repressive answer against which human rights are supposed to offer protection? But where exactly does this strange need to punish come from in our society? As a “heritage of modernity”, we have integrated the punitive reasoning as if it was obvious, we have put the idea of punishment on such a pedestal¹⁷ that it is now difficult for us to see beyond it. A genuine child-friendly justice should offer something else.

We must urgently find other ways to settle conflicts in order to prevent children from entering the vicious spiral of penal intervention. It is not only about having a better criminal justice; we must above all have something better, something more humane and more intelligent¹⁸. We have known this “something” for a long time: it is refusing detention and using the other measures that exist, wanting the reinsertion of children to enable them to participate in the social life as it is, favouring education for all and offering future prospects to children in conflict with the law. As Adolphe Prins wrote over a century ago, children in conflict with the law do not respect property or life for neither life nor property have real value to them¹⁹. Today, I think that the return to repression, in its most severe forms, as if it offered an answer to the

idea of justice, is not only a regression but also an illusion. This is a dead-end that will contribute to violence instead of appeasing it. We are all responsible, individually and collectively, for the consequences it will have on future generations.

*Françoise TULKENS
Vice-President of the European
Court of Human Rights (ECtHR)*

¹⁷ See A. P. Pires, *Quelques obstacles à une mutation du droit pénal*, in *Revue générale de droit - R.G.D.*, 1995, p. 145.

¹⁸ *Ibid.*, p. 135.

¹⁹ A. Prins, *Criminalité et répression. Essai de science pénale*, Paris/Bruxelles, Guillaumin et Cie Editeurs/Librairie européenne C. Mucquart, 1886, p. 15.

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ACRONYMS

BPRL	The UN Basic Principles on the Role of the Lawyers
CAT	The UN Committee Against Torture
CCPR	The UN Committee on Civil and Political Rights or the Human Rights Committee
CECHR	The Council of Europe Commissioner for Human Rights
CEDAW	The UN Committee on the Elimination of Discrimination against Women
CED	The UN Committee on Enforced Disappearances
CESCR	The UN Committee for Economic, Social and Cultural Rights
CRPD	The UN Committee on the Rights of Persons with Disabilities
CFJ	Child-Friendly Justice
CJEU	The Court of Justice of the European Union
CM	The Committee of Ministers
CoE	The Council of Europe
CPT	The Committee on the Prevention of Torture of the CoE
CRC Committee	The UN Committee on the Rights of the Child
CRIN	The Child Rights International Network
DCI	Defence for Children International
EAW	European Arrest Warrant
EC	The European Commission
ECHR	The European Convention on Human Rights
ECSR	The European Committee of Social Rights
ECTHR	The European Court of Human Rights
EP	The European Parliament
ESC	The European Social Charter
EU	The European Union
EUCFR	The European Union Charter of Fundamental Rights
GACCJS	The UN Guidelines for Action on Children in the Criminal Justice System
GC N°5	The General Comment N°5 of the CRC: General measures of implementation of the Convention on the Rights of the Child

GC N°10	The General Comment N°10 of the CRC: Children's rights in juvenile justice
GC N°12	The General Comment N°12 of the CRC: The right of the child to be heard
GC N°14	The General Comment N°14 of the CRC: The right of the child to have his or her best interests taken as a primary consideration
GPJD	The UN Guidelines for the Prevention of Juvenile Delinquency or The Riyadh Guidelines
HRC	The Human Rights Council
IAYFJM	The International Association of Youth and Family Judges and Magistrates
ICCPR	The International Covenant on Civil and Political Rights
MACR	The Minimum Age of Criminal Responsibility
MLMR	The My Lawyer, My Rights project
NGO	Non-Governmental Organisation
OP3 UNCRC	The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure
PGALA	The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems
RAJJ	The UN Standards Minimum Rules for the Administration of Juvenile Justice or The Beijing Rules
RPJDL	The UN Rules for the Protection of Juvenile Deprived of their Liberty or The Havana Rules
SLDC	Socio-Legal Defence Centre ²⁰
SPT	The UN Subcommittee on Prevention of Torture
TS	Technical Sheet
TEU	The Treaty on European Union
TFEU	The Treaty on the Functioning of the European Union
UDHR	The Universal Declaration of Human Rights
UN	The United Nations
UNCRC	The United Nations Convention on the Rights of the Child
UPR	The Universal Periodic Review

²⁰ For this project, we use the definition of Socio-Legal Defence Centre as conceived by Defence for Children International (DCI): <https://defenceforchildren.org/socio-legal-defence-centres/>.

LEXICON

Throughout this Manual reference is made to:

HARD LAW

The rules of hard law are contained within the international and regional instruments that are legally binding or which create obligations in the domestic law of EU Member States. These rules generally arise from a negotiation process among Member States of the United Nations, of the Council of Europe or of the European Union to produce a set of commonly accepted standards.

SOFT LAW

The rules of soft law are contained within the international and regional instruments that are not legally binding or do not create any obligation in the domestic law of the EU Member States. Nevertheless, these rules and guidelines provide interpretative and authoritative guidance to States.

CASE-LAW

The judgments of the European Court of Human Rights (ECtHR) and of the Court of Justice of the European Union (CJEU) do have an impact at national level for EU Member States. The ECtHR decisions are binding and should at least provide guidance to every EU Member State.

JUVENILE JUSTICE PROCEEDINGS

The set of EU directives on fair trial rights refers to “criminal proceedings”. Nonetheless, in order to facilitate the reading of this Manual we will use the term “juvenile justice proceedings” to talk about all the proceedings that a child in conflict with the law, regardless of the EU Member State legislation, can be involved in.

DEPRIVATION OF LIBERTY ²¹

For the purpose of this Manual, we will refer to the term “deprivation of liberty” rather than “detention” to include closed establishments that are not necessarily prison-like or that involve incarceration. A place where a child may be deprived of his liberty is, according to this Manual, any kind of public or private establishment – penal, correctional, educational, protective, social, therapeutic, medical or administrative – from which a child is not allowed to leave at will.

²¹ This definition has been taken from the Practical Guide “Monitoring places where children are deprived of liberty” (p.14), edited by DCI-Belgium as part of the EU funded project “Children’s Rights Behind Bars” available on: <https://defenceforchildren.org/wp-content/uploads/2016/02/DCI-Practical-GuideEN.pdf>. □

INTRODUCTION



“Concern over violation of children’s rights in these situations (of children who come into contact with the justice system as a result of being suspected or accused of committing an offence), throughout the world, is growing. Policy and practice relating to juvenile justice are among those areas most frequently criticized by the Committee on the Rights of the Child, the body responsible for monitoring the implementation of the United Nations Convention on the Rights of the Child. The Committee has in fact made reference to problems in this sphere in relation to some two thirds of the State reports it has reviewed so far. Juvenile justice, however, is not seen as a top priority in many countries, and its realities are often hidden or ignored”¹.

Nigel Cantwell, the co-founder of the Defence for Children International movement (DCI), issued a publication in 1998 in the *Innocenti Digest*, journal of the UNICEF Research Center, on the main issues of concern in juvenile justice. Twenty years later, in spite of the recommendations of the UN Committee on the Rights of the Child (CRC Committee) on juvenile justice, too many children suspected or accused of having committed an offence are still victims of violations of their fundamental human rights.

The United Nations Convention on the Rights of the Child (UNCRC) defines the juvenile justice system in article 40, paragraphs 3 and 4, as a justice system that should be specifically applicable to children alleged as, accused of, or recognized as having infringed the criminal law, appropriate to their well-being and proportionate both to their circumstances and the offence. It further grants, in article 37, the use of arrest, imprisonment or deprivation of liberty as a measure of last resort.

Other international and regional instruments and standards on juvenile justice² are in line with the UNCRC and confirm the primarily educational aim of the system, meaning that the justice system should in no way be strictly punitive. Regrettably in practice this is not the case.

In the context of this Manual the definition of “juvenile justice system or proceedings” requires a broad interpretation in order to include proceedings that are considered welfare- or education-based but yet can end up with a child being deprived of his liberty. Under no circumstances should EU Member States

¹ See <https://www.unicef-irc.org/publications/pdf/digest3e.pdf>.

² Non-exhaustive list of the main standards on juvenile justice for children: the Beijing Rules; the Riyadh Guidelines; the Havana Rules; the CoE Guidelines on CFJ and the set of EU Directives on fair trial rights (i.e. directives 2010/64/EU, 2012/13/EU, 2013/48/EU, (EU) 2016/800 and (EU) 2016/1919). These instruments will be explored more in detail in this Manual.

abdicate from safeguards and protections guaranteed to children in conflict with the law by international and regional instruments because they do not consider their juvenile justice proceedings as ‘criminal’.

Who is this Manual for?

This Manual seeks to guide EU Member States in ensuring that their national laws and practices comply with the relevant EU directives³, in line with the related international standards and principles.

This Manual is designed to be used by legislators, policy makers and practitioners at national, regional or local level, who work to implement the EU directives and the related instruments into their national juvenile justice systems.

The information gathered in this Manual will also be useful for civil society organisations and other organisations advocating for the correct implementation of these directives.

This Manual has a European scope. Therefore, some adaptations might be needed in order to respond to different contexts or national specificities (e.g. Ireland and the United Kingdom opted-out from most of the EU directives on fair trial rights).

Objectives of the Manual

The overall objective of this Manual is to guide EU Member States’ legislators and policy makers in the transposition, implementation and concrete application of the procedural rights of children in conflict with the law, as provided in the set of EU directives on fair trial rights⁴, with special focus on the child’s right to a lawyer.

The lawyer for children needs to be the child’s adviser. He will help the child through the juvenile justice proceedings in order to ensure that all of his procedural rights are guaranteed.

Moreover, our research demonstrates that:

- Children in conflict with the law are not always represented and assisted by a lawyer;
- Even when children are assisted, the lawyer is not necessarily specialised in representing children;

³ In particular directives 2010/64/EU, 2012/13/EU, 2013/48/EU, (EU) 2016/800, (EU) 2016/343 and (EU) 2016/1919 (« EU directives on fair trial rights »).

⁴ More information on these directives is given in a technical sheet (TS 1).



- Even when children are assisted by a specialised lawyer, they are not always represented at all stages of juvenile justice proceedings;
- In some EU Member States, children can waive their right to a lawyer.

Specific objectives:

- ➊ **Improve understanding and knowledge** of the EU Member States' obligations under directives:
 - **2010/64/EU** of 20 October 2010 on the right to interpretation and translation in criminal proceedings⁵;
 - **2012/13/EU** of 22 May 2012 on the right to information in criminal proceedings⁶;
 - **2013/48/EU** 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 liberty⁷;
 - **(EU) 2016/800** of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings⁸;
 - **(EU) 2016/1919** of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings⁹;
 - **(EU) 2016/343** 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 proceedings¹⁰;
- ➋ **Facilitate** the transposition, application and implementation of these EU directives, in line with the international and regional standards and principles in the field of juvenile justice;
- ➌ **Provide general direction** on the challenges of implementing these EU directives;
- ➍ **Call for action** to enhance the respect of children's rights in the EU, by drawing inspiration from the best practices already existing in some EU Member States.

⁵ Text available on <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:280:0001:0007:en:PDF>.

⁶ Text available on <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:142:0001:0010:en:PDF>.

⁷ Text available on <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:294:0001:0012:en:PDF>.

⁸ Text available on <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0800&from=FR>.

⁹ Text available on <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L1919&from=EN>.

¹⁰ Directive (EU) 2016/343 on the presumption of innocence has not been part of the national research carried out in the framework of the MLMR's project. However it will be mentioned below, primarily in the section "Other relevant rights of children in conflict with the law", see **TS 4**.



How to use this Manual?

This Manual consists of a guidance accompanied by technical sheets.

The guidance is divided into 4 parts:

Part A focuses on the key concepts relevant to the scope of this Manual, in order to give the reader a general idea of the context:

- Who is a child?
- Who is a child in conflict with the law?
- What is the minimum age of criminal responsibility?
- What is a child-friendly juvenile justice system?

Part B provides an overview of the international and regional legal framework (hard law, soft law and case-law) with regard to juvenile justice and, in particular, with an emphasis on the procedural rights of children in conflict with the law. This part also clarifies what the EU Member States' international and regional obligations regarding children's rights are and what type of control bodies are in charge of the enforcement and monitoring of these obligations.

Part C provides guidelines to support the correct implementation of the EU Member States' obligations set out in Part B. It outlines the key findings gathered through the national reports reflecting the field studies of the project MLMR, including inspiring practices, as well as obstacles that are limiting the respect of children's rights in the EU. The guidance also includes recommendations on steps that can be taken to improve the transposition of the relevant EU directives in line with the obligations set out in international and regional instruments.

Part D refers to the website of the project MLMR for further information and readings.

The **technical sheets** appended to the guidance offer the reader more technical information on the legal framework applicable in the context of this Manual, with specific and detailed guidance on the EU directives that are the primary focus of the Manual, their transposition and the bodies who will control the EU Member States' obligations related to these directives and other international and regional standards on juvenile justice.



- **TS1 and 4** give a detailed overview of the applicable international and regional instruments and standards guaranteeing children in conflict with the law their procedural rights in juvenile proceedings.
- **TS 2** summarises EU Member States' transposition obligations in relation to EU directives.

- **TS 3** provides the EU Member States with detailed and practical guidance on the set of EU directives on fair trial rights: 2010/64/EU; 2012/13/EU; 2013/48/EU; (EU) 2016/800 and (EU) 2016/1919.
- **TS 5** lists the control bodies in charge of controlling and monitoring the EU Member States' obligations under the international and regional instruments.
- **TS 6** analyses the application scope of EU directive (EU) 2016/800 and, consequently, of all the EU directives on fair trial rights.
- **TS 7** provides a checklist to facilitate the application of article 6 of directive (EU) 2016/800.
- **TS 8** provides a checklist to facilitate the application of article 7 of directive (EU) 2016/800.

It is recommended that the technical sheets are used together with the guidance of this Manual.

Finally, an **Appendix** attached to the Manual provides information on what Socio-Legal Defence Centres are and how to put in place such structures at national or local level within the EU Member States.

Icon used in the Manual



Technical Sheet



Quote



Child specific aspect



Reference



Important

A. KEY CONCEPTS

This part of the Manual explains key concepts relevant to its scope. The concepts are based on international children's rights standards and instruments. The EU directives on fair trial rights, that need to be transposed and implemented at national level by the EU Member States, should be read in line with the following standards.

1. Who is a child?

A child is every person below the age of eighteen (18) years unless under the law applicable to the child, majority is obtained earlier. (UNCRC, art. 1 and Directive (EU) 2016/800, art. 3.1¹)



“Where it is uncertain whether a person has reached the age of 18, that person shall be presumed to be a child”. (Directive (EU) 2016/800, art. 3, last paragraph)

18 years is the “age of majority”, the threshold of adulthood. It is the moment when children assume legal control over their person, actions and decisions², thus terminating the control and legal responsibilities of their parents or guardian over them. The age of majority does not necessarily correspond to the mental or physical maturity of an individual and it should not be confused with the minimum age of criminal responsibility (MACR) (see below p.24–28 □).

For the purpose of this Manual, we will refer to the term “child” rather than “juvenile”, “young person”, “minor” or “youngster”, even if a young person of 15 or 17 years old will not necessarily recognise himself in the term “child”.

This Manual also applies to young adults, above the age of 18, suspected or accused in juvenile justice proceedings where:

- The young adult is suspected or accused of an offence committed when he was a child;
- The young adult became subject to the juvenile justice proceedings when he was a child.

¹ The UNCRC defines a ‘child’ as a person below the age of 18, unless the laws of a particular country set the legal age for adulthood younger (UNCRC, art. 1). “For the purposes of this Directive the following definitions apply: ‘child’ means a person below the age of 18” (directive (EU) 2016/800, art. 3.1). The Committee on the Rights of the Child, the monitoring body for the UNCRC, has encouraged States to review the age of majority if it is set below 18 years old in order to increase the level of protection for all children under 18 (CRC Committee, General Comment N° 10, Children’s rights in juvenile justice, CRC/C/GC/10, 25 April 2007, § 38). See https://www.unicef.org/crc/files/Guiding_Principles.pdf.

² There may be different types of legal age requirements, alongside the notion of majority, for example, the age at which children can get married, vote and engage with the criminal justice system or access complaints mechanisms.

2. Who is a child in conflict with the law?

A child in conflict with the law is a person who has reached the age of criminal responsibility but not the age of majority (under 18 years old), who is suspected or accused of having committed an offence under his national criminal law. (CRC/C/GC/10, p. 3, *Introduction*, § 1)

The age that needs to be taken into consideration to determine whether a child is in conflict with the law is the age at the time of committing the offence, not later than that.

A child in conflict with the law, alleged to have committed a criminal offence, is involved in juvenile justice proceedings. In many countries these proceedings, which result in sanctions and “measures”, are not classified as “criminal” under the national law but are criminal in nature, according to the autonomous understanding of the term “criminal” as adopted by international and regional bodies. This will be further explained below with concrete national examples. It is important to underline that the same reasoning is adopted by this Manual.

3. What is the minimum age of criminal responsibility?

The age of criminal responsibility is the age that a person reaches when he is presumed to have the capacity to infringe the criminal law and thus to be judged by a criminal court or other relevant competent authority.

Normally, the age of criminal responsibility does not coincide with the age of majority and these two concepts must not be confused³.

³ See: UNCRC, art. 40.3; CRC Committee, *General Comment N°10, Children's rights in juvenile justice*, (CRC/C/GC/10, 25 April 2007), p. 11, § 31-35; *Beijing Rules*, Rule 4.

a. The minimum age of criminal responsibility

Under the UNCRC, States parties are encouraged to establish “*a minimum age below which children shall be presumed not to have the capacity to infringe the penal law*”. (UNCRC, art. 40.3, (a))

There are no hard law international standards setting out what the MACR should be. This is why there is a wide range of MACR throughout the UNCRC States parties⁴, including in the EU. Such a variety is due to different national juvenile justice systems (see below, p. 29 □).

Guidance is however provided by soft law instruments such as the UN Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”) which recommend that any MACR “*shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity*”. (Rule 4)

Moreover, the CRC Committee considers that a MACR below the age of 12 years is not internationally acceptable. (CRC/C/GC/10, §32)

In some countries exceptions to the MACR are allowed. These permit the use of a lower MACR in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible (CRC/C/GC/10, §34). According to the CRC Committee, these exceptions should not be allowed: States parties of the UNCRC must set a MACR that does not allow the use of a lower age. (CRC/C/GC/10, §34)

⁴ CRC/C/GC/10, §30: “They range from a very low level of age 7 or 8 to the commendable high level of age 14 or 16. Quite a few States parties use two minimum ages of criminal responsibility”.

MACR of the 6 partners' countries of the My Lawyer, My Rights' project :

	BELGIUM	IRELAND	THE NETHERLANDS	BULGARIA	ITALY	POLAND
MACR	No age limit*	12 y**	12 y	14 y	14 y	17 y***

**Belgium has not clearly defined an age below which children are not considered responsible under the criminal law. Therefore, there is no minimum age below which the child cannot be the subject of a measure by the youth tribunal (generally 12 years). However, certain types of measures cannot be imposed below a certain age (generally 14 years).*

***Children aged 10 years can be held criminally liable for serious offences.*

****For some specific offences children can be tried from the age of 15 years. Moreover, correctional measures can be imposed to children who have committed a prohibited act between 13 and 17 years.*

b. Below the minimum age of criminal responsibility

As regards children in conflict with the law below the MACR, the CRC Committee gives authoritative opinions in its General Comment N°10.

Children below the MACR are considered not to have the capacity to infringe the law, and should only be involved in proceedings that are corrective, protective and/or educational. (CRC/C/GC/10, § 31.1)

This means that when they are recognized as having infringed the criminal law or alleged to have committed a criminal offence, they cannot be involved in criminal proceedings. (CRC/C/GC/10, §33)

c. Above the minimum age of criminal responsibility

Children above the MACR at the time of the commission of an offence, but younger than 18 years old, can be formally charged and be subject to criminal law procedures. (CRC/C/GC/10, §31)

This means that they are presumed to have the capacity to infringe the criminal law and, therefore, to be held responsible for their actions.

⁵ A complete list and further detail on the MACR across Europe is available on the Child Rights International Network's (CRIN) website: <https://www.crin.org/en/home/ages/europe>.

The determination of the criminal responsibility is not only subject to the age of the child, but also to an assessment of his developmental maturity or ability of individual discernment and understanding. (Beijing Rules, Commentary to Rule 4)

Therefore, a child above the MACR that commits an offence could be not criminally charged if the judge ascertains his developmental immaturity.

A child above the MACR can be subject to proceedings that may take the form of corrective, protective, educational or criminal models depending on the national system. In any event, these proceedings, including the final outcome, should always be in line with the principles of a child-friendly juvenile justice system, according to the CRC Committee. (CRC/C/GC/10, §31.2)

d. Young adults, over the age of 18 years old

When a child has reached the age of 18 years old, he becomes a young adult and can be involved in the same criminal proceedings as adults.

Nevertheless, according to the CRC Committee, young adults who committed a criminal offence when they were children (younger than 18 years old) or who were children when they became subject to criminal proceedings have the right to be judged in the framework of the juvenile justice system. (CRC/C/GC/10, § 37)

Neither age bracket nor age limit are mentioned in the UNCRC or in the CRC Committee's General Comment N°10 on juvenile justice, to limit the fundamental right of young adults, who have committed an offence in one of the abovementioned situations, to benefit from the juvenile justice system.

CRC Committee, GC N° 10, § 37:

*“The Committee wishes to remind States parties that they have recognized the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in accordance with the provisions of article 40 of UN-CRC. This means that every person under the age of 18 years **at the time of the alleged commission** of an offence must be treated in accordance with the rules of juvenile justice”.*

Consequently, this Manual shall also apply to this category of person⁶.

⁶ See more on this in the section “Children who reach majority before or during the start of the proceeding”, p. 56. □

Furthermore, the CRC Committee welcomes the extension of the application of the rules of juvenile justice to young adults who committed an offence when they were 18 or older, which is the case in some countries:

CRC Committee, GC N° 10, §38:

*“The Committee notes with appreciation that some States parties allow for the application of the rules and regulations of juvenile justice to persons aged 18 and older, **usually** till the age of 21, either as a general rule or by way of exception”*

4. What is a child-friendly juvenile justice system and what are its key principles?

Every EU Member State is responsible for the establishment and implementation of its own national juvenile justice system.

UNCRC, art. 40.3:

“States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law”.

In the EU Member States there are different types of juvenile justice proceedings, depending on their objectives (e.g. criminal, restorative, educational, welfare, etc.). Most of the time, these models are combined or mixed.

Nonetheless, whatever these differences are, every State is bound by the UNCRC to establish a child-friendly juvenile justice system.

A system is considered child-friendly if it respects the principles and standards established at international and regional level. These principles have been identified first by the UN, developed by the Council of Europe (CoE) and then incorporated into EU law. They will be listed and described below.

a. The UN principles: the four general principles of the UNCRC and the fundamental principles of juvenile justice

The UNCRC is the most widely ratified convention in the world and incorporates the complete range of international human rights, including civil, cultural, economic, political and social rights as well as aspects of humanitarian law⁷.



According to the CRC Committee “In the administration of juvenile justice, States parties have to apply systematically the general principles contained in articles 2, 3, 6 and 12 of UNCRC, as well as the fundamental principles of juvenile justice enshrined in articles 37 and 40”. (CRC/C/GC/10, § 5-14)

⁷ In order to facilitate the reading and interpretation of the UNCRC, UNICEF published “A summary of the rights under the Convention on the Rights of the Child”, available on https://www.unicef.org/crc/files/Rights_overview.pdf.

These articles of the UNCRC were distinguished as general principles by the CRC Committee during its first session in 1991, when guidelines were formulated on how States should structure their reports to the Committee (CRC/G/5/1991, §13; CRC/C/58/1996, §25-47; CRC/GC/2003/5, §12) and represent the general requirements for all children's rights, including those pertaining to juvenile justice:

- 1) The principle of non-discrimination (art. 2);
- 2) The principle of the best interests of the child (art. 3);
- 3) The right to life, survival and development (art. 6);
- 4) The right to be heard (art. 12).

These guiding principles shall be applied systematically together with the fundamental principles of juvenile justice, enshrined in articles 37 and 40 of the UNCRC (☐ see below, p. 35), including that the juvenile justice system must be *child-friendly*, adapted to and focused on the needs and rights of the child involved in juvenile justice proceedings and thus different from justice for adults (see below, *The right to an adapted procedure*, p. 82 ☐). In particular, the UNCRC provides a set of fundamental principles and procedural rights that would ensure that children in conflict with the law are to be treated in accordance with the child's fundamental (human) rights. There are guarantees that are basic human rights (e.g. human dignity) as well as child-specific procedural rights and guarantees before, during and after the end of juvenile justice proceedings, which are crucial to ensure the respect of the child's right to a fair trial (e.g. information adjusted to his age and level of understanding, the parents' role in the proceedings, the principle of rehabilitation, etc.).

I. The principle of non-discrimination (UNCRC, art. 2)

The UNCRC applies to all children, without discrimination of any kind, irrespective of the child's or his parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. (UNCRC, art. 2)

No child should be treated unfairly on any basis. As a consequence, all children in conflict with the law enjoy procedural rights without discrimination. (☐ See also Beijing Rule 2 (1))

Special efforts must be made to ensure the human rights of particularly vulnerable children, including street children, children belonging to racial, ethnic, religious or linguistic minorities, children from indigenous communities, girls, children with disabilities, children on the move and recidivist children who are repeatedly in conflict with the law. (CRC/C/GC/10, §6)

II. The principle of the best interests of the child (UNCRC, art. 3)

Article 3 of the UNCRC states that the best interests of the child shall be a primary consideration in all actions concerning children. General Comment N°14 (CRC/C/GC/14) provides authoritative guidance on the application of article 3 of the UNCRC.

When EU Member States make decisions, they should think about how their decisions will affect children and this particularly applies to laws, policies and budget. (CRC/GC/2003/5, §19, §27, §51 and 52)

CRC Committee, GC N°5, §12, art.3.1:

“Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions”.

The well-being of the child involved in juvenile justice proceedings should always be the guiding factor in the consideration of his case⁸.

The CRC Committee’s General Comment N°10 provides authoritative guidance on the application of article 3 of the UNCRC in the administration of juvenile justice. (CRC/C/GC/10, §10)

CRC Committee, GC N° 10, §10:

“The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders”.

EU Member States should include rehabilitation in their juvenile justice system instead of solely serving the purpose of retribution. EU Member States where the juvenile justice system remains excessively punitive should focus more on rehabilitation. Alternatives to imprisonment should be sought in order to improve the response to juvenile crime and violence.

⁸ There is a difference between the “objective best interests of the child”, usually identified by the youth judge or other relevant authority, and the “subjective best interests”, claimed by the child (for more concrete examples see the Practical Guide for lawyers for children: “How to defend a child in conflict with the law?”). □

III. The right to life, survival and development (UNCRC, art. 6)

Children have the right to life and development. Governments should ensure that children survive and develop healthily. All forms of deprivation of liberty (including arrest, detention and imprisonment) can have negative consequences for a child's harmonious development and can seriously hamper his reintegration. (CRC/C/GC/10, §11)

Therefore, deprivation of liberty must be used only as a measure of last resort and for the shortest appropriate time. (UNCRC, art. 37 b)

IV. The right to be heard (UNCRC, art. 12)⁹

The UNCRC requires that a child who is capable of expressing his views is able to do so freely and that his views are given due weight in accordance with his age and maturity.

UNCRC, art. 12.2:


“For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law”.

This part of article 12 relates specifically to the right of the child in conflict with the law to legal assistance in the preparation and presentation of his defence.

The right to be heard also means that the child has the right to effectively participate in the proceedings in which he is involved (UNCRC, art. 40), to share his views, to say what he thinks and to have his opinions taken into account by the court and all the relevant actors in the proceedings.

In order to guarantee the right to effective participation, the proceedings should be specifically adapted to children. (UNCRC, art. 40.3)

General Comment N°12 of the CRC Committee provides guidelines on how to guarantee the child's right to be heard in juvenile justice proceedings. (CRC/C/GC/12, p.13)

⁹ A Manual on the “promotion of the implementation of article 12 in the juvenile justice system” was published under the EU funded project Twelve and is available on the following link: http://www.dei-belgique.be/IMG/pdf/dci_-_twelve_handbook_eng_web.pdf. 

Equally important is the right of the child to remain silent and the right not to give his views, if he is involved in juvenile justice proceedings. In order to ensure this, the role of lawyers for children is fundamental in advising and guiding a child as to when being silent might be in his best interests.

(See more on this topic in the Practical Guide for lawyers for children [□□](#)).

CRC Committee, GC N° 10, Non-discrimination

"States parties have to take all necessary measures to ensure that all children in conflict with the law are treated equally. Many children in conflict with the law are also victims of discrimination, e.g. when they try to get access to education or to the labour market. It is necessary that measures are taken to prevent such discrimination, inter alia, as by providing former child offenders with appropriate support and assistance in their efforts to reintegrate in society and to conduct public campaigns emphasizing their right to assume a constructive role in society".

CRC Committee, GC N° 10, The right to life, survival and development

"This inherent right of every child should guide and inspire States parties in the development of effective national policies and programmes for the prevention of juvenile delinquency. The death penalty and a life sentence without parole are explicitly prohibited under article 37 (a) of CRC. Deprivation of liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time, so that the child's right to development is fully respected and ensured".

CRC Committee, GC N° 10, The right to be heard

"The right of the child to express his/her views freely in all matters affecting the child should be fully respected and implemented throughout every stage of the process of juvenile justice. The Committee notes that the voices of children involved in the juvenile justice system are increasingly becoming a powerful force for improvements and reform, and for the fulfilment of their rights".

**GENERAL
PRINCIPLES
UNCRC**

CRC Committee, GC N° 10, Best interests of the child

"In all decisions taken within the context of the administration of juvenile justice, the protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders. The best interests of the child should be a primary consideration".

V. The fundamental UN principles on juvenile justice

- The UNCRC

As mentioned above, articles 37 and 40 of the UNCRC are devoted specifically to the subject of juvenile justice. These articles enumerate important rights of children in conflict with the law, such as the use of deprivation of liberty as a measure of last resort; the right of the child to be separated from adults when deprived of liberty; the right to access to a lawyer and all the other procedural rights related to a fair trial which apply equally to adults.

In addition to the protections available to adults, children accused of, or recognized as having infringed the criminal law, have the right to *“be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society”*. (UNCRC, art. 40.1)

- The CRC Committee

The CRC Committee provides authoritative guidance on how the UNCRC should be implemented in its General Comment N°10 on Children’s rights in juvenile justice. (CRC/C/GC/10)

According to the CRC Committee, a juvenile justice system is a justice system adapted to the child’s needs that must deal with the following core elements (CRC/C/GC/10, § 15 - § 89):

- The prevention of juvenile delinquency;
- Interventions without resorting to judicial proceedings and interventions in the context of judicial proceedings with specific procedural adaptations;
- The setting of the minimum age of criminal responsibility and upper age-limits for juvenile justice;
- Guarantees for a fair trial;
- The deprivation of liberty, including pre-trial detention and post-trial incarceration, as a measure of last resort and for the shortest appropriate period of time.

- The Beijing Rules

In order for a juvenile justice system to be classified as child-friendly it should be in line not only with the UNCRC but also with other fundamental international

standards such as those enshrined in the UN Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) which, even if not legally binding, represent minimum conditions which have been accepted at international level for the treatment of children who are in conflict with the law.

Beijing Rules, Rule 5 “Aims of juvenile justice”:

“The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence”.

- The Riyadh Guidelines

The UN Guidelines for the Prevention of Juvenile Delinquency (“The Riyadh Guidelines”) provide a practical, positive and pro-active approach to preventing the rise of crime in the youth population by listing various (non-binding) methods to discourage juvenile delinquency.

The Riyadh Guidelines, “Fundamental principles”:

“The prevention of juvenile delinquency is an essential part of crime prevention in society. By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes”.

National prevention policies should facilitate the socialisation and integration of all children, by focusing on support for vulnerable families and in particular by involving children at risk of social exclusion.

- The Havana Rules

Child-friendly juvenile justice offers alternative sanctions and measures to detention, in order to respect the principle that detention of children should only be used as a measure of last resort and for the shortest appropriate amount of time to better promote their reintegration into society¹⁰.

¹⁰ About alternative measures, see: UNCRC, art. 40.4; the General Comment N°10, (CRC/C/GC/10), especially §24-27 and §68-77; the Beijing Rules, Rules 17-18; the Recommendation 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), Rules 5, 23.1, 23.2, 24, 26, and 30.1. For more information, see also the “Alternatives to detention for juvenile offenders – Manual of Good Practices in Europe”, published by the International Juvenile Justice Observatory (www.ijjo.org). □

This important principle is also provided for by the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (“The Havana Rules”). These rules are intended to establish minimum standards for the protection of children deprived of their liberty in all forms, consistent with their human rights and fundamental freedoms, with a view to counteracting the detrimental effects of all types of detention and to fostering the child’s reintegration into society.

The Havana Rules, “Fundamental perspectives”:

“The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort”.

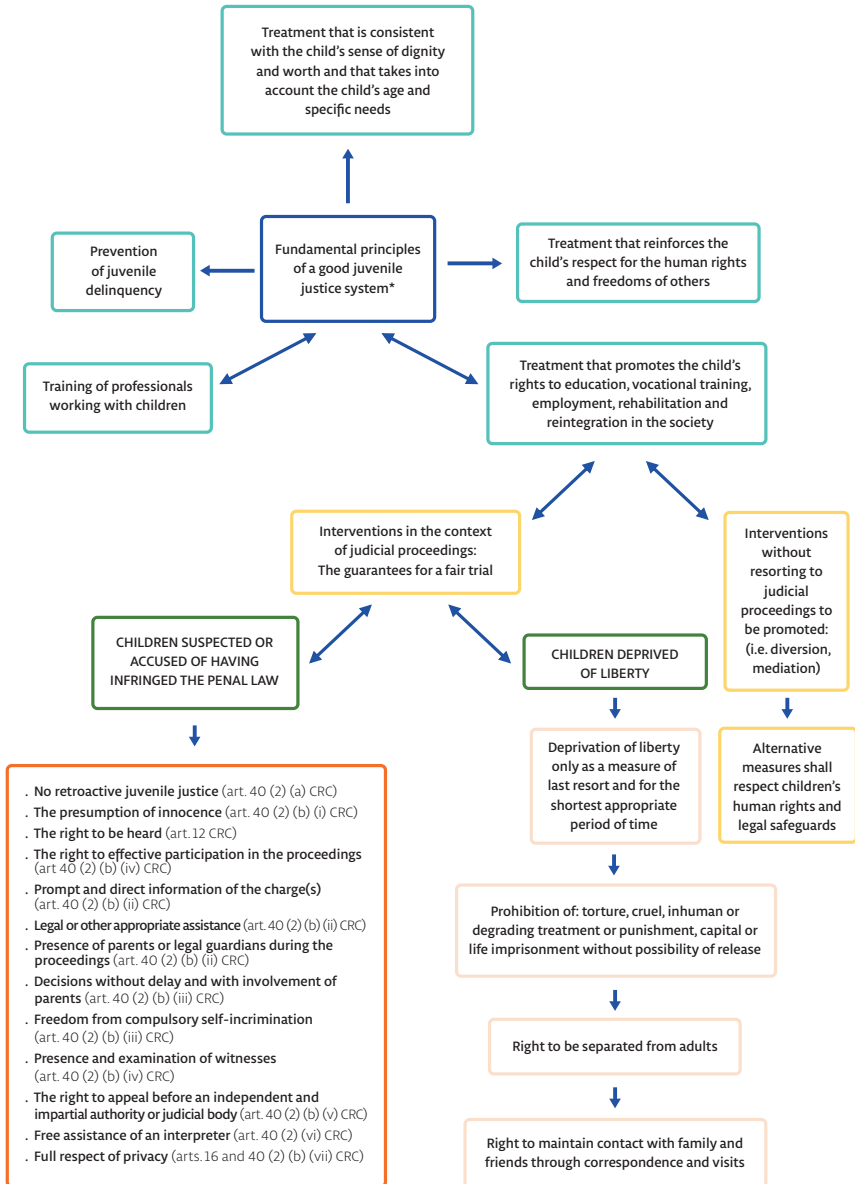
According to article 40.3 of UNCRC, States parties should seek to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected, and General Comment N°10 (CRC/C/GC/10) provides a series of useful guidelines on how to use these kind of measures without undermining the rights of children in conflict with the law. (CRC/C/GC/10, §26-27)

CRC Committee, GC N° 10, §26:

“States parties should take measures for dealing with children in conflict with the law without resorting to judicial proceedings as an integral part of their juvenile justice system, and ensure that children’s human rights and legal safeguards are thereby fully respected and protected”.

Given the fact that the majority of children who offend commit relatively minor offences, the use of a range of measures involving removal from juvenile justice proceedings and referral to alternative (social) services (i.e. diversion) should be a well-established practice which should be used in the majority of cases concerning children. (CRC/C/GC/10, § 24-25)

The following graphic summarises the main characteristics of an effective and appropriate juvenile justice system.



b. The CoE principles: the Guidelines on child-friendly justice

The Council of Europe (CoE) Guidelines on Child-Friendly Justice (CFJ)¹¹ is another key instrument in the field of the juvenile justice that is intended to enhance children's access to justice and their treatment in the justice system. The guidelines promote the principles of the best interests of the child, care and respect, participation, equal treatment and the rule of law. They also encourage the development of multidisciplinary approaches and training and require States to provide safeguards at all stages of criminal proceedings.

The CoE Guidelines on CFJ are not formally legally binding but they are built on existing and binding international and European standards and instruments such as the UNCRC. (CoE Guidelines on CFJ, Preamble, p. 13)

Directive (EU) 2016/800, recital 7:

"This Directive promotes the rights of the child, taking into account the Guidelines of the Council of Europe on child-friendly justice".

According to these Guidelines, "child-friendly justice" refers to:

CoE Guidelines on CFJ, Definitions:

"Justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child's level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity".

The CoE Guidelines also stress the importance of the use of alternative measures to judicial proceedings but under very specific conditions.


¹¹ Available at the following link <https://rm.coe.int/16804b2cf3>.

CoE Guidelines on CFJ, Part IV, §24:

“Alternatives to judicial proceedings such as mediation, diversion (of judicial mechanisms) and alternative dispute resolution should be encouraged whenever these may best serve the child’s best interests. The preliminary use of such alternatives should not be used as an obstacle to the child’s access to justice”.

c. The principles of child-friendly justice in the EU law

The European Union has devoted a wide range of procedural safeguards to persons suspected or accused in criminal proceedings by following the “Roadmap of the procedural rights of suspects”¹².

To date, five EU directives address the rights of suspects and accused persons in criminal proceedings (both for children and adults). These directives, the so called “directives on fair trial rights”, will be examined further in part C, p. 51  and in **TS 3**.



In 2016, the EU adopted the directive (EU) 2016/800¹³ on procedural safeguards for children who are suspects or accused persons in criminal proceedings, with the aim of setting minimum binding standards across EU Member States. This directive is the only one which is addressed specifically to children in conflict with the law and therefore it represents the main instrument by which certain principles of child-friendly justice have been incorporated into EU law.

Directive (EU) 2016/800, recital 1:

“The purpose of this directive is to establish procedural safeguards to ensure that children, meaning persons under the age of 18, who are suspects or accused persons in criminal proceedings, are able to understand and follow those proceedings and to exercise their right to a fair trial, and to prevent children from re-offending and foster their social integration”.

¹² Council Resolution regarding the Roadmap to strengthen the procedural rights of suspects or people prosecuted in a criminal procedure, 30 November 2009, JO C/295/1.

¹³ Available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32016L0800>. Ireland, the United Kingdom and Denmark are not bound by this directive since they have opted-out from the European Union’s area of freedom, security and justice.

This directive takes into account the UNCRC, the CoE Guidelines on CFJ (as mentioned above), the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) and must be read in conjunction with articles 21.1 and 24 of the EU Charter of Fundamental Rights (EUCFR) which have incorporated the four guiding principles of the UNCRC (non-discrimination, participation, best interests of the child and protection of the child's well-being).

B. EU MEMBER STATES' OBLIGATIONS REGARDING CHILDREN'S RIGHTS

This part of the Manual sets out for EU Member States (1) their obligations and tasks to be undertaken under international and regional law to guarantee the rights of children in conflict with the law; (2) why they need to respect these obligations and (3) what appropriate control mechanisms will verify and monitor that these obligations are being respected.

1. What is the international and regional legal framework?

This section lists the different instruments and standards stipulating the EU Member States' obligations concerning the rights of children in conflict with the law as follows: (1) the UN instruments (2) the CoE instruments and (3) the EU instruments.

These instruments are listed in accordance to their binding force: hard law, soft law, case-law¹.

In addition, a more detailed overview on the applicable international and regional instruments and standards guaranteeing children in conflict with the law their procedural rights in juvenile justice proceedings is available in a **technical sheet** attached to this Manual (see the 3 tables in **TS 1**).



¹ See the definitions of hard law, soft law and case-law in the lexicon, p. 14.

1.1 At international level

a. Hard Law

Binding international instruments applying to children in conflict with the law relevant for this Manual include, but are not limited to:

- *The Universal Declaration of Human Rights (UDHR)*, 1948;
- *The International Covenant on Civil and Political Rights (ICCPR)*, 1966;
- *The United Nations Convention on the Rights of the Child (UNCRC)*, 1989;
- *The Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OP3 UNCRC)*, 2011.

b. Soft law

International soft law instruments in the field of juvenile justice include, but are not limited to:

- *The UN Standards Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules or RAJJ)*, 1985;
- *The UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines or GPJD)*, 1990;
- *The UN Rules for the Protection of Juvenile Deprived of their Liberty (The Havana Rules or RPJDL)*, 1990;
- *The UN Basic Principles on the Role of the Lawyers (BPRL)*, 1990;
- *The UN Guidelines for Action on Children in the Criminal Justice System (GACCJS)*, 1997;
- *General Comment N°10 of the Committee on the Rights of the Child: Children's rights in Juvenile Justice (CRC – GC N°10)*, 2007;
- *General Comment N°12 of the Committee on the Rights of the Child: The right of the child to be heard (CRC – GC N°12)*, 2009;
- *General Comment N°14 of the Committee on the Rights of the Child: The right of the child to have his or her best interests taken as a primary consideration (CRC – GC N°14)*, 2013;

- *The UN Principles and Guidelines on access to legal aid in criminal justice systems (PGALA)*, 2013;
- *Guidelines on children in contact with the justice system* (prepared by an International Working Group of the International Association of Youth and Family Judges and Magistrates (IAYFJM)), 2017.

1.2 At regional level

The Council of Europe

a. Hard law

Binding CoE instruments applying to children in conflict with the law relevant for this project include, but are not limited to:

- *The European Convention on Human Rights (ECHR)*, 1950;
- *The European Social Charter (ECSR)*, 1961, revised in 1996.

b. Soft Law

CoE soft law instruments in the field of juvenile justice include, but are not limited to:

- *Recommendation of the Committee of Ministers on the European Rules for juvenile offenders subject to sanctions or measures*, CM/Rec (2008)11, 2008;
- *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, (CoE Guidelines on CFJ)*, 2010;
- *CPT Standards on Juveniles deprived of their liberty* of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2010.

c. The European Court of Human Rights (ECtHR): case-law

The ECtHR's judgments are binding for the 47 CoE Member States that have ratified the ECHR (among which are all the EU Member States). Decisions of the ECtHR have often led governments to alter their legislation and change practices in a wide range of areas.

The ECtHR's case-law makes not only the ECHR a powerful living instrument but also the UNCRC since the ECtHR often relies on the UNCRC when interpreting ECHR claims pursued either by or on behalf of children.

The ECtHR has a vast jurisprudence on children's rights, unlike the CJEU, including on the violation of the right to a fair trial (article 6 ECHR).

In particular, regarding the violation of this last provision, the UNCRC has had considerable influence on the ECtHR's reasoning in relation to the rights of children in conflict with the law² (See table "Case-Law", p. 99-103 □).

The European Union

a. Hard law

Binding EU instruments applying to children in conflict with the law relevant for this Manual include, but are not limited to³:

- The European Union Charter of Fundamental Rights (EUCFR), 2000 (in particular art. 24 (Rights of the child), arts. 47-50 (specific section focused on "Justice") and art. 52, § 3 on the scope of guaranteed rights);
- Treaty on European Union (TEU), 2009 (in particular art. 3 concerning the EU obligation to promote the protection of the rights of the child);
- Treaty on the Functioning of the European Union (TFEU), 2012 (in particular art. 82, § 2, as legal basis for the adoption of EU directives concerning the rights of individuals in criminal procedure);

² The case-law of the ECtHR's is available on the website <https://www.coe.int/en/web/children/case-law>. Here you will find two databases, HUDOC and THESEUS. This last one contains only the ECtHR's case-law regarding children's rights. For further information, see also U. Kil Kelly, *The impact of the Convention on the case-law of the European Court of Human Rights* in D. Fottrell (edited by), *Revisiting children's rights, 10 years of the UN Convention on the rights of the child*, Kluwer Law International, 2000.

³ As noted earlier, not all directives are applicable in all EU Member States. In particular, directives concerning fair trial rights, such as the majority of those discussed in this Manual are not always applicable in Ireland, the United Kingdom or Denmark. These States may elect to opt in or opt out of such directives.

- Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, 2010 (for children and adults);
- Directive 2012/13/EU on the right to information in criminal proceedings, 2012 (for children and adults);
- Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings, 2013 (for children and adults);
- Directive (EU) 2016/343 on the presumption of innocence and of the right to be present at the trial in criminal proceedings, 2016 (for children and adults);
- Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, 2016 (devoted specifically to children in conflict with the law);
- Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings, 2016 (for children and adults).



A **technical sheet** attached to this Manual is devoted to the transposition process of these directives into national legislations⁴ (see **TS 2**).



Another **technical sheet** details these directives and gives practical guidance to EU Member States in order to facilitate their transposition and implementation at national level (see **TS 3**).

b. Soft law

EU soft law instruments in the field of juvenile justice include, but are not limited to:

- *The European Commission's Recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings* (2013/C 378/02), 2013;
- *The European Commission's Recommendation on the right to legal aid for suspects or accused persons in criminal proceedings* (2013/C 378/03), 2013.

⁴ In EU law, "transposition" is a process by which the EU Member states give force to a directive through the adoption of appropriate implementation measures at national level.

c. The Court of Justice of the European Union (CJEU): case-law

To date, the CJEU's case-law concerning the protection of children's rights is not as broad as the ECtHR's. Most of the CJEU judgments relevant to children are in the context of the free movement of persons and in issues relating to EU citizenship and have been delivered after a request for a preliminary ruling by a national court⁵.

⁵ For the case-law of the CJEU see https://curia.europa.eu/jcms/jcms/j_6/en/.

2. Why should EU Member States respect their international and regional obligations regarding children's rights?

All EU Member States have ratified the UNCRC and the ECHR, which represent the core instruments for the protection of children's rights at international and regional level. The EU and its Member States are bound to adhere to the principles and provisions enshrined in these instruments in relation to matters that fall within the scope of EU competence.

Moreover, the binding force of international and regional instruments has an impact also at EU level since, according to art. 6.3 TEU, the written and unwritten principles drawn from the common and constitutional traditions of the EU Member States are "general principles" of EU law that must be used to supplement and guide the interpretation of the EU Treaties.

According to the CJEU, obligations arising from EU membership should not conflict with Member States' obligations derived from their international human rights commitments even if the EU itself is not a party to these treaties⁶.

This important principle is also confirmed by the following considerations:

- The European Union Charter of Fundamental Rights (EUCFR) contains a specific section focused on "Justice" (arts. 47-50) that reflects the ECHR's minimum standards on fair trials. This means, in effect, that a lack of compliance with the ECHR may lead to a violation of the EUCFR at the same time and vice versa⁷, according to article 52, § 3, of the EUCFR which establishes clearly that: *"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection"*;
- More specifically, since 1 December 2009, with the entry into force of the Treaty of Lisbon, the EU has, for the first time, a constitutional obligation to promote the protection of the rights of the child (TEU, art. 3) and the EUCFR, which now has the **same legal value** as the EU **Treaties**, contains a dedicated provision on children's rights (directly inspired by the UNCRC) which, among others, en-

⁶ See, for example, CJEU, 14 May 1974, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities* (C-4/73).

⁷ D. Sayers, *Protecting fair trial rights in criminal cases in the European Union: where does the Roadmap take us?* in *Human Rights Law Review*, 2014, p. 734.

shrines the principle of the best interests of the child (EUCFR, art. 24)⁸.

- The EU directives on fair trial rights in criminal proceedings refer to most of the aforementioned international instruments on human and children's rights (See **TS 1**). The mere mention and integration of these international principles and provisions, even of non-binding nature, into EU binding instruments give them a more effective and powerful channel of enforcement at EU level. For example, recital 55 of directive 2013/48/EU states that this directive intends to *"promote the rights of children and take into account the Guidelines of the Council of Europe on child friendly justice, in particular its provisions on information and advice to be given to children"*. The directive (EU) 2016/800, which is specifically devoted to the procedural rights of children in conflict with the law, states also that it *"promotes the rights of the child, taking into account the Guidelines of the Council of Europe on child-friendly justice"* (recital 7) and that *"nothing in this directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law, in particular the UN Convention on the Rights of the Child, or the law of any Member State which provides a higher level of protection"* (art. 23).



For all these reasons, EU Member States must take into account the rights of children in conflict with the law in the context of the transposition and implementation of all relevant EU directives. A **technical sheet** attached to this Manual provides a more detailed analysis on the transposition process of EU directives at national level (**TS 2**).



3. Who will monitor and control whether these obligations are respected by EU Member States?

For each of the abovementioned standards and instruments, a monitoring mechanism has been put in place. The functioning, powers, area of competencies of these mechanisms (control bodies) can greatly differ.

Monitoring mechanisms may take the form of:

- Committees of experts that monitor the implementation of the core international human rights treaties, including those dedicated to children's rights (such as the CRC Committee in relation to the UNCRC, the Human Rights Council (HRC)

⁸ For the position of Poland and the United Kingdom regarding the EUCFR, see "Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom" (12008E/PRO/30).

and its special procedures⁹, the CoE Commissioner for Human Rights (CECHR), the European Committee of Social Rights (ECSR), etc.).

- Judicial bodies: the ECtHR and the CJEU.

As previously stated, each State party to a treaty (or convention) has an obligation to take steps to ensure that its citizens¹⁰ can enjoy the rights set out in the treaty. Normally, the signature and the ratification by a State of a treaty implies the recognition also of the apposite control mechanism and its decisions by the State.

The existence of monitoring mechanisms and their recommendations are fundamental to guide European Member States towards stronger actions for the protection of children's rights.



For this Manual we will focus on the monitoring mechanisms relevant to juvenile justice and their essential characteristics are listed in **TS 5**.



To conclude, it is important to take into account the following key points:

- *The Treaty of Lisbon has provided a stronger legal basis for the development, in the EU, of a criminal justice area in line with all the fair trial rights already established under international and regional instruments;*
- *If EU Member States do not comply with their obligations under EU law regarding the protection of children's rights in criminal proceedings, they can be judged and sanctioned at EU level before the CJEU;*
- *The EU directives on fair trial rights in criminal proceedings are based on the aforementioned international and regional instruments on human and children's rights. The integration of these international principles and provisions into EU binding instruments give them a more effective and powerful channel of enforcement at EU level.*

⁹ There are also the Special Rapporteurs who are individual experts (not committees) with a thematic or geographic mandate who are working under UN HRC (such as the UN Special Representative of the Secretary General (SRSG) on Violence against children, the UN Special Rapporteur on the sale and sexual exploitation of children and the UN Special Representative of the Secretary-General for Children and Armed Conflict).

¹⁰ Sometimes this obligation is not limited only to national citizens.

C. HOW TO ENSURE EFFECTIVE IMPLEMENTATION AT NATIONAL LEVEL OF THE RIGHTS OF CHILDREN IN CONFLICT WITH THE LAW



“Child-friendly justice refers to justice systems which guarantee the respect and the effective implementation of all children’s rights at the highest attainable level”.

This section identifies both inspiring practices and challenges to implementing children’s procedural rights in the EU and serves as a basis for recommendations to EU Member States.

The recommendations are based on European and international legislation.

The practices and recommendations are based on a selection of the most significant examples derived from the 6 field-research studies of the partner-countries of the project “My Lawyer, My Rights”. For all national examples cited, please consult the national reports and their Country Overviews on the project’s website (www.mylawyermyrights.eu).

We found in our research that in most EU Member States a number of issues regarding the effective implementation of children’s rights should be resolved².

This is why the structure of the next chapter will be divided as follow:

- Main challenges with regards to the implementation of children’s rights at national level;
- Inspiring practices at national level;
- Recommendations and key directions for implementation.

It is crucial that both national legislation and its practical implementation in EU Member States are in line with children’s rights. Therefore, the aim of this part of

¹ CoE Guidelines on CFJ and their Explanatory Memorandum (2011), p. 4.

² See also: European Commission, Summary of contextual overviews on children’s involvement in criminal judicial proceedings in the 28 Member States of the European Union, Publications office of the European Union, 2014; European Commission, Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings of 27 November 2013, SWD (2013) 480 final, p. 12 et seq.; European Union Agency for Fundamental Rights, Child-friendly justice. Perspectives and experiences of professionals on children’s participation in civil and criminal judicial proceedings in 10 EU Member States, Publications office of the European Union, 2015.

the Manual is to encourage EU Member States to draw inspiration from the best practices already in place in other Member States and to follow the key directions for the implementation of the EU directives on fair trial rights in compliance with international and regional standards.

1. The application of the set of EU directives on fair trial rights in criminal proceedings

There are some aspects in the EU directives on fair trial rights that need to be analysed more closely, such as:

- The legal classification and the nature of the procedure in which a child in conflict with the law may be involved;
- The determination of the MACR;
- The age of the child;
- The type of alleged offence (minor offences).

Some interpretations could affect the application of the set of EU directives to children in EU Member States.

It is therefore essential that EU Member States always consider the following challenges in the light of the core principles of the juvenile justice as established, in particular, in the UNCRC's guiding principles and in the CRC Committee General Comments.

A) Main challenges

a. Welfare proceedings for children

Article 82 TFEU provides that the EU has competence to legislate in relation to criminal matters and this is the reason why directive (EU) 2016/800 indicates that:

Directive (EU) 2016/800, recital 17:

“This directive should apply only to criminal proceedings. It should not apply to other types of proceedings, in particular proceedings which are specially designed for children and which could lead to protective, corrective or educative measures.”

As mentioned above, different models of juvenile justice exist across the different EU Member States, therefore, the different systems do not always follow the criminal model prescribed in the EU directives. For example, they may differ from the criminal proceedings as regards their objectives, the actors involved and the measures that can be taken by a court or any other competent authority.

In some EU Member States, children suspected or accused of having committed an offence come in contact with welfare systems based on educational measures as opposed to strictly criminal procedures.

However, the distinction between a criminal and a welfare procedure is not always clear since the latter can still expose children to a risk of deprivation of liberty or can have negative consequences on the child's psychological and physical well-being. Moreover, the child involved in a welfare proceeding, leading to protective, corrective or educative measures, will meet a few of the same actors as those involved in a criminal proceeding, namely police officers, prosecutors and judges, and may be involved in similar phases of investigation and decision making.

The CJEU and the ECtHR jurisprudence have held that it is necessary to look at the substantive nature of the proceedings in order to establish if they are criminal or not, rather than how they are classified at national level.

Consequently, EU Member States should not exclude their welfare systems for children in conflict with the law (as is the case in Belgium, Bulgaria and Poland) from the protections established in the EU directives in criminal matters by stating that the European Union is only able to legislate in the field of criminal law. The substantive nature of the national juvenile justice proceedings must be the relevant criterion to ascertain the applicability of the entire set of EU directives on fair trial rights to children in conflict with the law (for more information, see **TS 2 and 6**).



b. Administrative procedures for persons suspected of having infringed the criminal law

In the course of our research it was established that in some States the justice system does not consider the first phase of the proceedings (police questioning) as criminal. As long as the suspected person of the alleged offence is not detained and has not been formally charged by the prosecutor or the inquiry judge, he is only involved in an administrative procedure.

Research-based national example

The Bulgarian criminal justice system does not formally recognise the figure of “suspected person”. The police questioning is considered as an administrative preventive measure.

Such a system does not allow the EU directives to be applied at this stage of proceedings to persons that are not formally accused, unless they are detained in police custody.

c. The principle of primacy of EU law

Some EU Member States believe that having a juvenile justice system already in place is sufficient to be exempted from the application of the EU directives on fair trial rights. This happens, in particular, in Member States where the juvenile justice system follows a welfare model. This kind of proceeding is often considered to be better, in terms of procedural guarantees, than the criminal ones referred to in the EU directives.

By affirming that, these States give to EU law a secondary position in relation to their national legislative provisions and, therefore, they fail to respect the principle of primacy of EU law.

Indeed, the EU does not recognize the principle of the “maximum standard of protection of fundamental rights” since this recognition could pose a significant threat to the achievability of the EU’s objectives. This means that the EU can require the application of EU law despite the existence of more protective national provisions³.

³ CJEU, 26 February 2013, *Stefano Melloni* (C-399/11).

Even if this cannot be considered “good EU practice”, in the context of juvenile justice it becomes relevant for the protection of children involved in criminal proceedings since EU Member States are required to respect the EU definition of the term “criminal proceeding”. As mentioned above, this definition includes also national proceedings which, even if not labelled as criminal, have a substantial criminal nature.

Therefore, even if some EU Member States assume that a welfare procedure is the best solution for children in conflict with the law, they cannot rely on the national legal classification of the procedure as “welfare” to deny children all the guarantees of a fair trial when they are deprived of liberty or subject to measures of a criminal nature.

Research-based national example

Belgium considers that its national provisions concerning children in conflict with the law are more protective than the minimum standards laid down in the EU directives. According to the Belgian Ministry of Justice, the guarantees enshrined in the EU directives are not applicable to children suspected or accused in the context of the welfare procedure of the law of 1965.

d. The minimum age of criminal responsibility (MACR)

None of the EU directives contain provisions that affect national rules determining the MACR (See, p. 25-26 [□□](#)).

In this regard, it is important to underline that the practice of prosecuting a child under the MACR if he has committed a serious crime or to impose upon him punitive measures such as deprivation of liberty, in the context of an administrative or welfare proceedings, is against the UNCRC. The MACR cannot be circumvented⁴.

⁴ This practice, in particular, is contrary to the UNCRC, art. 40 (see CRC/C/GC/10, § 34). See also the observations of the UN HRC and of the CRC Committee regarding the Czech Republic on this issue (Concluding Observations of the UN HRC on the Third Periodic Report of the Czech Republic, adopted on 22 August 2013, section 20, CCPR/C/CZE/CO/3; Concluding observations of the CRC Committee on the Czech Republic, adopted on 17 June 2011, CRC/C/CZE/CO/3-4).

e. Children who reach majority before or during the start of the proceeding

Directive (EU) 2016/800, art. 2.3:

“The directive applies to persons who were children when they became subject to the proceedings but have subsequently reached the age of 18 and the application of this directive is appropriate in the light of all the circumstances of the case, including the maturity and vulnerability of the person concerned. Member States may decide not to apply this directive when the person concerned has reached the age of 21”.

This provision should be read in conjunction with the international standards and principles on juvenile justice and, in particular with the position of the CRC Committee (see section “Young adults, above the age of 18 years old”, p. 27-28 □□).

Moreover, EU Member States shall read this provision in conjunction with recital 12 of the same directive.

Directive (EU) 2016/800, recital 12:

“When, at the time a person becomes a suspect or accused person in criminal proceedings, that person has reached the age of 18, but the criminal offence was committed when the person was a child, Member States are encouraged to apply the procedural safeguards provided for by this directive until that person reaches the age of 21, at least as regards criminal offences that are committed by the same suspect or accused person and that are jointly investigated and prosecuted as they are inextricably linked to criminal proceedings which were initiated against that person before the age of 18”.

The length of the process or the delay in starting a trial must not have a detrimental effect on the child’s rights. Both this recital and article 2.3 of directive (EU) 2016/800, shall, therefore, always be read in conjunction with article 23 of the same directive.

Directive (EU) 2016/800, art. 23:

“Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law, in particular the UN Convention on the Rights of the Child, or the law of any Member State which provides a higher level of protection”.

f. Minor offences

Article 2.6 of directive (EU) 2016/800 and its recitals 14, 15 and 16 state that the directive should not apply in respect of certain minor criminal offences such as minor road traffic offences, minor offences in relation to general municipal regulations and minor public order offences which fall under the responsibility of an authority other than a court having jurisdiction in criminal matters.

In these cases, if the sanctions imposed on the child are other than deprivation of liberty, according to the abovementioned provisions, it would be unreasonable to require that the competent national authorities ensure all the rights guaranteed under the directive if there is either a right of appeal or the possibility for the case to be referred to a court having jurisdiction in criminal matters.

The derogation related to minor offences has also been introduced, with some differences, in the directive on the right to interpretation and translation, in the directive on the right to information, in the directive on the right of access to a lawyer and in the directive on legal aid⁵.

However, on the one hand, EU Member States must be aware that all judicial proceedings may have a detrimental effect on children even if they concern minor offences.

On the other hand, EU Member States should be aware that a similar distinction between types of crimes (serious or minor) does not exist in any international instruments concerning the rights of children in conflict with the law, nor in the ECtHR's case-law.

On this matter, some recitals in the EU directives on fair trial rights are relevant to clarify this aspect, above all with regard to the right of access to a lawyer.

Directive 2013/48/EU, recital 18 and directive (EU) 2016/1919, recital 14:

“The scope of application of this Directive in respect of certain minor offences should not affect the obligations of Member States under the ECHR to ensure the right to a fair trial, including obtaining the assistance of a lawyer”.

⁵ Directive 2012/13/EU (Recital 17 and art. 2, § 2), directive 2010/64/EU (Recital 16 and art. 1, § 3), directive (EU) 2016/1919 (Recitals 11-14 and art. 2, § 4), directive 2013/48/EU (Recitals 16-18, 24 and art. 2, § 4).

Directive 2013/48/EU, recital 24:

“In respect of certain minor offences, this directive should not prevent Member States from organising the right of suspects or accused persons to have access to a lawyer by telephone. However, limiting the right in this way should be restricted to cases where a suspect or accused person will not be questioned by the police or by another law enforcement authority”.

g. Opt in/opt out

More in general, regarding the application of all the EU directives on fair trial rights, it is also important to remember that Denmark, Ireland and the United Kingdom have opted out from the area of freedom, security and justice. Ireland and the United Kingdom have a flexible opt-out from legislation adopted in this area which allows them to opt-in or out of legislation and legislative initiatives on a case-by-case basis.

- To date, Ireland and the United Kingdom have taken part only in the adoption of directive 2010/64/EU on the right to interpretation and translation in criminal proceedings and of directive 2012/13/EU on the right to information in criminal proceedings.
- In contrast, Denmark has a general opt-out from the area of freedom, security and justice and it did not take part in the adoption of any of the abovementioned directives.

B) Recommendations and key directions for implementation

- EU Member States should effectively implement the EU directives on procedural rights for suspected and accused persons in criminal proceedings;
- EU Member States should guarantee children their procedural rights by also applying the EU directives also in welfare proceedings which have substantial criminal characteristics and that may have negative consequences for the child’s well-being;
- EU Member States should recognize children suspected of having committed

a criminal offence as suspects within the scope of the EU directives and, thus, entitle them to the procedural guarantees provided for in these directives, regardless of the national classification of juvenile justice proceedings;

- ⑤ EU Member States should check the legality of a criminal trial, including its compliance with the fundamental guarantees enshrined in the EU directives, from the first police questioning or police custody until the outcome of the criminal procedure. In this regard, if a child has benefited from lower guarantees in a welfare or administrative phase of the proceeding compared to the guarantees granted in a criminal proceeding, the procedure should be modified in order to ensure the child all his procedural rights;
- ⑤ In case of doubt as to the interpretation or validity of EU law (in terms of compliance with the international and regional obligations), Member States' jurisdictions may make a request for a preliminary ruling before the CJEU. This procedure is further discussed in a technical sheet attached to this Manual (TS 5).



2. The procedural rights of children suspected or accused in criminal proceedings

This part highlights the procedural rights of children in conflict with the law which are guaranteed by the directive (EU) 2016/800 (on procedural safeguards for children who are suspects or accused persons in criminal proceedings) and by the other directives on fair trial rights which are applicable to both children and adults involved in criminal proceedings (i.e. directives 2010/64/EU on the right to interpretation and translation, 2012/13/EU on the right to information, 2013/48/EU on the right of access to a lawyer, (EU) 2016/343 on the presumption of innocence and (EU) 2016/1919 on legal aid).

2.1 The assistance by a lawyer

Assistance by a lawyer is guaranteed by international and regional legal instruments to every child involved in juvenile justice proceedings as a suspect or accused person.

EU Member States are to ensure the exercise of the rights of defence in an effective manner (Directive 2013/48/EU).

In particular, with regard to children, EU Member States are required to provide them with the assistance of a lawyer in order to allow them to effectively exercise their rights of defence (Directive (EU) 2016/800, art. 6.2). Legal assistance for

children in conflict with the law includes the right of the child to consult and meet with a lawyer and the right to communicate with him in private, in particular prior to being questioned by the police or by other law enforcement or judicial authorities, irrespective of whether the child is formally charged, or whether the questioning is on his alleged involvement in a criminal offence. The right to legal assistance entails also that the lawyer has the opportunity to participate effectively during questioning and during, as a minimum, certain investigative or evidence-gathering acts concerning his client (Directive (EU) 2016/800, art. 6.4). Moreover, when a lawyer is not present and the child is to be assisted by a lawyer, the competent authorities shall postpone the questioning of the child, or other investigative or evidence-gathering acts, for a reasonable period of time in order to allow his arrival or to arrange for a lawyer to assist the child for whom a lawyer has not already been appointed or to arrange for a lawyer for the child (Directive (EU) 2016/800, art. 6.7).

Right to a lawyer: access and assistance

1. *As previously stated, the full set of EU directives on fair trial rights needs to be read together. We would therefore highlight the fact that article 6 of directive (EU) 2016/800 on “**assistance** by a lawyer” needs to be read in conjunction with directive 2013/48/EU on “the right of the child to **access** a lawyer”.*

Directive (EU) 2016/800, art. 6.1 (“Assistance by a lawyer”):

“Children who are suspects or accused persons in criminal proceedings have the right of access to a lawyer in accordance with directive 2013/48/EU. Nothing in this directive, in particular in this article, shall affect that right”.

According to the frame introduced by directive (EU) 2016/800, it is now an obligation of EU Member States to provide children with the assistance of a lawyer and, therefore, this obligation must be introduced in the Member States’ domestic laws. This means, that in any event, the child should always be assisted by a lawyer and this assistance should not be limited to guarantees of access to a lawyer or the mere presence of the lawyer during the juvenile justice proceedings. The lawyer should be allowed to have an active role and to participate during all steps of the proceedings.

Directive (EU) 2016/800, recital 25:

“Since children are vulnerable and not always able to fully understand and follow criminal proceedings, they should be assisted by a lawyer in the situations set out in this directive. In those situations, Member States should arrange for the child to be assisted by a lawyer where the child or

the holder of parental responsibility has not arranged such assistance”.

- 2. The possibilities to derogate from the right of access to and assistance by a lawyer introduced, respectively, by the two directives (directive 2013/48/EU and directive (EU) 2016/800) must be interpreted as strict exceptions by the Member States and should be as limited as possible. In directive (EU) 2016/800, in particular, there are some provisions that encourage EU Member States not to derogate from the assistance by a lawyer when dealing with children:*

Directive (EU) 2016/800, recital 26:

“Assistance by a lawyer under this directive presupposes that the child has the right of access to a lawyer under directive 2013/48/EU. Therefore, where the application of a provision of directive 2013/48/EU would make it impossible for the child to be assisted by a lawyer under this directive, such provision should not apply to the right of children to have access to a lawyer under directive 2013/48/EU. On the other hand, the derogations and exceptions to assistance by a lawyer laid down in this directive should not affect the right of access to a lawyer in accordance with directive 2013/48/EU, or the right to legal aid in accordance with the Charter and the ECHR, and with national and other Union law”.

- 3. Finally, Member States are obliged to ensure the assistance of a child by a lawyer. Children cannot waive being assisted by a lawyer. No waiver has been foreseen in Directive (EU) 2016/800. This conclusion appears also from directive (EU) 2016/1919 on legal aid.*

Directive (EU) 2016/1919 (on legal aid), recital 9:

“Without prejudice to article 6 of directive (EU) 2016/800, this directive should not apply where suspects or accused persons, or requested persons, have waived their right of access to a lawyer in accordance with, respectively, article 9 or article 10.3 of directive 2013/48/EU, and have not revoked such waiver, or where Member States have applied the temporary derogations in accordance with article 3.5 or 3.6 of directive 2013/4/EU, for the time of such derogation”.

A) Main challenges

a. Questions of interpretation and application of the EU directives

- Temporary derogations to the right of access to a lawyer:

Articles 3.6 of directive 2013/48/EU and 6.8 of directive (EU) 2016/800 provide the possibility to **derogate temporarily** from the assistance by a lawyer in exceptional circumstances, on the basis of one of the following compelling conditions and reasons:

- Only at the pre-trial stage;
- When there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
- When immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings in relation to a serious criminal offence¹.

As with adult persons involved in criminal proceedings who are suspected or accused of having committed a crime (see arts. 8.1 and 8.2 of directive 2013/48/EU), directive (EU) 2016/800 also clarifies for children in conflict with the law that:

- The decision to proceed without a lawyer must be taken only in exceptional circumstances, on a case-by-case basis;
- The decision to proceed without a lawyer must be capable of being submitted to judicial review.

There is also an additional important clarification in directive (EU) 2016/800 when children are involved in criminal proceedings:

- The child's best interests shall always be taken into account when taking such a decision.

EU Member States shall be aware that the pre-trial stage is the most delicate moment of the entire criminal proceeding as it is often decisive for the outcome of proceedings. Precisely for this reason, the possibility of using any kind of derogation at this stage should be strictly avoided in line with ECtHR's case-law. In particular,

¹ The reference to a "serious criminal offence" is only in directive (EU) 2016/800.

in its judgment *Salduz v. Turkey*, the ECtHR has stated that in order to guarantee a practical and effective right to a fair trial, access to a lawyer shall be assured from the first police questioning,² and in another important judgment the ECtHR has also pointed out that “*Suspects are particularly vulnerable at the investigation stage and evidence gathered may determine the outcome of the case. The right of access to legal assistance is particularly important for vulnerable suspect such as minors*”³.

➤ Other derogations to the assistance by a lawyer:

In addition to the derogations allowed in the pre-trial stage, article 6.6 of directive (EU) 2016/800 permits, in general, other derogations when the assistance of a lawyer is not proportionate in the light of the circumstances of the case, taking into account, cumulatively, the following criteria:

- The seriousness of the alleged criminal offence;
- The complexity of the case;
- The measures that could be taken in respect of such an offence.

Also in these cases, the child’s best interests shall always be a primary consideration. Derogations must comply with the right to a fair trial and, in any event, Member States are to ensure that children are assisted by a lawyer when they are brought before a competent court or judge in order to decide on detention and also during the period of detention itself.

In general, all these derogations should be interpreted narrowly.

➤ Investigative actions without the presence of a lawyer:

Recital 28 of directive (EU) 2016/800 lists several actions (identifying the child; determining whether an investigation should be started; verifying the possession of weapons or other similar safety issues; carrying out investigative or evidence-gathering acts other than those specifically referred to in this directive, such as body checks, physical examinations, blood, alcohol or similar tests, or the taking of photographs or fingerprints; or bringing the child to appear before a competent authority or surrendering the child to the holder of parental responsibility or to another appropriate adult, in accordance with national law) that do not place an obligation on EU Member States to ensure that children, who are suspects or accused of having committed a criminal offence, have the assistance of a lawyer, if this complies with the right to a fair trial.

EU Member States shall interpret and apply this provision in light of the principle of the best interests of the child.

² ECtHR, 27 November 2008, *Salduz v. Turkey*, n. 36391/02.


³ ECtHR, 15 June 2004, *S.C. v. the United Kingdom*, n. 60958/00.


b. Specific EU Member States challenges


I. Concerning the assistance by a lawyer at the pre-trial stage


Directive (EU) 2016/800 specifically addresses the responsibilities of police in questioning and arresting children suspects and accused in juvenile justice proceedings. Such responsibilities include ensuring that the child is assisted by a lawyer both before and during the police questioning (art. 6.4).


EU Member States should be aware of the following challenges to overcome:


 **In Belgium, Bulgaria and The Netherlands:** The right of access to a lawyer can often be derogated during police questioning and can vary depending on the sanctions that may be imposed for the alleged offences.


 **In Poland:** In section 57(b) of the Children Act 2001 as amended, a child must be notified that he is entitled to consult a solicitor (lawyer) and advised as to how this entitlement can be availed of. If a child (or his parent) chooses not to engage a lawyer, a questioning may proceed without the presence of a lawyer. In practice, the assistance of a lawyer is usually not provided at the pre-trial stage. The presence of a family assistant, of a representative of a community organisation or of the child's school during police interviews can replace the assistance of a lawyer according to the law.


 **In Ireland:** A child may have a responsible or appropriate adult attend police questioning with him, in the absence of a lawyer and of a parent or guardian. It is not mandatory and the legislation does not define such a person.


 **In The Netherlands:** Children aged under the MACR have no right to access a lawyer before or during police questioning, as they are heard as witnesses.

 **In The Netherlands:** In cases concerning a minor offence, children suspects have the right to access a lawyer during police interrogations, but when the minor offence is then dealt with by the prosecutor, they will not always have the right to access a lawyer.

 **In Bulgaria:** The presence of a lawyer is not mandatory for children only "invited" to the police station for questioning.

 **In Bulgaria and Poland:** Mandatory defence by a lawyer is not available for defendants who attained the age of 18 during the trial stage even if the crime had been committed before their eighteenth birthday. (Poland - only in criminal proceedings. It is different in juvenile justice proceedings - and Bulgaria)

 **In Belgium, Bulgaria and Poland:** Children often have to give a statement or sign documents in the absence of a lawyer during police questioning.


 **In Bulgaria:** The testimonies of police officers who have questioned the child without a lawyer are legally admissible in the trial.


A child in conflict with the law cannot waive being assisted by a lawyer. No provision on waiver is foreseen in Directive (EU) 2016/800.

Moreover, according to the ECtHR, the questioning of a child by the police without the presence of his lawyer constitutes a violation of article 6 of the ECHR⁴.

Indeed, the absence of a lawyer in this particular phase could have a critical impact on the outcome of the proceedings. Given the specifically vulnerable position of the child, the presence of a lawyer is fundamental to ensure the effective exercise of all his rights to ensure a fair trial.

EU Member States should be aware of the following challenges to overcome:

 **In The Netherlands:** Children can renounce to their right to receive legal assistance during police questioning (but they cannot waive the right to have a legal consultation before taking this decision).

 **In Bulgaria:** The right to waive the lawyer is possible at the police-stage since the police normally do not encourage children to consult lawyers before or during questioning or actively persuade them to waive their right to a lawyer.

 **Belgium, Denmark, France and the Netherlands** have made reservations with respect to articles 37 and 40 of the UNCRC that limit the access by a child to a lawyer for minor offences (see table 1 in **TS 1**).



⁴ ECtHR, 2 March 2010, *Adamkiewicz v. Poland*, n. 54729/00.

II. Concerning the right to confidentiality

Article 4 of directive 2013/48/EU and article 6.5 of directive (EU) 2016/800 establish the right of confidentiality of communication between the child and his lawyer. According to both articles, the right to confidentiality includes meetings, correspondence, telephone conversations and other forms of communication between the child and his lawyer.

EU Member States should be aware of the following challenges to overcome:



In Belgium and The Netherlands: The time foreseen by the legislation for a confidential consultation before police and court hearings (30 minutes), is too short to create a relationship of trust between the child and his lawyer.



In Bulgaria: The duration of the prior consultation is not established by a statutory requirement.



In Belgium and Poland: When a child is deprived of liberty (at the police station), the right to confidentiality is not always fully guaranteed (e.g. there are often no special and separate rooms for these kinds of meetings).

B) Inspiring practices at national level⁵

I. Concerning the assistance by a lawyer⁶

EU Member States should take inspiration from the following national practices:



In Belgium and The Netherlands: The active and participative role of the lawyer during police questionings and court hearings is organised by legislation.



In Belgium: Appointed lawyers registered on an on-call service can be contacted directly, night and day, via the system of a web application. The aim is to allow the police officers to contact a lawyer quickly and easily.



In Belgium: The specialist function of the lawyer for children is organised by a Regulation of the French-speaking national bar association of Belgium (2011) and by a Recommendation of the Flemish-speaking bar association of Belgium (2005).



In Ireland: Where the child or parent or guardian has asked for a lawyer, the child shall not be interviewed until a reasonable time for the attendance of the lawyer has elapsed.

EU Member States should take inspiration from following national practices:



In Belgium: It is expressly foreseen by legislation that a child cannot waive his right to lawyer. Neither the right to a private consultation, nor the effective assistance during the police questioning or court hearing may be waived.

⁵ For more information and other examples of inspiring practices, see all the national reports and Countries Overviews on the website www.mylawyermyrights.eu.

⁶ More inspiring practices are to be found in the Guide addressed to lawyers for children (Practical Guide "How to defend a child in conflict with the law?"). □□

II. Concerning the right to confidentiality

EU Member States should take inspiration from following national practices:



In Belgium and Bulgaria: When the child is deprived of liberty (at the pre-trial stage or during the trial), he can meet his lawyer in a soundproofed room.

C) Recommendations and key directions for implementation

I. Concerning the assistance by a lawyer

- In order to meet their international commitments, EU Member States should ensure that all young suspects, including children below the MACR, children not under arrest (for examples, children only invited to go to the police station for questioning) have access to a lawyer 24 hours a day, free of charge (if this is necessary to guarantee their right to defence);
- It is recommended that EU Member States do not foresee derogation to the assistance by a lawyer;
- It is recommended that EU Member States apply directive (EU) 2016/800 and its guarantees also in respect of certain minor offences committed by children when this is necessary not to affect their obligations under the ECHR (in particular concerning the right to a fair trial and the obligation to provide the assistance of a lawyer);
- EU Member States should guarantee that children are able to exercise their rights consciously and prevent abuses during police questioning (especially, but not only, at the pre-trial stage);
- EU Member States should withdraw all reservations to articles 37 and 40 of the UNCRC.
- EU Member States should lay down clear national legal provisions to prohibit the possibility for a child to waive his right to a lawyer.



A **technical sheet** attached to this Manual provides EU Member States with a checklist on article 6 of directive (EU) 2016/800 (the assistance by a lawyer) (**TS 7**).

II. Concerning the right to confidentiality

- EU Member States should ensure absolute confidentiality in each meeting between the child and his lawyers, if necessary by providing a room adapted for this purpose in every facility where a child can be deprived of his liberty.

2.2 The right to free legal aid

EU Member States should ensure that children have fair access to the national legal aid system in order to guarantee the effective exercise of the assistance by a lawyer (art. 18 of directive (EU) 2016/800 and arts. 1.2, 4 -7 and 9 of directive (EU) 2016/1919).

A) Main challenges

a. Questions of interpretation and application of the EU directives

- Neither in directive (EU) 2016/800, nor in directive (EU) 2016/1919 are there specific provisions which prescribe exactly how legal aid should be provided to children beyond the articles above.

However, other international and regional instruments provide guidance on this issue which should be carefully considered by the EU Member States. In particular, the UN Principles and Guidelines on access to legal aid in criminal justice systems, the CoE Guidelines on CFJ (Guideline 38) and the European Commission Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings (points 6 and 8), state that the right to legal aid is to be permanently effective for every child.

Moreover, in the CoE Guidelines on CFJ (Explanatory memorandum, point 102), it is clarified that providing children with access to free legal aid “*...should not necessary require a completely separate system of legal aid. (.....). In any case, the legal aid system has to be effective in practice*”.

- Article 4.1 of directive (EU) 2016/1919 on legal aid states that: “*Member States shall ensure that suspects and accused persons who lack sufficient resources to pay for the assistance of a lawyer have the right to legal aid when the interests of justice so require*”.

This provision shall be read in conjunction with article 18 of directive (EU) 2016/800 which states that “*Member States shall ensure that national law in relation to legal aid guarantees the effective exercise of the right to be assisted by a lawyer pursuant to its article 6*”. Moreover, according to article 9 of directive (EU) 2016/1919, “*Member States shall ensure that the particular needs of vulnerable suspects, accused persons and requested persons are taken into account in the implementation of this directive*”.

b. Specific EU Member States challenges

I. Concerning the right of access to a lawyer free of charge

EU Member States should be aware of the following challenges to overcome:



In Belgium: In practice, most children are not aware of their right to free legal representation before they are brought to court.



In Belgium: The form that the child must complete in order to obtain legal aid is often too long, tedious to fill out and totally unsuited to the capacities of most children. This type of administrative restraint is a considerable obstacle to the exercise of their right to legal aid.




In The Netherlands: The police provide information only about the option to have an appointed lawyer, without advising that children have right to a lawyer free of charge as well.





In the Netherlands: It is not clear if children arrested for minor offences can have access to a lawyer free of charge. Moreover, children invited to go to the police station for questioning do not have the right to legal aid free of charge.













In Belgium and The Netherlands: Legal aid lawyers are not available 24 hours a day.

 **In Bulgaria:** Many children are of the opinion that they do not need a lawyer and according to their experience, legal aid lawyers are not “good” professionals.

 **In Italy:** Access to a lawyer free of charge is only guaranteed to children. If, during the criminal proceedings, a child turns 18 years of age, there has to be an application for legal aid as an adult or the person and/or his family has to pay even if there is still a court-appointed lawyer.

 **In Poland:** The possibility of revoking the decision to appoint a legal aid defence lawyer for a child is not mentioned in the Polish Act on juvenile justice nor happens in practice.


II. Concerning systematic problems in the legal aid system in some EU Member States


Very often adequate resources for an effective and robust legal aid scheme are not available. This leads to a number of negative consequences: lower remuneration for legal aid lawyers ( **Belgium**,  **The Netherlands**,  **Ireland**,  **Bulgaria**,  **Italy**) and considerable delay in their payment ( **Belgium**,  **Italy**) thus a lower quality of legal assistance (with legal aid lawyers that are not always trained, like in  **Bulgaria**), weak preparation of cases (e.g. due to the lack of legal aid funding for lawyer-client consultations -  **Ireland**) and parents often reluctant to have their child defended by a lawyer who works through the legal aid system. ( **Belgium**)


B) Inspiring practices at national level⁷


I. Concerning the right of access to a lawyer free of charge


EU Member States should take inspiration from the following national practices:


 **In Belgium and Ireland:** As children are of limited, if any, means, they are always granted legal aid, upon application.


 **In Belgium:** The Commission on legal aid of the Bar association of Arlon finances and distributes a brochure entitled: “The child and his lawyer”. This brochure informs children of their right to free legal representation.


 **In Belgium:** A lawyer who is consulted by a child outside the legal aid system has the obligation to inform the child of his right to legal aid.

 **In Belgium:** A child who becomes a young adult and has committed an offence when he was younger than 18 years, benefits from the irrefutable presumption of indigence and may have a lawyer free of charge.

 **In Italy:** Unaccompanied foreign children, involved in juvenile justice proceedings, have the right to be informed of their right to appoint a lawyer and to benefit from the free legal aid system.

 **In Belgium:** The Legal Aid Office of the French-speaking Bar association of Brussels has a section devoted to “unaccompanied foreign children” providing free legal aid to this category of children.

 **In Belgium:** Twenty Belgian non-profit associations and an individual have brought an application for the annulment of the national law regarding legal aid before the Belgian Constitutional court. This law, while maintaining free legal aid for children, restricts access to legal aid for the poorest families. Since children involved with the law often come from precarious families and environments, they will often be referred to as “children in danger” before they are labelled as “offenders”. Throughout all the procedure legal aid lawyers are involved to defend children. It is thus essential that their parents and their families can also be assisted by a lawyer and have access to justice.

 **In Italy:** “The Protocol of Milan” is a Protocol signed between the juvenile court, the public prosecutor of the same court, the lawyers and the Juvenile Chamber of Milan, that permits the effectiveness and quality of the legal aid system to be verified in reasonably short terms (it is the only one in Italy)⁸.

⁷ For more information and other examples of inspiring practices, see all the National reports and Countries Overviews on the website www.mylawyermyrights.eu.

⁸ See <http://www.camerapenalemilano.it/public/file/Protocollo%20Tribunale%20per%20i%20minorenni%202014.pdf>.

C) Recommendations and key directions for implementation

I. Concerning the right of access to a lawyer free of charge

- ④ In order to have a legal aid system that is truly child-friendly, EU Member States should grant free legal aid to children without regard to the child's own assets and/or those of his parents or guardians;
- ④ EU Member States should apply article 18 of directive (EU) 2016/800 in conjunction with article 9 of directive 2016/1919 by always taking into primary consideration the principle of the child's best interests;
- ④ EU Member States should ensure that children have fair and easy access to the national legal aid system in order to guarantee the effective exercise of their right to be assisted by a lawyer.

II. Concerning systematic problems in the legal aid system

- ④ EU Member States should provide every child with accessible information on the existing legal aid system and on how it may be accessed;
- ④ EU Member States should provide legal aid lawyers with adequate remuneration;
- ④ EU Member States should adopt national Protocols in order to ensure uniform standards in their respective legal aid systems.

2.3 The right to information

EU Member States should ensure that children, who are made aware that they are suspected or accused of having committed a crime, are informed promptly (in writing, orally or both) about their procedural rights in accordance with directive 2012/13/EU (art. 4.1, directive (EU) 2016/800) and the general aspects of the conduct of the proceedings (i.e. about the next procedural steps and the role of the authorities involved) in simple and accessible language, taking into account their particular needs (recital 19 and art. 4 of directive (EU) 2016/800).

This includes the right to remain silent, the right not to incriminate oneself, the right to interpretation and translation (if he does not understand the language of the proceedings), the right of access to a lawyer, any entitlement to free legal advice and the right to be informed of the accusation.

In addition, children need to be informed about the rights set out in directive (EU) 2016/800. A distinction is made between the different stages of the proceedings and the directive sets out which information children should receive during each stage (e.g. only children deprived of liberty will be informed about their right to specific treatment during deprivation of liberty. For children who are not deprived of liberty this information is not relevant). The information obligation is accompanied by a recording obligation on the competent authorities in order to ensure that the information is actually provided to the children.

When a child is deprived of liberty, EU Member States should ensure that he receives a written Letter of Rights, always drafted in simple and accessible language (art. 4.3 of directive (EU) 2016/800 which refers to directive 2012/13/EU on the right to information in criminal proceedings).

A) Main challenges

a. Questions of interpretation and application of the EU directives

- Article 4 of directive (EU) 2016/800 is devoted to the right to information. Its first paragraph refers to directive 2012/13/EU which deals specifically with the right to information.

In this regard, even if directive (EU) 2016/800 does not make any specific reference to the right of the child to be informed of his rights to remain silent, not to incriminate himself and to receive the assistance of an interpreter or translator (if he does not understand the language of the proceedings), EU Member States must be aware that children have the right to be informed about these rights according to directive 2012/13/EU on the right to information and directive (EU) 2016/343 on the presumption of innocence.

- The competent authorities of each Member State are responsible for informing children at the different stages of the criminal procedure. All professionals involved should always ask whether a child has understood the information provided to him during all stages of the juvenile justice procedure (it may also be necessary to reiterate all the required information several times). The information given to the child must be noted, using the recording procedure in accordance with national law.

- Directive 2012/13/EU on the right to information provides for the obligation to guarantee a “Letter of Rights” to suspects/accused persons deprived of liberty (art. 4).

Respect of the child’s right to information cannot be limited to handing out a copy of the “Letter of Rights” without providing any further information. In particular, according to recital 19 of directive (EU) 2016/800: *“Children should receive information about general aspects of the conduct of the proceedings. To that end, they should, in particular, be given a brief explanation about the next procedural steps in the proceedings in so far as this is possible in the light of the interest of the criminal proceedings, and about the role of the authorities involved. The information to be given should depend on the circumstances of the case”*.


For more information about how a lawyer should properly inform a child in conflict with the law, see The Practical Guide for lawyers. □


b. Specific EU Member States challenges


I. Concerning the right to information


EU Member States should be aware of the following challenges to overcome:


 **In Belgium and The Netherlands:** The lack of information is often linked to the fact that the access to information is difficult for lawyers and their clients, in particular before a police questioning.

 **In Belgium:** There is a lack of information concerning, in particular, how a child can change his lawyer.

 **In Ireland:** Few special measures are taken at national level to ensure that information is provided to children in appropriate language.

 **In Ireland:** There is a lack of information concerning, in particular, the child’s right to access to justice.


 **In Italy and Poland:** There are no legal provisions on what the consequences of a failure to respect the right to information are.


 **In Italy:** The right to information is not ensured from the first contact of the child with the justice system, in particular, in police stations.

II. Concerning the Letter of Rights

EU Member States should be aware of the following challenges to overcome:

 **In Belgium, Bulgaria, Italy and Poland:** The Letter of Rights is not drafted in child-friendly language.

 **In Bulgaria:** The complicated language used in the Letter of Rights may lead some children to waive their right to a lawyer and its translation in other languages is not available in all police departments.


 **In Italy:** The Letter of Rights is not commonly known nor used by professionals working in the juvenile justice system.


B) Inspiring practices at national level⁹

I. Concerning the right to information

EU Member States should take inspiration from the following national practices:

 **In Belgium and The Netherlands:** If a suspect has not been informed about his right to consult a lawyer before a police questioning, the results of the testimonies may not be used as evidence in court.

 **In The Netherlands:** The police have opened a website especially to inform children of their rights¹⁰. The Public Prosecutor publishes a youth page on its website as well¹¹. The Dutch court has a website that also explains the juvenile justice procedure and the role of the judge to children¹². Finally, also the website of the Children's Ombudsman has information for children suspects.¹³

 **In Belgium:** Materials are provided by the Flemish Child Rights Services (magazine "t'Zitemzo")¹⁴ designed to explain to children, in modified language, the scope of their rights and the functioning of the Belgian system.

⁹ For more information and other examples of inspiring practices, see all the National reports and Countries Overviews on the website www.mylawyermyrights.eu. 


¹⁰ See <https://www.vraaghetdepolitie.nl/>.

¹¹ See <https://www.om.nl/onderwerpen/onderwijs-jongeren>.

¹² See https://www.rechtvoorjou.nl/#/ik_moet_naar_de_rechter/ik_word_verdacht.

¹³ See <https://www.dekinderombudsman.nl/208/jongeren/alles-over/vragen-over-politie-en-justitie>.

¹⁴ See <http://www.tzitemzo.be>.


N.B. Socio-Legal Defence Centres (SLDC)¹⁵ do exist in some EU Member States: the work of these centres consists of providing direct access to justice and adequate legal and social assistance to children. To do this, these Centres provide information, refer children to other services when necessary, provide legal advice and can also represent the child or his family in court in certain specific procedures (for more information see the Appendix attached to this Manual .




The EU Project “Protecting Young Suspects in Interrogations: a study on safeguards and best practice”¹⁶ provides inspiring practices on how to inform a child suspected of a crime of his rights.

II. Concerning the “Letter of Rights”

EU Member States should take inspiration from following national practices:

 **In Belgium:** Most of the children interviewed in the framework of the project MLMR remember having received a Letter of Rights in the police station.

 **In Belgium and Poland:** Some of the police officers and judges are trying to make the “Letter of Rights” more child-friendly, especially by giving children additional information on the “Letter of Rights”.

C) Recommendations and key directions for implementation

I. Concerning the right to information

- EU Member States should ensure that the national competent authorities are obliged to always inform children of their rights to remain silent and not to incriminate themselves and also of all other rights listed in directives 2012/13/EU and (EU) 2016/800.
- EU Member States should inform children who do not speak or understand the language of the proceedings of their rights to translation and interpretation;

¹⁵ For this project, we use the definition of centres of social and legal defence as conceived by Defence for Children International - DCI (Defence for Children International, “Socio-Legal Defence Centres”: pp. 1-3).

¹⁶ See <http://youngsuspects.eu/>.

- EU Member States should ensure that the language used to inform children should not only be simple and accessible but also *child-friendly* as stated by the CoE Guidelines CFJ, p. 21: “*The information and advice should be provided to children in a manner adapted to their age and maturity, in a language which they can understand and which is gender and culture sensitive*”;
- EU Member States should develop specialized and effective means for providing information on the rights of suspected and accused children at all stages of the proceedings, including within police custody. All the information should be provided to children in a child-friendly manner, such as through the use of audio and video materials;
- EU Member States should establish free legal advice centres, with specialist knowledge of the law and policy pertaining to the rights of the child and juvenile justice. These centres should also provide child-friendly materials detailing the child’s rights within the juvenile justice system (see the SLDC’s model proposed in the Appendix);
- EU Member States should ensure that lawyers, police officers, judges and staff of relevant institutions respect their duty to inform children.

II. Concerning the Letter of Rights¹⁷

- The Letter of Rights should be written in child-friendly language and must be given to children before police questionings and court hearings;
- A child-friendly Letter of Rights should be available for children in several languages, as well as national minority languages, throughout all police stations.

2.4 The right to interpretation and translation

Children who do not understand the language of the juvenile justice proceedings in which they are involved have the right to interpretation and translation, like any other suspected or accused person. The linguistic assistance must be adequate and free of charge (irrespective of the outcome of the proceeding) (directive 2010/64/EU on the right to interpretation and translation in criminal proceedings).

¹⁷ More recommendations are to be found in the PRO-JUS report available on: <http://tdh-europe.org/upload/document/7261/Pro-Jus-EN.pdf>.

A) Main challenges

a. Questions of interpretation and application of the EU directives

- Directive (EU) 2016/800 must be read in conjunction with directive 2010/64/EU.

Every child suspected or accused in criminal proceedings, who does not speak or understand the language of the criminal proceedings concerned, has the right to interpretation and translation in accordance with directive 2010/64/EU. The absence of interpretation and/or translation could lead to a child being subject to proceedings without understanding what is said. These two rights must be guaranteed to children in conflict with the law according to their specific needs and in a child-friendly manner.

- Article 3.8 of directive 2010/64/EU allows for the possibility of waiving the right to translation.


This is possible but only under certain conditions (for more information see the **TS 3** which provides a detailed and practical guidance on the set of EU directives on fair trial rights).





b. Specific EU Member States challenges


I. Concerning the right to interpretation


EU Member States should be aware of the following challenges to overcome:

 **In Belgium:** Interpreters are paid with considerable delay and their remuneration is insufficient.

 **In Belgium:** There is no formal procedure to verify that a child needs an interpreter. The child's linguistic skills are not automatically assessed.


 **In Belgium:** The independence and impartiality of interpreters is not assured.


 **In Bulgaria:** Interpreters are guaranteed only for foreign children and not for Bulgarian children originally from minority populations.


 **In Italy:** Interpreters are guaranteed during court hearings but not at the police-stage.


II. Concerning the right to translation

EU Member States should be aware of the following challenges to overcome:

 **In Bulgaria:** Children can waive their right to receive a written translation.

 **In Bulgaria:** Not all documents are translated (**also in The Netherlands and Ireland**), there is no regulation on which documents must be translated.


 **In Bulgaria:** There is a shortage of translators outside the big cities.

 **In Ireland:** There is a concern about the ability of translators to communicate with children in a child-friendly manner.

III. Concerning both rights

EU Member States should be aware of the following challenges to overcome:

 **In Belgium and The Netherlands:** There is no quality control process of the translation of documents and/or of the interpretation.

 **In Belgium and Italy:** There is a lack of quality in translations and in interpretation.

 **In Italy:** Court-appointed lawyers cannot refer to the legal aid system to ask for translation or interpretation in case of need.

B) Inspiring practices at national level¹⁸

I. Concerning the right to translation


EU Member States should take inspiration from following national practices:


 **In Bulgaria:** It is possible to object to the quality of the translation.

C) Recommendations and key directions for implementation

I. Concerning the rights to interpretation and translation¹⁹

- ➊ EU Member States should ensure that the competent national authorities verify, *ex officio*, the real capacity of suspected or accused children to follow and understand the proceedings;

¹⁸ For more information and other examples of inspiring practices, see all the National reports and Countries Overviews on the website www.mylawyermyrights.eu. 

¹⁹ More recommendations are to be found in the PRO-JUS report available on: <http://tdh-europe.org/upload/document/7261/Pro-Jus-EN.pdf>. 

- ④ EU Member States should take all necessary measures to guarantee that the rights to interpretation and translation are guaranteed to all children within their jurisdiction, without discrimination, in a way that is adapted to their specific needs;
- ④ EU Member States should make it possible to object to the quality of the interpretation and/or of the translation;
- ④ EU Member States should provide training to interpreters that work with children since the use and understanding of their mother tongue might be different from that of adults. Lack of knowledge and/or experience in that regard may impede the child's full understanding of the questions raised and interfere with the right to a fair trial and to effective participation (CRC/C/GC/10, §62).

2.5 The right to an adapted procedure

In a child-friendly juvenile justice system, some procedural adaptations are necessary to guarantee the child his right to effective participation in the proceedings and to take into account his best interests²⁰.

In that respect, directive (EU) 2016/800 provides specific procedural modifications, such as:

1. The set-up of audio-visual recordings for questioning of the child (art. 9)

Every interrogation represents a traumatic experience for children, irrespective of the state of deprivation of liberty. Recording the questioning offers the advantage of avoiding its repetition at each stage of the juvenile justice proceedings. It also protects children from the risk of abuses, distortions of their words and from all kind of pressure which could easily lead them to self-incrimination. The audio-visual recording shall not be considered as a particular form of protection which excludes other guarantees, such as legal assistance, or that must be used only in extreme situations, e.g. when a child is deprived of liberty²¹.

In any case, according to article 9, §2, in the absence of audio-visual recordings, questioning is to be recorded in another appropriate manner.

2. Court hearings are not to be public in order to protect the child's privacy (art. 14)

Member States should ensure that the privacy of children during juvenile justice proceedings is protected. To that end, they should either provide

²⁰ See above "The principle of the best interests of the child", p. 31. □□

²¹ D. De Vocht, M. Panzavolta, M. Vanderhallen, M. Van Oosterhout, *Procedural safeguards for juvenile suspects in interrogations. A look at the Commission's Proposal in light of an EU comparative study*, in *New Journal of European Criminal law*, vol. 5, issue 4, 2014, p. 502.

that court hearings involving children are usually held in the absence of the public, or allow courts or judges to decide to hold such hearings in the absence of the public. Member States should also take appropriate measures to ensure that the audio-visual recordings of questioning are not publicly disseminated.

3. Cases involving children must be treated in a timely and diligent manner (art. 13)

Under this article, Member States should take all appropriate measures to ensure that juvenile justice proceedings involving children are treated as a matter of urgency and with due diligence.

Moreover, the child in conflict with the law should be treated in a manner which protects his dignity and which is appropriate to his age, maturity and level of understanding, and which takes into account any special needs, including any communication difficulties, he may have.

4. The holders of parental responsibility (or of another appropriate adult) must be involved in the case (arts. 5 and 15)

Parents are provided with all the necessary information concerning the situation of their child (the same information which the child has the right to receive) and they have the right to accompany the child during court hearings and also during other stages of the criminal proceedings. The participation of parents (or of another appropriate adult) is essential to provide a psychological assistance and an emotional and moral support to children in line with the spirit of the principle of the best interests of the child. Exceptions do exist to the accompaniment by the parents in case of conflict of interests or when it is contrary to the best interests of the child.

5. Children in conflict with the law have the right to an individual assessment (art. 7 and recitals 35-40)

With the aim of guaranteeing that the specific needs and circumstances of a child involved in juvenile justice proceedings are taken into account (i.e. protection, education, training and social integration) and to determine what procedural adaptations should be made to ensure his effective participation, every child has the right to an individual assessment (see also the CoE Guidelines on CFJ, Guideline 16 and ECtHR's case-law²²).

²² ECtHR, 15 June 2004, *SC v. United Kingdom*, n. 60958/00, §28: "In the case of a child, it is essential that he be dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities" and ECtHR (GC), 16 December 1999, *V. v. UK*, n. 24888/94, § 86.

More specifically²³;

- The individual assessment is to take into account the child's personality and maturity, his economic, social and family background and any specific vulnerability that he may have (art. 7.2). It is distinct from the medical examination (art. 8);
- The individual assessment should be carried out by qualified and well trained professionals, following a multidisciplinary approach (art. 7.7);
- All individual assessments are to be carried out with the close involvement of the child and of the holder of parental responsibility (where appropriate). Otherwise, another appropriate adult can be involved (art. 7.7);
- The individual assessment should be done at the earliest appropriate stage of the proceedings (in any case, before an indictment) (art. 7.5);
- It must be revised throughout the proceedings if the elements that form its basis change significantly (art. 7.8);
- It shall be used by the competent authorities for determining whether any specific measure to the benefit of the child is to be taken, for assessing the appropriateness and effectiveness of any precautionary measures in respect of the child and for taking any decision or course of action in the juvenile justice proceedings, including when sentencing (art. 7.4);

There are considerable opportunities for EU Member States resulting from the proper implementation of article 7, including most fundamentally the potential for better outcomes for children in all phases of the process (and attendant cost savings by potentially reducing detention and recidivism).

Legal and social professionals may be consulted to determine what procedures are needed to ensure the proper scope and conduct of the individual assessment in order to adapt it to the circumstances of the case and, above all, to the characteristics of the child involved (for example, lawyers should be allowed to propose the participation of a particular type of professional (like a social worker, a psychologist or a doctor) in the multidisciplinary team charged with carrying out the individual assessment).

For more information on article 7 of directive (EU) 2016/800, see the **TS 3** which provides a detailed and practical guidance on the EU directive (EU) 2016/800 and **TS 8** which provides a checklist on the individual assessment.



²³ In the preparatory stage for the Manual, Child Circle carried out research and analysis on article 7 and developed the checklist on individual assessment (**TS 8**).

6. The professionals working in the juvenile justice system must be trained (art. 20)

Ensuring multidisciplinary cooperation and specific training for all professionals working in the juvenile justice system are fundamental aspects of guaranteeing the respect of the principle of the best interests of the child (see also the CoE Guidelines on CFJ, Guidelines 14 and 15 [□□](#)). For this purpose, joint training is important to promote mutual knowledge of the roles and tasks of each other and it can be useful also to organise regular meetings to discuss problems of communication/coordination, in order to find new solutions to improve the interaction between the different professionals. In this regard, children should be involved in so far as to having the opportunity to provide feedback on the professionals that they met during juvenile justice proceedings. Finally, training should include education as to what sort of procedural adaptations may be needed to give effect to the child's rights.

7. The limitation of deprivation of liberty (art. 10) and specific treatment in the case of deprivation of liberty (art. 12)

The deprivation of liberty of a child must be imposed by a court only as a measure of last resort. Moreover, each decision which deprives a child of his liberty must be reasoned, take due account of the age and the individual situation of the child and the particular circumstances of the case, be subjected to periodic review and limited to the shortest appropriate period of time.

When a child is deprived of liberty, he has the right to be treated in a child-friendly manner. This means that children should be held separately from adults and allowed to meet with their parents (or another appropriate adult) as soon as possible. In addition, EU Member States shall take appropriate measures to preserve their physical and mental health and development, their right to education and training, their right to family life and their right of freedom of religion or belief. Moreover, all these measures shall ensure access to programmes that foster their reintegration into society.

For more information on these rights, we refer to the **Practical Guide** "*Monitoring places where children where children are deprived of liberty*" [□□](#) entirely dedicated to deprivation of liberty of children in EU Member States and edited by DCI-Belgium as part of the EU funded project "Children's Rights Behind Bars" available on:

http://www.childrensrightsbehindbars.eu/images/Guide/Practical_Guide.pdf

You will also find further information on these rights in **TS 3** of this Manual.



8. The recourse to alternative measures to detention (art. 11 and 20.4)

Member States should ensure that, where possible, the competent authorities have recourse to measures other than detention (“alternative measures”).

Further, EU Member States shall also provide adequate training to professionals providing children with support and restorative justice services in order to ensure that such services are provided in an impartial, respectful and professional manner.

DCI-Belgium is participating in an EU funded project on AWAY “*Alternative ways to address youth*” focused on diversion and restorative justice: <http://www.dei-belgique.be/en/our-actions/our-projects/>. An online course on the subject will be available on www.childhub.org.

This Manual is focused on the procedural rights of children in conflict with the law which have been targeted in national research carried out in the frame of the project MLMR. However, the rights listed in points 7 and 8, together with other rights of children in conflict with the law that have not been part of the research, will be analysed more closely in TS 4: «Other relevant rights of children in conflict with the law».



A) Main challenges

a. Questions of interpretation and application of the EU directives

- **Article 9, directive (EU) 2016/800²⁴ (The right to audio-visual recording of questioning)** This right is subjected to a proportionality test but particular attention is paid to children deprived of liberty. Questions for the sole purpose of identification of the child by the police or other competent authority are not covered
- **Article 13, directive (EU) 2016/800 (Timely and diligent treatment of cases)** This article states that children in conflict with the law shall be always treated in a manner which is appropriate to their age, maturity and level of understanding. However, directive (EU) 2016/800 does not provide specific procedures for interviewing children in conflict with the law during criminal investigations and court proceedings, in contrast to directive 2012/29/EU on the rights, support and protection of victims of crime which provides several guarantees for vulnerable victims like children²⁵.
- **Article 7, directive (EU) 2016/800 (The right to an individual assessment)** This provision will likely require the introduction of new procedures or the adaptation of existing procedures to ensure that this obligation is met. Some challenging questions may be raised in relation to how to properly fulfil its obligations. In particular, the carrying out of the individual assessment will require clear procedures in relation to the roles of the different actors involved (multi-disciplinary approach), the manner in which it is taken into account in the procedures (including the role of the lawyer in relation to submissions on the child's behalf in this regard) and the availability of the necessary measures to respond

²⁴ Directive (EU) 2016/800, art. 9: "Member States shall ensure that questioning of children by police or other law enforcement authorities during the criminal proceedings is audio-visually recorded where this is proportionate in the circumstances of the case, taking into account, inter alia, whether a lawyer is present or not and whether the child is deprived of liberty or not, provided that the child's best interests are always a primary consideration".

²⁵ Directive 2012/29/EU on the rights, support and protection of victims, art. 20: "Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that during criminal investigations: a) interviews of victims are conducted without unjustified delay after the complaint with regard to a criminal offence has been made to the competent authority, b) the number of interviews of victims is kept to a minimum and interviews are carried out only where strictly necessary for the purposes of the criminal investigation...". Directive 2012/29/EU, art. 23, §2 and 3: "2. The following measures shall be available during criminal investigations to victims with specific protection needs identified in accordance with Article 22 (1): a) interviews with the victim being carried out in premises designed or adapted for that purpose; b) interviews with the victim being carried out by or through professionals trained for that purpose; ... 3. The following measures shall be available for victims with specific protection needs identified in accordance with Article 22 (1) during court proceedings:c) measures to avoid unnecessary questioning concerning the victim's private life not related to the criminal offence".

to the assessment. Moreover, derogations to this right should be limited and always in the best interests of the child. This suggests that the derogation must be applied carefully on a case-by-case basis (art. 7.9, directive (EU) 2016/800).

- **Article 14, directive (EU) 2016/800 (The right to protection of privacy)**

This provision does not state a real restriction on the disclosure of information concerning the personal identity of children involved in juvenile justice proceedings as suspects or accused persons. According to this article, Member States are to encourage the media to take self-regulatory measures. In our experience, this provision is not sufficient to protect the privacy of children in conflict with the law, above all when it is compared with other EU directives dedicated to victims, in which the identity of the family of the child victim is also protected²⁶.

Moreover, at national level, the right to privacy can be derogated for reasons of public order. In such cases, the possibility to submit an appeal against these kinds of decisions must always be guaranteed. In this regards, Member States should be aware that the public disclosure of the identity of a child in conflict with the law can be detrimental – with a lifelong impact – to his right to a private life, to his personal safety, to the right of presumption of innocence and also to his right to be reintegrated in society.

- **Article 20, directive (EU) 2016/800 (Training)**

Concerning the training of professionals working with children in the juvenile justice system, directive (EU) 2016/800 places an obligation to receive specific training (with regard to children's rights, appropriate questioning techniques, child psychology and communication in a language adapted to the child) only on the staff of law enforcement authorities and detention facilities who handle cases involving children.

The level of obligation for Member States is different when the training is organised for judges and prosecutors or for lawyers.

In particular, Member States shall take appropriate measures to ensure that judges and prosecutors who deal with criminal proceedings involving children have specific competence in that field, effective access to specific training, or both (without prejudice to judicial independence and differences in the organisation of the judiciary across the Member States, and with due respect for the role of those responsible for the training of judges and prosecutors).


Concerning lawyers, Member States shall take appropriate measures to promote the provision of specific training to lawyers who deal with criminal proceedings involving children (with due respect for the independence of the legal profession and for the role of those responsible for the training of lawyers).


²⁶ See directive 2012/29/EU on the rights, support and protection of victims, art. 21 and directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography, art. 20.


b. Specific EU Member States challenges


I. Concerning the necessary procedural adaptations

EU Member States should be aware of the following challenges to overcome:

 **In The Netherlands and Italy:** Length of the procedures and excessive bureaucracy bring uncertainty and stress to children.

 **In The Netherlands, Bulgaria and Italy:** It is not common practice to use audio-visual recording during police hearings of child suspects.

 **In The Netherlands:** Data and information about crimes are kept for years (e.g. DNA). If such information is disclosed, this could hamper the child's reintegration into society.


 **In Italy:** To protect the privacy of the child, the juvenile procedure is not public and must be held behind closed doors. At the request of a child who is more than 16 years, the hearing may be public, if it is in his best interests. However, in practice, hearings of children are often held in the presence of the public.


II. Concerning the individual assessment (in particular)

EU Member States should be aware of the following challenges to overcome:

The Commission's impact assessment²⁷ in advance of directive (EU) 2016/800 reviewed vulnerability assessments and found they were largely undertaken on a case-by-case basis, rather than systematically for every child. The assessments appeared to be quite limited in scope and typically they were not multidisciplinary or often took place in the police station.

There is limited information available about Member States practices regarding individual assessments:


 **In Ireland:** There is a lack of involvement of lawyers in the review of assessment reports.


 **In Italy:** No legal provision is available on the involvement of the lawyer in the individual assessment.

²⁷ See http://ec.europa.eu/justice/criminal/files/swd_2013_480_en.pdf.


III. Concerning the multidisciplinary approach and the training of lawyers for children (in particular)²⁸


EU Member States should be aware of the following challenges to overcome:

 **In Belgium, Bulgaria, Italy and Poland:** Normally, during the study of law, youth law courses are not compulsory.


 **In Belgium and Italy:** In the context of particular training to become a lawyer, juvenile justice is an optional course (Belgium) or is not included in the training at all since it is not part of the bar association's exam (Italy).

 **In Belgium, Italy and The Netherlands:** The content, the amount of hours, the quality and the evaluation of training for lawyers for children (when it exists) can vary greatly from one bar association to the other (French speaking part of Belgium and Italy) and the training is often not multidisciplinary. (The Netherlands)

 **In Belgium:** Lawyers personally create the programme of their continuing vocational training and there is a limited and non-compulsory number of courses for lawyers who wish to receive further training.

 **In Belgium and Italy:** Specialised training is mandatory only for lawyers registered on the list of voluntary lawyers (as part of the legal aid system - Belgium) or only for court appointed lawyers. (Italy)

 **In Bulgaria, Ireland and Poland:** There is no mandatory specialisation for lawyers for children in general.


 **In Ireland:** There is no requirement for lawyers involved in the representation of children in juvenile justice proceedings to undertake any specialised training.

²⁸ See the Practical Guide "How to defend a child in conflict in the law?" for more information on training for lawyers. □

B) Inspiring practices at national level²⁹

I. Concerning the necessary procedural adaptations

EU Member States should take inspiration from the following national practices:

 ***In Belgium, Ireland, Italy and The Netherlands:*** Parents (or in their absence another person appointed by the child – ***in Italy***) can be very involved in the juvenile justice procedure.

N.B. Rather than be in the best interests of the child, their involvement could also be an obstacle (as seen before, when there is a conflict of interests between the parents and the child).



II. Concerning the individual assessment (in particular)

EU Member States should take inspiration from the following national practices:

External Study for the Commission's Impact Assessment³⁰ found that ***in The Netherlands*** individual assessments were conducted on a systematic and continuous basis. Social workers of the Council for Child Protection do the initial screening; Institute for Forensic Psychiatry and Psychology conducts more extensive screening if necessary; further assessment of mental capacities is performed by forensic psychologists and psychiatrists.

²⁹ For more information and other examples of inspiring practices, see all the National reports and Countries Overviews on the website www.mylawyermyrights.eu.

³⁰ See the external study "Impact assessment of a measure covering special safeguards for children and other vulnerable suspected or accused persons in criminal proceedings, DG Justice", carried out by the consultant company ICF-GHK, 25 June 2013.

III. Concerning the multidisciplinary approach and the training of lawyers for children (in particular)

EU Member States should take inspiration from the following national practices:



In Belgium: A website³¹ provides access to training tools for all lawyers (in the French speaking part of Belgium).



In Belgium: There is a central training for the lawyers for children who are members of the Flemish bar associations (in the Dutch speaking part of Belgium): if trainers believe that a lawyer cannot work with children, they may deny him the accreditation.



In The Netherlands: There is a central and continuous training for professionals and also for lawyers registered as legal aid lawyers. There is no difference in quality between a “free lawyer” and a “paid lawyer” for children, both categories are well trained.





In The Netherlands: *The ZSM methodology* (“Rapidly, Selective, Smart, Together and as Simple as possible”) is a multi-disciplinary approach used by the Public Prosecutors’ Office in which multiple partners work together to speed up the diversion process (the role of lawyers is however limited).


³¹ See <http://www.droitdelajeunesse.be/>.

IV. Concerning alternative measures

EU Member States should take inspiration from the following national practices:

 **In Italy:** *Probation (or “Messa alla prova”)*: The judge has the option to suspend the proceedings when it is deemed necessary to evaluate the personality of the child at the end of a period of probation. During this period, the child must perform several activities and respect different prescriptions set out by the judge in collaboration with the social services. The type of measures will depend on the personal situation and needs of the child with the aim to repair the consequences of the crime and to promote the reconciliation of the child with the person harmed by the offense. The juvenile justice proceedings will be then terminated if the measures have been carried out in a satisfactory manner by the child. Unlike other models, the “Messa alla prova” is conceived as an innovative and proactive tool, which forms the vehicle to giving implementation to some of the goals and purposes of typical juvenile justice aims such as the quick exit from the justice system for children, the timeliness of the institutional intervention, diversion, the possibility of using practices of mediation and reconciliation (between the child and the victim) as well as the need to provide the child with individualized answers.

 **In Italy:** *Burning Times Project*: In the territory of Monza, local services and the juvenile Prosecutor are carrying out an experimental project of “premature probation”, which takes place between the time of the police report and the first court hearing. In such cases, social workers intervene before the procedure starts.

 **In The Netherlands:** *HALT* is a diversion service for first offenders (for cases involving vandalism or minor property offences).

C) Recommendations and key directions for implementation

I. Concerning the necessary procedural adaptations

- In general, EU Member States should ensure all procedural adaptations required by international and regional binding instruments for children in conflict in the law involved in a juvenile justice proceeding;
- EU Member States should ensure the right to audio-visual recording of questioning to all children in conflict with the law (directive (EU) 2016/800, art. 9) and not only to those deprived of liberty. Moreover, EU Member States should ensure not only that records are not publicly disseminated (as provided for in directive (EU) 2016/800, art. 14.3) but also that they are not used in other proceedings involving the same child when he comes of age;
- EU Member States should ensure that children in conflict with the law are interviewed by the police, prosecutors and judges with particular attention to their needs, such as children victims of crime;
- EU Member States should ensure that, according to article 15 of directive (EU) 2016/800, children have the right to be accompanied by the holders of parental responsibility during court hearings;
- EU Member States should also ensure appropriate assistance to the child and his family during the trial and also after its end (taking into account the best interests of the child in each given situation);
- EU Member States should ensure that, as a rule, court hearings involving children are held in the absence of the public or allow courts or judges to decide to hold such hearings in the absence of the public. Nevertheless, juvenile justice proceedings should always be opened to monitoring bodies for the protection of children and human rights and to NGOs working in this field, in order to protect children from an incorrect use of law against them;
- EU Member States should put in place safeguards to ensure that the identity of the child in conflict with the law and/or of his family is not disclosed publicly;
- EU Member States should guarantee that juvenile justice proceedings are of an appropriate length of time. According to the CoE Guidelines on CFJ (p. 9) a juvenile justice proceedings: *“...adjusts its pace to children: it is neither expeditious nor lengthy, but reasonably speedy”*.

II. Concerning the individual assessment (in particular)

- ④ Considering that, in most of EU Member States, there is not a general and systematic approach on how an individual assessment of a child in conflict with the law should be done, Member States should develop clearer, and sometimes new, procedures and practices. For example, they can rely on emerging and inspiring national practices concerning the individual assessment for child victims of crime or witnesses and then develop new procedures more suitable for children involved in a juvenile justice proceeding as suspected or accused persons;
- ④ EU Member States should design practical arrangements to promote a multi-disciplinary approach, including exchange of information, in the carrying out of an individual assessment of a child. This must take into account the right to confidentiality and guarantee that all the professionals involved respect this right in order to avoid interference with the criminal investigation;
- ④ EU Member States should ensure an adequate budget to finance all costs arising from the individual assessment itself and from the measures which it may require.

III. Concerning the multidisciplinary approach and the training of lawyers for children ³²

- ④ EU Member States should ensure a similar level of training for all professionals working with children in the juvenile justice system throughout their national territory. This is fundamental to avoid discrimination in the treatment of children in conflict with the law within the same State.
- ④ All lawyers for children (both court-appointed lawyers and chosen lawyers) should be specialised in defending children in conflict with the law. The CoE Guidelines on CFJ specify that “*lawyers representing children should be trained in and knowledgeable on children’s rights and related issues, receive ongoing and in-depth training and be capable of communicating with children at their level of understanding*” (Principle 39).
- ④ EU Member States should endeavour to strengthen the cooperation among professionals (lawyers, judges, social workers, prosecutors, public forces) involved in the juvenile justice system.

³² See the Practical Guide “How to defend a child in conflict in the law?” for more information on training for lawyers. □□

4. Other relevant rights of children in conflict with the law



The other relevant rights of children involved in juvenile justice proceedings are listed and analysed, with some key directions for their implementation, in a technical sheet attached to this Manual (**TS 4**).

D. FURTHER INFORMATION, READINGS AND APPENDICES

All documents used as sources of inspiration for this Manual, as well as all the relevant reading materials and further information referenced on the topic of procedural guarantees for children in conflict with the law, can be found on the database of the project, available on the following website:

www.mylawyermyrights.eu



TECHNICAL SHEET 1

TS 1 - THE INTERNATIONAL AND REGIONAL LEGAL FRAMEWORK

The objective of this technical sheet is to provide the reader with an overview on the applicable international and regional instruments and standards guaranteeing children in conflict with the law their procedural rights in juvenile justice proceedings.

In order to do so, 3 tables are attached to this Manual (2 of them are attached in the form of posters)

- a. *The first table* contains an overview of the hard law instruments at the UN, CoE and EU level.
- b. *The second table* contains an overview of the soft law instruments at the UN, CoE and EU level.
- c. *The third table (here below)* contains case-law decisions of the ECtHR and the CJEU.

CASE-LAW TABLE

PROJECT "MY LAWYER, MY RIGHTS" (2017)		
CASE-LAW AND INFRINGEMENT PROCEDURE AGAINST EU MS		
Right to legal representation	Right to access to a lawyer	ECHR case-law
		Child under police arrest (ECtHR, 17 October 2006, Okkali v. Turkey , no. 52067/99, § 69 et seq.)
		Legal assistance to minors in police custody since the first police questioning (ECtHR, Grand Chamber , 27 November 2008, Salduz v. Turkey , no. 36391/02, § 55-62)
		Access to a lawyer for a child during police investigation (ECtHR, 2 March 2010, Adamkiewicz v. Poland , no. 54729/00)
		Access to a lawyer in cases involving children (ECtHR, 11 December 2008, Panovits v. Cyprus , no. 4268/04 and ECtHR, Grand Chamber , 23 March 2016, Blokhin v. Russia , no. 47152/06, §196, p. 64: "a child may in no case be deprived of procedural safeguards for the sole reason that under domestic law the procedure, which could lead to deprivation of liberty, is intended to protect the interests of the minor rather than to punish".
		Waiver of the rights of defence under certain and restrictive conditions (ECtHR, 11 December 2008, Panovits v. Cyprus , no. 4268/04, § 68 and ECtHR, 27 April 2017, Zherdev v. Ukraine , no. 34015/07, § 140)
		Access to a lawyer during the proceedings determining the lawfulness of the child detention (ECtHR, 29 February 1988, Bouamar v. Belgium , no. 9106/80)
		The importance of the right to legal representation for a minor (ECtHR, 15 June 2004, S.C. v. UK , no. 60958/00, § 29)
		Infringement procedures against MS

		Non-communication cases concerning the implementation of directive 2013/48/EU on the right of access to a lawyer in criminal proceedings: Luxemburg, Bulgaria, France, Slovenia, Greece, Croatia, Slovakia, Cyprus and Germany → For all these States: letter of formal notice (art. 258 TFUE), except for Bulgaria: reasoned opinion (art. 258 TFEU)
	Access to free legal aid	ECHR case-law
		Access to a lawyer free of charge for a child (ECtHR, 11 December 2008, Panovits v. Cyprus , no. 4268/04)
Right to information	The right to information and advice	CJUE case-law
		CJEU, 15 October 2015, C-216/14, Covaci (not child-focused)
		Infringement procedures against MS
		Non-communication cases concerning the implementation of directive 2012/13/EU on the right to information in criminal proceedings: Luxemburg, Cyprus, Malta, Slovenia, Slovakia, Spain and Czech Republic → For Luxembourg: letter of formal notice (art. 258 TFUE), for the other EU Member States: the infringement proceedings have already been closed
Right to be heard	Right to be heard / to participate	ECHR case-law
		The concept of “effective participation” in a case dealing with an accused minor with a low level of understanding (ECtHR, 15 June 2004, S.C. v. UK , no. 60958/00, § 29)
		The effective participation of children in the courtroom (ECtHR, Grand Chamber , 16 December 1999, T. v. UK , no. 24724/94, § 88 and ECtHR, Grand Chamber , 16 December 1999, V. v. UK , no. 24888/94, § 90)

		<p><i>“The right of an accused minor to effective participation in his or her criminal trial requires that he be dealt with due regard to his vulnerability and capacities from the first stages of his involvement in a criminal investigation and, in particular, during any questioning by the police”</i> (ECtHR, 27 April 2017, Zherdev v. Ukraine, no. 34015/07, § 135; see also ECtHR, 11 December 2008, Panovits v. Cyprus, no. 4268/04, § 67)</p>
	Right to interpretation & translation	CJUE case-law
		CJEU, 15 October 2015, C-216/14, Covaci (not child-focused)
		Infringement procedures against MS
		Non-communication cases concerning the implementation of directive (EU) 2010/64/EU on the right to interpretation & translation in criminal proceedings: Lithuania, Belgium, Slovenia, Romania, Luxemburg, Greece, Ireland, Italy, Slovakia, Austria, Spain, Finland, Hungary, Malta, Bulgaria and Cyprus → All the infringement proceedings have already been closed
Right to privacy	Right to privacy & protection of personal data	ECHR case-law
		In a case of young child charged with a grave offence attracting high levels of media and public interest (ECtHR, Grand Chamber , 16 December 1999, V. v. UK , no. 24888/94, § 87 and ECtHR, Grand Chamber , 16 December 1999, T. v. UK , no. 24724/94)
	Conducting proceedings behind closed doors	ECHR case-law
		ECtHR, Grand Chamber , 16 December 1999, T. v. UK , no. 24724/94 and ECtHR, Grand Chamber , 16 December 1999, V. v. UK , no. 24888/94.
Best interests of the child	Taking the best interests of the child into consideration	ECHR case-law

		To modify the adult courts' procedures in order to attenuate the rigours of an adult trial (ECtHR, Grand Chamber , 16 December 1999, T. v. UK , no. 24724/94 and ECtHR, Grand Chamber , 16 December 1999, V. v. UK , no. 24888/94)
		Detained children should be separated from adults (ECtHR, 20 January 2009, Güveç v. Turkey , no. 70337/01; ECtHR, 6 May 2008, Nart v. Turkey , no. 20817/04; ECtHR, 9 October 2012, Çoşelav v. Turkey , no. 1413/07)
		When a child is suspected of a crime, justice must respect the principle of the best interest of the child (ECtHR, 2 March 2010, Adamkiewicz v. Poland , no. 54729/00, § 70)
	Right to an individual assessment	ECHR case-law
		Taking full account of the age, level of maturity and intellectual and emotional capacities of the child (ECtHR, Grand Chamber , 16 December 1999, V. v. UK , no. 24888/94, § 28)
	Avoiding undue delay	ECHR case-law
		Avoiding undue delay in cases of detention of minors (ECtHR, 29 February 1988, Bouamar v. Belgium , no. 9106/80, § 63; ECtHR, 21 December 2010, Ichin and others v. Ukraine , no. 28189/04)
		Special diligence in bringing children to trial within a reasonable time (ECtHR, 28 October 1998, Assenov and Others v. Bulgaria , no. 24760/94, § 157; ECtHR, 3 March 2011, Kuptsov and Kuptsova v. Russia , no. 6110/03, § 91)
	The vulnerability of the child at the police station	ECHR case-law

		<p><i>“The Court emphasizes that it is vital for law-enforcement officers who are in contact with minors in the exercise of their duties to take due account of the vulnerability inherent in their young age (European Code of Police Ethics, § 44). Police behavior towards minors may be incompatible with the requirements of Article 3 of the Convention simply because they are minors, whereas it might be deemed acceptable in the case of adults. Therefore, law-enforcement officers must show greater vigilance and self-control when dealing with minors” (ECtHR, Grand Chamber, 28 September 2015, Bouyid v. Belgium, no. 23380/09, § 110)</i></p>
	Deprivation of liberty as a measure of last resort & promotion of alternative measures	ECHR case-law
		Pre-trial detention of children as a measure of last resort (ECtHR, 19 January 2012, Korneykova v. Ukraine , no. 39884/05, § 43-44; ECtHR, 10 January 2006, Selçuk v. Turkey , no. 21768/02, § 35-36; ECtHR, 13 November 2012, J.M. v. Denmark , no. 34421/09, § 63; ECtHR, 6 May 2008, Nart v. Turkey , no. 20817/04)
		Selçuk v. Turkey , no. 21768/02, § 35-36; ECtHR, 13 November 2012, J.M. v. Denmark , no. 34421/09, § 63; ECtHR, 6 May 2008, Nart v. Turkey , no. 20817/04)
		Placement of a juvenile in a shelter for juveniles (equivalent to pre-trial detention): ECtHR, 30 June 2015, Grabowski v. Poland , no. 57722/12.
		Child detention for the purposes of “educational supervision”(ECtHR, 16 May 2002, D.G v. Ireland , no. 39474/98)
		Alternatives to pre-trial detention for children (ECtHR, 9 July 2013, Dinç and Çakır v. Turkey , no. 66066/09, § 63; ECtHR, 20 January 2009, Güveç v. Turkey , no. 70337/01, § 108)
	Training of professionals	ECHR case-law
		Juvenile defendants must be, in any case, represented by skilled lawyers experienced in dealing with children (ECtHR, Grand Chamber, 16 December 1999, T. v. UK , no. 24724/94, § 88 and ECtHR, Grand Chamber, 16 December 1999, V. v. UK , no. 24888/94, § 90)



TECHNICAL SHEET 2

TS 2 - THE TRANSPOSITION OF THE EU DIRECTIVES

1. THE INTERNAL TRANSPOSITION PROCESS

The directive is a legal instrument used by the EU institutions to harmonise national laws within the EU territory and to implement EU policies¹.

TFEU, art. 288:

“A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”.

Once a directive is adopted at EU level, it must be transposed at national level to take effect in the EU Member States. Therefore, EU Member States must adopt national implementing measures to implement a directive at national level. Member States are free to choose the best form and methods to achieve the objectives set by a directive and implement its provision at national level (by taking, for example, laws, regulations or administrative provisions) and these procedures are to be concluded by the required deadline referred to in the directive. This is the so-called “internal transposition process”.

All measures adopted to comply with a specific directive must contain a reference to the directive concerned or must be accompanied by such a reference on the occasion of their official publication. Member States must then communicate the text of the national measures adopted in the field covered by a directive to the European Commission.

¹ In general, the EU directives are addressed to all EU Member States, however some Member States have the possibility not to take part in the adoption of a specific directive and, consequently, they are not bound by it or subject to its application (for ex., in the case of use of the “opt-out”, see the section “The application of the set of EU directives on fair trial rights in criminal proceedings. A. Main challenges, g. Opt in/opt out” at p. 58). □

Furthermore, according to the CJEU, Member States must comply with the so-called “standstill obligation”. This means that Member States, also before the end of the transposition deadline, cannot adopt acts conflicting with the objectives of the directive to be transposed.

2. THE “DIRECT LEGAL EFFECT” OF EU DIRECTIVES

In principle, the directive only takes effect once transposed.

However, the CJEU considers that a directive that has not been transposed on time or that has been transposed incorrectly can produce certain effects directly when its provisions:

- a) Are unconditional and sufficiently clear and precise
- b) Give rights to individuals.

When these conditions are met together, this type of directive is called “detailed directive” and individuals may rely on it and claim the rights which it contains against an EU Member State during national court proceedings.

The “direct legal force” of the EU directives, however, is only “vertical”, the claim can be only against a Member State. An individual cannot make a claim against another individual if the directive has not yet been transposed at national level².

3. THE TRANSPOSITION DEADLINE OF EU DIRECTIVES

A directive must always be transposed correctly and on time³.

The transposition has to be done by the “transposition deadline” usually mentioned at the end of the directive itself: ***“Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive by ...”***.

² See the CJEU’s judgment in the case *Paola Faccini Dori v. Recreb Srl* (C-91/92) of 14 July 1994 and in the most recent case *Farrel* (C-413/15) of 10 October 2017.

³ The Court of Justice allows individuals, under certain conditions, the possibility of obtaining compensation for directives whose transposition is poor or delayed (see the ECJEU’s judgment in the *Joined Cases Francovich and Bonifaci* (C-6/90 and C-9/90) of 19 November 1991).

Regarding the EU directives on fair trial rights in criminal proceedings, the deadlines are as follows:

- **Dir.2010/64/EU** of 20 October 2010 needs to be transposed by the Member States by **27 October 2013** (art. 9);
- **Dir.2012/13/EU** of 22 May 2012 needs to be transposed by the Member States by **2 June 2014** (art. 11);
- **Dir.2013/48/EU** of 22 October 2013 needs to be transposed by the Member States by **27 November 2016** (art. 15);
- **Dir. (EU) 2016/343** of 09 March 2016 needs to be transposed by the Member States by **1 April 2018** (art. 14);
- **Dir. (EU) 2016/800** of 11 May 2016 needs to be transposed by the Member States by **11 June 2019** (art. 24);
- **Dir. (EU) 2016/1919** of 26 October 2016 needs to be transposed by the Member States by **5 May 2019** (art. 12 and Corrigendum OJ L 91 of 5.4.2017, p.40).

4. THE REPORT AND DATA-COLLECTION

In order to comply with the obligations deriving from the EU directives, EU Member States have an obligation also to send to the Commission available data showing how the rights set out/laid down in the directive have been implemented.

- According to article 21 of **directive (EU) 2016/800**: Member States are to send their available data by **11 June 2021** and every three years thereafter.
- According to article 10.1 of **directive (EU) 2016/1919**: Member States are to send their available data by **5 May 2021** and every three years thereafter.

Starting with this information, the EC submits a report to the EP and the Council to assess the extent to which EU Member States have taken the necessary measures to comply with a specific directive, accompanied, if necessary, by legislative proposals, as stated in:

- Article 10, directive 2010/64/EU: Report of the EC by 27 October 2014;
- Article 12, directive 2012/13/EU: Report of the EC by 2 June 2015;
- Article 16, directive 2013/48/EU: Report of the EC by 28 November 2019, including an evaluation of the application of article 3.6 (temporary derogations to the right to a lawyer) in conjunction with 8.1 and 8.2 (temporary derogations to the right to a lawyer);
- Article 25, directive (EU) 2016/800: Report of the EC by 11 June 2022, including an evaluation of the application of article 6 (assistance by a lawyer);
- Article 10 of directive (EU) 2016/1919: Report of the EC by 11 June 2022, and every three years thereafter.

5. CONSEQUENCES OF NON-TRANSPOSITION

As mentioned above, EU Member States are required to transpose the directives into their national legislation and to communicate the text of the national measures, adopted to comply with them, to the European Commission by the transposition deadline.

If a directive has not been transposed correctly or on time, a Member State can be submitted to an infringement procedure.

It is up to the European Commission to start such proceedings, according to article 258 of the TFEU⁴. After the so called “pre-litigation stage”, if a Member State still fails to ensure compliance with an EU directive, the European Commission may decide to refer it to the Court of Justice (CJEU) for the “judicial stage” (for more information, see **TS 5** “Control bodies”).



⁴ TFEU, art. 258: “If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union”.



TECHNICAL SHEET 3

TS 3 – THE SET OF EU DIRECTIVES ON FAIR TRIAL RIGHTS: DETAILED AND PRACTICAL GUIDANCE

In this technical sheet “criminal proceedings” should be read as well as “juvenile justice proceedings”.

1. DIRECTIVE 2010/64/EU ON THE RIGHTS TO INTERPRETATION AND TRANSLATION IN CRIMINAL PROCEEDINGS

This directive establishes minimum rules concerning the right to interpretation and translation in criminal proceedings.

The goal of this directive is to ensure adequate linguistic assistance, free of charge, for any suspected or accused person, either child or adult, as long as they do not speak or understand the language of the criminal proceedings in which they are involved.

EU Member States are obliged to automatically verify the capacity of suspected or accused persons to follow and understand the language of the proceedings. Therefore, in line with the ECtHR’s case-law¹, Member States should not wait for the suspect or accused’s specific request for interpretation or translation.

¹ Arts. 2, §1 and 4, of the directive. ECtHR, 19 December 1989, *Brozicek v. Italy*, n. 10964/84 and ECtHR, 24 September 2002, *Cuscani v. United Kingdom*, n.32771/96: “the burden of proof is on the authorities to prove that the defendant sufficiently understands the language of the court”. On this issue, see also S. Van Der AA, *Variable Vulnerabilities? Comparing the Rights of Adult Vulnerable Suspects and Vulnerable Victims under EU Law*, in *New Journal of European Criminal Law*, Issue 1, 2016, p. 51.

a. Common rules of the rights to interpretation and to translation

To whom?

To any suspected or accused person in criminal proceedings (adult or child) and any persons (adult or child) subject to a European Arrest Warrant (EAW) who do not speak or understand the language of the proceeding (art. 2.1 and 3.1)

How?

- I. Free of charge (art. 4) → The interpreting and translation costs and fees must be assumed by the Member States, irrespective of the outcome of the proceedings;
- II. Quality of the interpretation and translation provided (art. 5.1) → Member States should ensure that the quality of the interpretation and translation provided are of a quality sufficient to safeguard the fairness of the proceedings, in particular by ensuring that suspected or accused persons have knowledge of the case against them and are able to exercise their right of defence (arts. 2.8 and 3.9).


In order to guarantee the quality of these services, EU Member States should:

- Endeavour to establish registers of independent translators and interpreters who are appropriately qualified (art. 5.2);
- Make available such registers to legal counsel and relevant authorities (art. 5.2);
- Ensure that interpreters and translators be required to observe confidentiality regarding the services provided under this directive (art. 5.3);
- Request those responsible for the training of judges, prosecutors and judicial staff involved in criminal proceedings to pay special attention to the particularities of communicating with the assistance of an interpreter so as to ensure efficient and effective communication (art. 6);
- Ensure that when a suspected or accused person has been subject to questioning or hearings with the assistance of an interpreter or with the support of an oral translation (or oral summary) of essential documents and also when a person has waived the right to translation (see below □), these events will be noted and recorded (art. 7).

These guarantees allow the persons suspected or accused in criminal proceedings to fully exercise their right of defence and also all the other procedural safeguards associated with a fair trial in line with article 6 of the ECHR, as interpreted by the case-law of the ECtHR.

How to comply with these rights?

- I. EU Member States must ensure that suspected or accused persons have the right to challenge a decision finding that there is no need for interpretation or translation and, when interpretation or a translation have been provided, the possibility to complain that the quality of these services is not sufficient to safeguard the fairness of the proceedings (art. 2.5 and 3.5);
- II. Principle of non-regression → Nothing in this directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, other relevant provisions of international law or the law of any Member State which provides a higher level of protection (art. 8).
 - See also “*Key directions for implementation*” of this right, p. 81-82. □□

 **N.B.** This directive does not affect national law concerning the presence of the lawyer during any stage of the criminal proceedings, nor does it affect national law concerning the right of access of a suspected or accused person to documents in criminal proceedings (art. 1.4).

b. The right to interpretation (art. 2):

To whom?

The right to interpretation also includes appropriate assistance for persons with hearing or speech difficulties (art. 2.3)

When?

Without delay during criminal proceedings before investigative and judicial authorities (art. 6.1), including during:

- police questioning (art. 2.1);
- all court hearings (art. 2.1);
- any necessary interim hearings (art. 2.1);
- where necessary for the purpose of safeguarding the fairness of the proceedings, the interpretation shall be available also for communication with the law-

yer in direct connection with any questioning or hearing during the proceedings or with the lodging of an appeal or other procedural applications (art. 2.2).

How?

Normally by the physical presence of the interpreter or by the use of communication technology such as videoconferencing, telephone or internet but only if these means do not undermine the fairness of the proceedings (art. 2.6)

How to comply with this right?

- ☉ EU Member States should ensure that a procedure or mechanism is in place to ascertain whether suspected or accused persons speak and understand the language of the criminal proceedings and whether they need the assistance of an interpreter (art. 2.4).

c. The right to translation (art. 3):

When?

Within a reasonable period of time (art. 3.1)

How?

- Normally by written translation (art. 3.1)
- As an exception: Also by oral translation or an oral summary of essential documents may be provided (instead of a written translation) on condition that this does not prejudice the fairness of the proceedings (art. 3.7).

What type of documents?

All the documents which are essential to ensure the right of defence and the fairness of the proceedings (art. 3, §2, 3 and 4), such as:

- Any decision depriving a person of his liberty;
- Any charge;
- Any indictment;

- Any judgment;
- Any other essential document: upon request from the suspected or accused person or his legal counsel to the competent authorities.

Is the waiver of this right possible?

Yes (art. 3.8) BUT only:

- After legal advice or after having otherwise obtained full knowledge of the consequences of such a waiver;
- If the waiver is unequivocal and given voluntarily.



N.B. The waiver is not expressly provided for the right to interpretation.

2. DIRECTIVE 2012/13/EU ON THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS

This Directive lays down minimum rules concerning the right to information about rights in the context of criminal proceedings and about the accusation. It also enshrines the right of access to the materials of the case.

To whom?

To any suspected or accused person (adult or child), relating to their rights in criminal proceedings and any persons (adult or child) subject to an EAW.

How to comply with this right?

- ➊ Member States should ensure that when information is provided to suspects or accused persons, this is noted and recorded (art. 8);
- ➋ Member States should ensure that suspects or accused persons or their lawyers have the right to challenge the possible failure or refusal of the competent authorities to provide information in accordance with this directive (art. 8).
- ➌ Member States should request those responsible for the training of judges, prosecutors, police and judicial staff involved in criminal proceedings to provide appropriate training with respect to the objectives of this directive (art. 9);
- ➍ Principle of non-regression → nothing in this directive shall be construed as limiting or derogating from any of the rights or procedural safeguards that are ensured under the Charter, the ECHR, other relevant provisions of international law or the law of any Member State which provides a higher level of protection (art. 10).

This directive must be read in conjunction with directive (EU) 2016/800.



See also “*Key directions for implementation*” of this right, p. 77-78. □

a. Right to information about rights (art. 3)

When?

Promptly (art. 3.1)

What?

Information concerning at a minimum the following procedural rights (art. 3.1):

- The right of access to a lawyer;
- Any entitlement to free legal advice and the conditions for obtaining such advice;
- The right to be informed of the accusation;
- The right to interpretation and translation;
- The right to remain silent.

How?

Information should be given (art. 3.2):

- Orally or in writing
- In simple and accessible language
- Taking into account any particular needs of vulnerable suspects or accused persons
- When persons are arrested or detained, Member States should ensure their right to receive, promptly, a Letter of Rights (art. 4):

a) Purpose of the Letter of Rights (art. 4.1) → Opportunity to read it and keep it in their possession throughout the time that they are deprived of liberty;

b) Content of the Letter of Rights (art. 4, §2 and 3) → In addition to the information concerning the procedural rights set out in art. 3.1, the Letter of Rights should also refer to the following rights and guarantees:

- The right to access to the materials of the case;
- The right to have consular authorities and one person informed;
- The right of access to urgent medical assistance;
- The maximum number of hours or days suspects or accused persons may be

deprived of liberty before being brought before a judicial authority;

- The basic information about any possibility, under national law, of: 1. challenging the lawfulness of the arrest; 2. obtaining a review of the detention; 3. making a request for provisional release;

c) Form of the Letter of Rights (art. 4, § 4 and 5):

- Written
- In simple and accessible language
- In language that the suspect or accused person understands. If an appropriate Letter is not available, the persons should be informed first orally and then, without undue delay, he must receive a Letter of Rights which meets his linguistic needs.

N.B. An indicative model of Letter of Rights is set out in the Annex I of this directive. 

b. Right to information about the accusation (art. 6)

What?

Information about:

- The criminal act the person is suspected or accused of having committed (art. 6.1)
- The nature and legal classification of the criminal offence (art. 6.3)
- The nature of participation by the accused person (art. 6.3)
- The reasons for their arrest or detention (if the person is arrested or detained) (art. 6.2)
- Any changes in the information given where this is necessary to safeguard the fairness of the proceedings (art. 6.4)

When?

- Promptly (articles 6.1 and 6.4);
- At the latest, on submission of the merits of the accusation to a court (art. 6.3).

How?

The information shall be provided in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence.

c. Right of access to the materials of the case (art. 7)

To whom?

- Persons suspected or accused in criminal proceedings
- Persons arrested and detained

What?

The documents which must be made available to the concerned persons or to their lawyers are (at least):

- All documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively the lawfulness of the arrest or detention (art. 7.1);
- All material evidence in the possession of the competent authorities, whether for or against suspects or accused persons (i.e. all the inculpatory and exculpatory materials), in order to safeguard the fairness of the proceedings and to prepare the defence (art. 7.2).

When?

- In due time to allow the effective exercise of the rights of the defence (art. 7.3);
- At the latest, upon submission of the merits of the accusation to the judgment of a court (art. 7.3);
- Where further material evidence comes into the possession of the competent authorities, access should be granted to it in due time to allow for it to be considered (art. 7.3).

How?

Free of charge (art. 7.5).

Are derogations of this right possible?

Yes. Access to certain materials may be refused, if this does not prejudice the right to a fair trial, when (art. 7.4):

- Such access may lead to a serious threat to the life or the fundamental rights of another person;
- Such refusal is strictly necessary to safeguard an important public interest, like in cases where access could prejudice an ongoing investigation or seriously harm the national security of the Member State in which the criminal proceedings are instituted;
- If the decision to refuse access is taken by a judicial authority or is at least subject to judicial review.

3. DIRECTIVE 2013/48/EU ON THE RIGHT OF ACCESS TO A LAWYER

This directive establishes minimum rules concerning the right of access to a lawyer in criminal proceedings, the right to have a third party informed upon deprivation of liberty², as well as the right, for persons deprived of liberty, to communicate with third persons and with the consular authorities³.

To whom?

To any suspected or accused person in criminal proceedings (adult or child) and to any persons (adult or child) subject to a EAW (European Arrest Warrant) (articles 2, 3 and 10);

How to comply with this right?

- ④ Member States should ensure that the particular needs of vulnerable suspects and vulnerable accused persons are taken into account in the application of this directive (art. 13);
- ④ Remedies (art. 12.2) → Member States shall ensure that suspects or accused persons in criminal proceedings, as well as requested persons in EAW proceedings, have an effective remedy under national law in the event of a breach of rights under this directive;
- ④ Member States should ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with this directive, the rights of the defence and the fairness of the proceedings are respected (art. 12.2);
- ④ Principle of non-regression (art. 14) → Nothing in this directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law or the law of any Member State which provides a higher level of protection.



This directive must be read in conjunction with directive (EU) 2016/800 See “Key directions for implementation” of this right, p. 68-69. □

² Suspects or accused persons deprived of liberty have the right to inform, without delay, at least one person of their choice, such as a family member or their employer (art. 5 of the directive).

³ The right to communicate can only be denied in the name of imperative commensurate operational demands or needs (arts. 6 and 7 of the directive).

a. The right of access to a lawyer in criminal proceedings (art. 3)

How?

- In such a manner so as to allow the persons concerned to exercise their rights of defence practically and effectively (art. 3.1);
- The right of access to a lawyer entails (art. 3.3):
 - The right to meet in private and communicate with the lawyer (such communication shall include meetings, correspondence, telephone conversations and other forms of communication permitted under national law) (art. 4);
 - The right for the lawyer to be present and participate effectively when a suspect or accused person is questioned. The participation of the lawyer should be noted and should be in line with procedures under national law (such procedures shall not prejudice the effective exercise and essence of the right to a lawyer);
 - The right for the lawyer to attend, as a minimum, the following investigative or evidence-gathering acts if the suspect or accused person is required or permitted to attend them: identity parades, confrontations and reconstructions of the scene of a crime.

Access to a lawyer and assistance by a lawyer: in the EU directives, a distinction between the “right of access to a lawyer” and the “assistance by a lawyer” can be observed, in terms of target group and nature of these rights.

In fact, while directive 2013/48/EU grants to every person, suspected or accused in a criminal proceeding, the right of access to a lawyer, directive (EU) 2016/800 foresees for every child, suspected or accused in a criminal proceeding, the assistance by a lawyer.

As already mentioned above (see p. 60-61 ☐), the assistance has introduced a higher degree of protection for children because it is also an obligation of the national competent authorities to ensure the assistance by a lawyer for all children in conflict with the law. Moreover, recital 9 of directive 2016/1919 prohibits the child to waive his assistance to a lawyer.

N.B. Both the directives ((EU) 2016/800 and 2013/48/EU) enshrine the right of the lawyer to participate effectively during the questioning of his clients



When?

Without undue delay and in any case (art. 3.2):

- Before suspects or accused persons are questioned by the police or by another law enforcement or judicial authority;
- During an investigative or evidence-gathering act (identity parades, confrontations and reconstructions of the scene of a crime) (art. 3.3, point c);
- Without undue delay after deprivation of liberty;
- In due time before they appear before a court having jurisdiction in criminal matters.

Are temporary derogations allowed?

Yes, BUT only (arts. 3.6 and 8)⁴:

- In exceptional circumstances;
- At the pre-trial stage.

In particular:

- Temporary derogations should always be justified on the basis of one of the following compelling reasons (art. 3.6):
 - There is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
 - Immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings
- Temporary derogations shall (art. 8.1):
 - Be proportionate and not go beyond what is necessary;
 - Be strictly limited in time;
 - Not be based exclusively on the type or seriousness of the alleged offence;
 - Not prejudice the overall fairness of the proceedings.

How to comply with this right?

- EU Member States should endeavour to make general information available to

⁴ Art. 3.5 does not apply to children.

facilitate the access to a lawyer for suspects or accused persons (art. 3.4);

- ④ EU Member States should make the necessary arrangements to ensure that suspects or accused persons who are deprived of liberty are in a position to effectively exercise their right of access to a lawyer (art. 3.4);
- ④ Member States should respect the confidentiality of communication between suspects or accused persons and their lawyer in the exercise of the right of access to a lawyer provided for under this Directive (art. 4).

See also “Key directions for implementation” of this right, p. 68-69. □

b. The right to have a third person informed of the deprivation of liberty (art. 5)

What?

- All suspects or accused persons who are deprived of liberty have the right to have, at least, one person (a relative, an employer..), nominated by them, informed of their deprivation of liberty if they so wish;
- Every child has the right to have the holder of parental responsibility informed. If the communication of this information to the child’s parents is contrary to the child’s best interests, another appropriate adult, such as another family member, shall be informed instead (recital 55 and art. 5.2).

When?

Without undue delay (art. 5.1)

Are temporary derogations allowed?

Yes, BUT temporary derogations should always be justified on the basis of one of the following compelling reasons (arts. 5.3):

- ④ There is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
- ④ There is an urgent need to prevent a situation where criminal proceedings could be substantially jeopardised.

When there is a child deprived of liberty, a temporary derogation of this right is under the condition that an authority responsible for the protection or welfare of children is informed without undue delay of his deprivation of liberty (art. 5.4)

How to comply with this right?

- ➊ Member States should ensure that the holder of parental responsibility of the child (or another appropriate adult) is informed as soon as possible of the deprivation of liberty and of the reasons pertaining thereto (art. 5.2);
- ➋ In case of derogation of this right, EU Member States should inform an authority responsible for the protection or welfare of children (art. 5.4).

See “Key directions for implementation” of this right, p. 83. ☐☐

c. The right to communicate, while deprived of liberty, with third persons (art. 6)

What?

All suspects or accused persons who are deprived of liberty have the right to communicate with at least one third person, such as a relative, nominated by them

When?

Without undue delay (art. 6.1)

Are temporary derogations allowed?

Yes (art. 6.2), in view of:

- imperative requirements
- proportionate operational requirements

d. The rights to communicate with consular authorities (art. 7)

To whom?

To any suspect or accused person who is non-national and who is deprived of liberty.

What?

This right entails (art. 7.1 and 7.2):

- The right to have the consular authorities of their State of nationality informed of the deprivation of liberty;
- The right to communicate with those authorities;
- The right, for suspects or accused persons who have two or more nationalities, to choose which consular authorities, if any, are to be informed of the deprivation of liberty and with whom they wish to communicate;
- The right to be visited by their consular authorities;
- The right to converse and correspond with them;
- The right to have legal representation arranged for by their consular authorities (subject to the agreement of those authorities and the wishes of the suspects or accused persons concerned).

When?

Without undue delay (art. 7.1)

How?

The exercise of these rights may be regulated by national law or procedures, provided that such law or procedures enable full effect to be given to the purposes for which these rights are intended (7.3)

e. The right to legal aid (art. 11)

How?

The right to legal aid, guaranteed under national law, shall apply in accordance with the EU Charter of Fundamental Rights of the European Union and the ECHR.

How to comply with this right?

See “Key directions for implementation” of this right, p. 73. ☐☐

4. DIRECTIVE (EU) 2016/800 ON PROCEDURAL SAFEGUARDS FOR CHILDREN WHO ARE SUSPECTS OR ACCUSED PERSONS IN CRIMINAL PROCEEDINGS⁵

This new directive (to be implemented by 11 June 2019) is the first binding instrument at EU level that is entirely devoted to the procedural rights of children in conflict with the law.

It provides children with specific rights (e.g. the right to an individual assessment) and with some procedural adaptations of the rights already guaranteed to all suspects or accused persons in criminal proceedings by the other, above mentioned, EU directives on fair trial rights.

The purpose of this directive is to ensure that children in conflict with the law are able to understand and follow the criminal proceedings in which they are involved, participate effectively in it and exercise their right to a fair trial.

To whom?

To children who are suspects or accused person in criminal proceedings or subject to a EAW (art. 17).

How to comply with this directive?

- **Principle of non-regression (art. 23) → Nothing in this Directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law, in particular the UN Convention on the Rights of the Child, or the law of any Member State which provides a higher level of protection.**
- **Timely and diligent treatment of cases (art. 13) → Member States shall take appropriate measures to ensure that criminal proceedings involving children are treated:**
 - **As a matter of urgency**
 - **With due diligence**

Member States shall also take appropriate measures to ensure that children are always treated in a manner:

 - **which protects their dignity**

⁵ This directive applies also to children subject to European arrest warrant proceedings pursuant to Framework Decision 2002/584/JHA. In particular, according to article 17: "Member States shall ensure that the rights referred to in Articles 4, 5, 6 and 8, Articles 10 to 15 and Article 18 apply mutatis mutandis, in respect of children who are requested persons, upon their arrest pursuant to European arrest warrant proceedings in the executing Member State".

- which is appropriate to their age, maturity and level of understanding
 - and which takes into account any special needs, including any communication difficulties, that they may have
- ④ **Training (art. 20)** → Member States shall ensure that:
 - Staff of law enforcement authorities and of detention facilities who handle cases involving children, receive specific training to a level appropriate to their contact with children with regard to children’s rights, appropriate questioning techniques, child psychology, and communication in a language adapted to the child;
 - Judges and prosecutors who deal with criminal proceedings involving children have specific competence in that field, effective access to specific training, or both;
 - Lawyers who deal with criminal proceedings involving children receive specific training;
 - Those providing children with support and restorative justice services receive adequate training to a level appropriate to their contact with children and observe professional standards in order to provide such services in an impartial, respectful and professional manner.
 - ④ **Costs (art. 22)** → Member States shall meet the costs resulting from the individual assessment (art. 7), the medical examination (unless the costs are covered by medical insurance) (art. 8), and the audio-visual recording of questioning (art. 9), irrespective of the outcome of the proceedings;
 - ④ **Remedies (art. 19)** → Member States shall ensure that children, who are suspects or accused in criminal proceedings or subject to a EAW, have an effective remedy under national law in the event of a breach of the rights under this directive.

See “Key directions for implementation” starting from p. 94. □

a. The right to information (art. 4)

What?

- Information about the rights set out in directive 2012/13/EU on the right to information;
- Information about general aspects of the conduct of the proceedings;
- Information about the rights set out in this directive.

When? (art. 4.1 (a) (b) (c))

- Promptly, when children are made aware they are suspects or accused persons, in respect of the following rights:
 - The right to have the holder of parental responsibility informed (art. 5);

- The right to be assisted by a lawyer (art. 6);
 - The right to protection of privacy (art. 14);
 - The right to be accompanied by the holder of parental responsibility during stages of the proceedings other than court hearings (art. 15);
 - The right to legal aid (art.18).
- At the earliest appropriate stage in the proceedings, in respect of the following rights:
- The right to an individual assessment (art. 7);
 - The right to a medical examination, including the right to medical assistance (art. 8);
 - The right to limitation of deprivation of liberty and to the use of alternative measures, including the right to periodic review of detention (articles 10 and 11);
 - The right to be accompanied by the holder of parental responsibility during court hearings (art. 15);
 - The right to appear in person at trial (art. 16);
 - The right to effective remedies (art. 19).
- Upon deprivation of liberty, in respect of the right to specific treatment during deprivation of liberty (art. 12).

How?

The information given shall be noted and provided to children (article 4.2):

- In writing, orally or both but when the child is arrested or detained he has the right to receive a “Letter of Rights” (according to directive 2012/13/EU) which also includes a reference to the rights enshrined in this directive
- In simple and accessible language

b. The right of the child to have a holder of parental responsibility informed (art. 5)

What?

Children have the right to have the holder of parental responsibility informed with the same information that a child has the right to receive (in accordance with art. 4)

When?

As soon as possible (art. 5.1)

Who is an appropriate adult and what his role (art. 5.2)?

- An “appropriate adult” is an adult nominated by the child and accepted as such by the competent authority that can be notified of the same information that a child has the right to receive in the event that providing that information to the holder of parental responsibility: (a) Would be contrary to the child’s best interests; (b) is not possible because, after reasonable efforts have been made, no holder of parental responsibility can be reached or his or her identity is unknown; (c) could, on the basis of objective and factual circumstances, substantially jeopardise the criminal proceedings. When these circumstances cease to exist, any information that the child receives and which remains relevant in the course of the proceedings, shall be provided to the holder of parental responsibility.
- Where the child has not nominated another appropriate adult or where the adult that has been nominated by the child is not acceptable to the competent authority, this latter shall designate and provide the information to another person, taking into account the child’s best interests. In such circumstances, that person may also be the representative of an authority or of another institution responsible for the protection or welfare of children.

c. The right of the child to be accompanied by the holder of parental responsibility during the proceedings (art. 15)

What?

The child has the right to be accompanied by the holder of parental responsibility or by another appropriate adult during:

- a) Court hearings in which he is involved;
- b) Stages of the proceedings other than court hearings at which the child is present, where the competent authority considers that it is in the child’s best interest to be accompanied by that person and the presence of that person will not prejudice the criminal proceedings.

How to comply with these rights?

See “Key directions for implementation” of this right, p. 94. □

d. Assistance by a lawyer (art. 6)

What?

The assistance by a lawyer includes:

- The right of access to a lawyer in accordance with directive 2013/48/EU (art. 6.1);
- The right to exercise the rights of defence effectively (art. 6.2);
- The right to meet in private and communicate with the lawyer representing them (art. 6.4 (a)). The right to confidentiality includes meetings, correspondence, telephone conversations and other forms of communication between the child and his lawyer (art. 6.5);
- Effective participation of the lawyer during questioning (art. 6.4 (b));
- If the child is required or permitted to attend the act concerned, there is a right to be assisted by a lawyer, as a minimum, during the following investigative or evidence-gathering acts: identity parades, confrontations and reconstructions of the scene of a crime (art. 6.4 (c));
- The right to legal aid where this is necessary to ensure that the child is effectively assisted by a lawyer (art. 18 in line with directive (EU) 2016/1919 on legal aid).

When?

- Without undue delay once children are made aware that they are suspects or accused persons (art. 6.3);
- In any event, children shall be assisted by a lawyer from whichever of the following points in time is the earliest:
 - Before they are questioned by the police or by another law enforcement or judicial authority;
 - In due time in advance of them appearing before a court having jurisdiction in criminal matters;
 - During the following investigative or evidence-gathering acts: identity parades, confrontations and reconstructions of the scene of a crime;
 - Without undue delay after deprivation of liberty.

Are derogations allowed?

Yes. According to directive (EU) 2016/800, derogations to the child's assistance by a lawyer are allowed BUT ONLY in exceptional circumstances.

When? (art. 6.8)

In general, a decision to proceed to questioning in the absence of the lawyer may be taken only:

- Upon decision of a judicial authority or another competent authority;
- On a case-by-case basis;
- If the decision to allow a derogation can be submitted to judicial review.

I. Permanent derogations (art. 6.6)

When?

The assistance by a lawyer can be derogated only when it is proportionate in the light of the circumstances of the case, taking into account:

- The child's best interests as primary consideration;
- The right to a fair trial;
- The seriousness of the alleged criminal offence;
- The complexity of the case;
- The measures that could be taken in respect of such an offence.

In any event, the derogation of the right to a lawyer is not allowed when:

- The child is brought before a court or judge in order to decide on detention (at any stage of the proceedings);
- During detention.

II. Temporary derogations (art. 6.8)

When?

- Only in exceptional circumstances;
- Only at the pre-trial stage;

- Only if the child's best interests have been taken into account;
- Only if the derogation is justified on the basis of one of the following compelling reasons:
 - Where there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person;
 - Where immediate action by the investigating authorities is imperative to prevent substantial jeopardy to criminal proceedings in relation to a serious criminal offence.

How to comply with this right?

- Where a lawyer participates during questioning, the fact that such participation has taken place shall be noted using the recording procedure under national law (art. 6.4 (d));
- The competent authorities shall postpone the questioning of the child, or other investigative or evidence-gathering acts, when the child is to be assisted by a lawyer but no lawyer is present. The postponing shall be for a reasonable period of time in order to allow for the arrival of the lawyer or, where the child has not nominated a lawyer, to arrange a lawyer for the child (art. 6.7);
- Member States shall also ensure that deprivation of liberty is not imposed as a criminal sentence, unless the child has been assisted by a lawyer in such a way as to allow him to exercise the rights of the defence effectively and, in any event, during the trial hearings before a court (art. 6.6).

See “Key directions for implementation” of this right, p. 68-69. □

e. The right to an individual assessment (art. 7)

Why?

- Children who are suspects or accused persons in criminal proceedings shall be individually assessed in order to ensure that their specific needs concerning protection, education, training and social integration, are taken into account (art. 7.1 and 7.2);
- The individual assessment shall serve to establish and note such information about the individual characteristics and circumstances of the child as might be of use to the competent authorities when (art. 7.4):
 - Determining whether any specific measure to the benefit of the child is to be taken;
 - Assessing the appropriateness and effectiveness of any precautionary measures in respect of the child;
 - Taking any decision or course of action in the criminal proceedings (including sentencing).

What is its content?

- The individual assessment will take into account, in particular:
 - The child's personality and maturity (article 7.2);
 - The child's economic, social and family background (article 7.2);
 - Any specific vulnerability that the child may have (article 7.2).
- The extent and detail of the assessment may vary depending on the circumstances of the case, the measures that can be taken if the child is found guilty of the alleged criminal offence, and whether the child has, in the recent past, been the subject of an individual assessment (art. 7.3);
- The individual assessment should be updated if the elements that form its basis change significantly during the criminal proceedings (art. 7.8).

When?

The individual assessment shall be carried out:

- At the earliest appropriate stage of the proceedings (art. 7.5);
- Before the indictment (art. 7.5) since, in the absence of an individual assessment, an indictment cannot be presented (art. 7.6).

How? (art. 7.7)

The individual assessments shall be carried out (cumulatively):

- With the close involvement of the child;
- By qualified personnel;
- Following, as far as possible, a multidisciplinary approach;
- Involving, where appropriate, the holder of parental responsibility (or another appropriate adult) and/or a specialised professional.

Derogations

- Exceptionally, an indictment can be presented in the absence of an individual assessment BUT ONLY if this is in the child's best interests and the individual assessment is, in any event, available at the beginning of the trial hearings before a court (art. 7.6);
- More in general, EU Member States may derogate from the obligation to carry out an individual assessment when (art. 7.9):
 - Such derogation is warranted in the circumstances of the case; and
 - It is compatible with the child's best interests.

How to comply with this right?

See “Key directions for implementation” of this right, p. 95. ☐

f. The right to a medical examination (art. 8)

To whom?

To children who are deprived of liberty (art. 8.1)

Why?

- To assess the child’s general mental and physical condition (art. 8.1);
- To determine the capacity of the child to be subject to questioning, investigative or evidence-gathering acts or any measures taken or envisaged against the child (art. 8.2).

When?

- Without undue delay (art. 8.1);
- Where specific health indications call for such an examination (art. 8.3);
- Where the circumstances so require one (art. 8.5).

How?

- On the initiative of the competent authorities or on request of the child, the holder of parental responsibility (or another appropriate adult) or the child’s lawyer (art.8.3);
- Non-invasive as possible (art. 8.1);
- Carried out by a physician or another qualified professional (art. 8.1);
- The conclusion of the medical examination shall be recorded in writing (art. 8.4);
- Where required, medical assistance shall be provided (art. 8.4).

g. Audio-visual recording of questioning (art. 9)

What?

Questioning of children by police or other law enforcement authorities shall be audio-visually recorded (art. 9.1)

When? (Art 9.1)

When this is proportionate in the circumstances of the case, taking into account, in particular:

- a) If the lawyer is present or not;
- b) If the child is deprived of liberty or not;
- c) The child's best interests must be always a primary consideration.

Are derogations of this right allowed?

- Yes. The possibility to ask questions for the sole purpose of the identification of the child may take place without audio-visual recording (art. 9.3) BUT, in any case, in the absence of audio-visual recording, questioning shall be recorded in another appropriate manner (art. 9.2).

How to comply with this right?

See "Key directions for implementation" of this right, p. 94. □

h. Deprivation of liberty

I. Limitation of deprivation of liberty (art. 10)

What?

- Deprivation of liberty of a child shall be limited to the shortest appropriate period of time;
- Any deprivation of liberty, in particular detention, shall be imposed on children only as a measure of last resort.

How?

- Every decision concerning the deprivation of liberty of a child shall take into account: a) the age, b) the individual situation of the child and c) the particular circumstances of the case (art. 10.1)
- Any detention shall be based on a reasoned decision, subject to judicial review by a court (art. 10.2);
- Any detention shall be reviewed periodically, at reasonable intervals of time, by a court (ex officio or upon request of the child or of his lawyer) or of another judicial authority.

When?

Any decision concerning this right shall be taken without undue delay.

II. Alternative measures (art. 11)

When?

Where possible, alternative measures should be preferred to detention.

III. Specific treatment in the case of deprivation of liberty (art. 12)

What?

- Detained children and children in police custody shall be held separately from adults (art. 12.1 and 12.2);
- Detained children turning 18 years can be still held separately from detained adults, taking into account:
 - The circumstances of the person concerned; and
 - The best interests of children who are detained with that person (articles 12.3).
- Children may be detained with young adults, unless this is contrary to the child's best interests (art. 12.4).

Are derogations of this right allowed?

- Detained children can be held with adults if this is in their best interest;
- Children in police custody can be held with adults if this is in their best interest or if, in exceptional circumstances, it is not possible, in practice, to hold them separately from adults, provided that the manner is compatible with the child's best interests.

What type of measures, during detention, must be guaranteed to children?

Appropriate measures, proportionate and appropriate to the duration of the detention, should be taken in order to ensure and preserve (art. 12.5):

- Their health and their physical and mental development (also in situations of deprivation of liberty other than detention);
- Their right to education and training (also for children who have physical, sensory or learning disabilities and in situations of deprivation of liberty other than detention if this is appropriate and proportionate in the light of the nature and duration of such situations);
- Their right to family life that must be effective and regular (also in situations of deprivation of liberty other than detention if this is appropriate and proportionate in the light of the nature and duration of such situations);
- Their right to reintegration into society thanks to the access to programmes that foster their development (also in situations of deprivation of liberty other than detention if this is appropriate and proportionate in the light of the nature and duration of such situations);
- Their right to freedom of religion or belief (also in situations of deprivation of liberty other than detention);
- Their right to meet, as soon as possible, with the holder of parental responsibility or another appropriate adult, where such a meeting is compatible with investigative and operational requirements (art. 12.6).

i. Right to protection of privacy (art. 14)

What?

The child's privacy during criminal proceedings must be protected.

How?

- Court hearings involving children should usually be held in the absence of the public or courts or judges should be allowed to decide to hold such hearings in the absence of the public (art. 14.2);
- The records of the audio-visual recording of questioning must not be publicly disseminated (art. 14.3);
- The media must be encouraged to take self-regulatory measures to protect children's privacy (art. 14.4).

How to comply with these rights?

See "Key directions for implementation" of this right at p. 94. 

j. Right of children to appear in person at, and participate in, their trial (art. 16)

What?

Children have the right to (art. 16.1):

- a) Be present at their trial;
- b) Participate effectively in the trial;
- c) Have the opportunity to be heard and express their views.

How?

Children who were not present at their trial have the right to a new trial or to another legal remedy, according to directive (EU) 2016/343 (art. 16.2).

5. DIRECTIVE (EU) 2016/1919 ON LEGAL AID FOR SUSPECTS AND ACCUSED PERSONS IN CRIMINAL PROCEEDINGS

The purpose of this directive (to be implemented by 5 May 2019) is to ensure the effectiveness of the right of access to a lawyer as a complement to directives 2013/48/EU and (EU) 2016/800.

By “legal aid”, this directive means funding by EU Member States for the assistance of a lawyer, enabling the exercise of the right of access to a lawyer (art. 3). Even if this legislative instrument is not child-focused:

- Recital 29 affirms that this directive upholds the rights of the child;
- Recital 9 declares that *“Without prejudice to Article 6 of Directive (EU) 2016/800, this Directive should not apply where suspects or accused persons, or requested persons, have waived their right of access to a lawyer in accordance with directive 2013/48/EU or where Member States have applied the temporary derogations of directive 2013/48/EU”*.

To whom?

To any suspected or accused person in criminal proceedings (adult or child) and to any persons (adult or child) subject to a EAW (art. 5).

How to comply with this right?

- ➊ The European Commission’s Recommendation of 2013 states that *“when the legal aid is for a child, the child’s own assets should be taken into account and not those of their parents or holder of parental responsibility”*,⁶
- ➋ EU Member States are required to take into account the particular needs of vulnerable suspects/accused persons in the implementation of this directive (art. 9);
- ➌ Remedies (art. 8) → Member States shall ensure that suspects, accused and requested persons have an effective remedy under national law in the event of a breach of the rights under this directive;
- ➍ Member States shall ensure that, in criminal proceedings, in the assessment of statements made by suspects or accused persons or of evidence obtained in breach of their right to a lawyer or in cases where a derogation to this right was authorised in accordance with this directive, the rights of the defence and the fairness of the proceedings are respected (art. 12.2);

⁶ Commission Recommendation of 27 November 2013 on the right to legal aid for suspects or accused persons in criminal proceedings (2013/C 378/03), section 2, point 6.

- ☉ Principle of non-regression (art. 11) → Nothing in this directive shall be construed as limiting or derogating from any of the rights and procedural safeguards that are ensured under the Charter, the ECHR, or other relevant provisions of international law or the law of any Member State which provides a higher level of protection.



This directive must be read in conjunction with directive (EU) 2016/800.

- See “Key directions for implementation” of this right, p. 73. ☐

a) Legal aid in criminal proceedings (art. 4)

To whom?

For persons who lack sufficient resources to pay for the assistance of a lawyer (art. 4.1).

When? (art. 4.5)

- Without undue delay;
- At the latest, before questioning by the police or by another law enforcement authority or judicial authority; or
- At the latest, before the following investigative or evidence-gathering acts: identity parades, confrontations and reconstructions of the scene of a crime.

How determine whether legal aid is to be granted?

Through a means test, a merits test or both (art. 4.2):

- In a means test, account should be taken of all relevant and objective factors such as: the income, capital and family situation of the person concerned, as well as the costs of the assistance of a lawyer and the standard of living in the Member State;
- In a merits test, account should be taken of the seriousness of the criminal offence, the complexity of the case and the severity of the sanction at stake. In any event, the merits test shall be deemed to have been met in the following situations: (a) where a suspect or an accused person is brought before a competent court or judge in order to decide on detention at any stage of the proceedings and (b) during detention;

The decision on whether or not to grant legal aid shall be (art. 6):

- a) Taken by a competent authority;
- b) Taken diligently, without undue delay, respecting the rights of the defence;
- c) Sent in writing to the requested person in case of refusal (in full or in part) of legal aid.

How to comply with this right? (art. 7)

EU Member States shall ensure that:

- There is an effective national legal aid system;
- Legal aid services are of a quality adequate to safeguard the fairness of the proceedings;
- Adequate training is provided to staff involved in the decision-making on legal aid in criminal proceedings and in EAW proceedings;
- Adequate training is provided to lawyers providing legal aid services;
- Suspects, accused persons and requested persons have the right, upon their request, to have the lawyer providing legal aid services assigned to them replaced, where the specific circumstances so justify.

See “Key directions for implementation” of this right, p. 73. □



TECHNICAL SHEET 4

TS 4 - OTHER RELEVANT RIGHTS OF CHILDREN IN CONFLICT WITH THE LAW

	ARTICLES HARD LAW	RECOMMENDATIONS TO IMPLEMENT THESE RIGHTS IN LINE WITH THE INTERNATIONAL AND REGIONAL STANDARDS
RIGHT TO A MEDICAL EXAMI- NATION	<p>Art. 8, directive (EU) 2016/800:</p> <p>1. Member States shall ensure that children who are deprived of liberty have the right to a medical examination without undue delay with a view, in particular, to assessing their general mental and physical condition. The medical examination shall be as non-invasive as possible and shall be carried out by a physician or another qualified professional.</p> <p>2. The results of the medical examination shall be taken into account when determining the capacity of the child to be subject to questioning, other investigative or evidence-gathering acts, or any measures taken or envisaged against the child.</p> <p>3. The medical examination shall be carried out either on the initiative of the competent authorities, in particular where specific health indications call for such an examination, or on a request by any of the following: (a) the child; (b) the holder of parental responsibility, or another appropriate adult as referred to in Articles 5 and 15; (c) the child's lawyer.</p> <p>4. The conclusion of the medical examination shall be recorded in writing. Where required, medical assistance shall be provided.</p> <p>5. Member States shall ensure that another medical examination is carried out where the circumstances so require.</p>	<p>CRC Committee, General Comment 10, Children's Rights in Juvenile Justice, § 89:</p> <p>Every child has the right to be examined by a physician upon admission to the detention/correctional facility and shall receive adequate medical care throughout his/her stay in the facility, which should be provided, where possible, by health facilities and services of the community.</p> <p>Havana rules, § 49-52:</p> <p>49. Every juvenile shall receive adequate medical care, both preventive and remedial, including dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated. All such medical care should, where possible, be provided to detained juveniles through the appropriate health facilities and services of the community in which the detention facility is located, in order to prevent stigmatization of the juvenile and promote self-respect and integration into the community.</p> <p>50. Every juvenile has a right to be examined by a physician immediately upon admission to a detention facility, for the purpose of recording any evidence of prior ill-treatment and identifying any physical or mental condition requiring medical attention.</p> <p>51. The medical services provided to juveniles should seek to detect and should treat any physical or mental illness, substance abuse or other condition that may hinder the integration of the juvenile into society (...).</p> <p>52. Any medical officer who has reason to believe that the physical or mental health of a juvenile has been or will be injuriously affected by continued detention, a hunger strike or any condition of detention should report this fact immediately to the director of the detention facility in question and to the independent authority responsible for safeguarding the well-being of the juvenile.</p>

DEPRIVATION OF LIBERTY AS A MEASURE OF LAST RESORT	<p>Arts. 5.1 (d), 4 and 5, ECHR:</p> <p>1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.</p> <p>4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.</p> <p>5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.</p> <p>Art. 37 (b), UNCR:</p> <p>States Parties shall ensure that: (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.</p> <p>Art. 10, directive (EU) 2016/800:</p> <p>1. Member States shall ensure that deprivation of liberty of a child at any stage of the proceedings is limited to the shortest appropriate period of time. Due account shall be taken of the age and individual situation of the child, and of the particular circumstances of the case.</p> <p>2. Member States shall ensure that deprivation of liberty, in particular detention, shall be imposed on children only as a measure of last resort. Member States shall ensure that any detention is based on a reasoned decision, subject to judicial review by a court. Such a decision shall also be subject to periodic review, at reasonable intervals of time, by a court, either ex officio or at the request of the child, of the child's lawyer, or of a judicial authority which is not a court. Without prejudice to judicial independence, Member States shall ensure that decisions to be taken pursuant to this paragraph are taken without undue delay.</p>	<p>CoE Guidelines on CFJ, § 19 and 74:</p> <p>19. Any form of deprivation of liberty of children should be a measure of last resort and be for the shortest appropriate period of time.</p> <p>74. The main principle is that no other children's right shall be restricted except the right to liberty, as a consequence of the deprivation of liberty. As Guidelines 19 and 20 clearly stipulate, remedies that involve detention, in whatever form, need to be avoided as much as possible and should only be a measure of last resort, used for the shortest time possible and restricted to serious cases. This is a vital legal obligation. In addition, it is common knowledge that detention does not diminish the risk of recidivism.</p> <p>ECTHR, 6 November 1980, Guzzardi v. Italy, n. 7367/76:</p> <p>Difference between deprivation of and restriction upon liberty is ... merely one of degree or intensity and not one of nature or substance.</p> <p>CRC Committee, General Comment 10, Children's Rights in Juvenile Justice, § 11 and 80:</p> <p>11. The use of deprivation of liberty has very negative consequences for the child's harmonious development and seriously hampers his/her reintegration in society. In this regard, article 37 (b) explicitly provides that deprivation of liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time, so that the child's right to development is fully respected and ensured.</p> <p>80. The Committee notes with concern that, in many countries, children languish in pre-trial detention for months or even years, which constitutes a grave violation of article 37 (b) of CRC. An effective package of alternatives must be available (see chapter IV, section B, above), for the States parties to realize their obligation under article 37 (b) of CRC to use deprivation of liberty only as a measure of last resort.</p>
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**SPECIFIC
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Art. 37 (a, c, d), UNCRC:

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.

Art. 40, UNCRC:

States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

Art. 12, directive (EU) 2016/800:

1. Member States shall ensure that children who are detained are held separately from adults, unless it is considered to be in the child's best interests not to do so.

2. Member States shall also ensure that children who are kept in police custody are held separately from adults, unless: (a) it is considered to be in the child's best interests not to do so; or (b) in exceptional circumstances, it is not possible in practice to do so, provided that children are held together with adults in a manner that is compatible with the child's best interests.

CRC Committee, General Comment 10: Children's Rights in Juvenile Justice, § 85-89:

85. Every child deprived of liberty shall be separated from adults. A child deprived of his liberty shall not be placed in an adult prison or other facility for adults. There is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate. The permitted exception to the separation of children from adults stated in article 37 (c) of CRC, "unless it is considered in the child's best interests not to do so", should be interpreted narrowly; the child's best interests does not mean for the convenience of the States parties. States parties should establish separate facilities for children deprived of their liberty, which include distinct, child-centred staff, personnel, policies and practices.

86. This rule does not mean that a child placed in a facility for children has to be moved to a facility for adults immediately after he/she turns 18. Continuation of his/her stay in the facility for children should be possible if that is in his/her best interest and not contrary to the best interests of the younger children in the facility.

87. Every child deprived of liberty has the right to maintain contact with his/her family through correspondence and visits. In order to facilitate visits, the child should be placed in a facility that is as close as possible to the place of residence of his/her family. Exceptional circumstances that may limit this contact should be clearly described in the law and not be left to the discretion of the competent authorities.

88. The Committee draws the attention of States parties to the **United Nations Rules for the Protection of Juveniles Deprived of their Liberty**, adopted by the General Assembly in its resolution 45/113 of 14 December 1990. The Committee urges the States parties to fully implement these rules, while also taking into account as far as relevant the **Standard Minimum Rules for the Treatment of Prisoners** (see also **rule 9 of the Beijing Rules**). In this regard, the Committee recommends that the States parties incorporate these rules into their national laws and regulations, and make them available, in the national or regional language, to all professionals, NGOs and volunteers involved in the administration of juvenile justice.

89. The Committee wishes to emphasize that, inter alia, the following principles and rules need to be observed in all cases of deprivation of liberty:

- Children should be provided with a physical environment and accommodations which are in keeping with the rehabilitative aims of residential placement, and due regard must be given to their needs for privacy, sensory stimuli, opportunities to associate with their peers, and to participate in sports, physical exercise, in arts, and leisure time activities;

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3. Without prejudice to paragraph 1, when a detained child reaches the age of 18, Member States shall provide for the possibility to continue to hold that person separately from other detained adults where warranted, taking into account the circumstances of the person concerned, provided that this is compatible with the best interests of children who are detained with that person.

4. Without prejudice to paragraph 1, and taking into account paragraph 3, children may be detained with young adults, unless this is contrary to the child's best interests.

5. When children are detained, Member States shall take appropriate measures to: (a) ensure and preserve their health and their physical and mental development; (b) ensure their right to education and training, including where the children have physical, sensory or learning disabilities; (c) ensure the effective and regular exercise of their right to family life; (d) ensure access to programmes that foster their development and their reintegration into society; and (e) ensure respect for their freedom of religion or belief. The measures taken pursuant to this paragraph shall be proportionate and appropriate to the duration of the detention. Points (a) and (e) of the first subparagraph shall also apply to situations of deprivation of liberty other than detention. The measures taken shall be proportionate and appropriate to such situations of deprivation of liberty. Points (b), (c), and (d) of the first subparagraph shall apply to situations of deprivation of liberty other than detention only to the extent that is appropriate and proportionate in the light of the nature and duration of such situations.

6. Member States shall endeavour to ensure that children who are deprived of liberty can meet with the holder of parental responsibility as soon as possible, where such a meeting is compatible with investigative and operational requirements. This paragraph shall be without prejudice to the nomination or designation of another appropriate adult pursuant to Article 5 or 15^o.

Recital 50, directive (EU) 2016/800:

It should be possible to detain children with young adults unless this is contrary to the child's best interests. It is for Member States to determine which persons are considered to be young adults in accordance with their national law and procedures. Member States are encouraged to determine that persons older than 24 years do not qualify as young adults.

- Every child of compulsory school age has the right to education suited to his/her needs and abilities, and designed to prepare him/her for return to society; in addition, every child should, when appropriate, receive vocational training in occupations likely to prepare him/her for future employment;

- The staff of the facility should promote and facilitate frequent contacts of the child with the wider community, including communications with his/her family, friends and other persons or representatives of reputable outside organizations, and the opportunity to visit his/her home and family;

- Restraint or force can be used only when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted. The use of restraint or force, including physical, mechanical and medical restraints, should be under close and direct control of a medical and/or psychological professional. It must never be used as a means of punishment. Staff of the facility should receive training on the applicable standards and members of the staff who use restraint or force in violation of the rules and standards should be punished appropriately;

- Any disciplinary measure must be consistent with upholding the inherent dignity of the juvenile and the fundamental objectives of institutional care; disciplinary measures in violation of article 37 of CRC must be strictly forbidden, including corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child concerned;

- Every child should have the right to make requests or complaints, without censorship as to the substance, to the central administration, the judicial authority or other proper independent authority, and to be informed of the response without delay; children need to know about and have easy access to these mechanisms;

- Independent and qualified inspectors should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative; they should place special emphasis on holding conversations with children in the facilities, in a confidential setting.

CoE Guidelines on CFJ, § 20-21:

20. When deprivation of liberty is imposed, children should, as a rule, be held separately from adults. When children are detained with adults, this should be for exceptional reasons and based solely on the best interests of the child. In all circumstances, children should be detained in premises suited to their needs.

21. Given the vulnerability of children deprived of liberty, the importance of family ties and promoting the reintegration into society, competent authorities should ensure respect and actively support the fulfilment of the rights of the child as set out in universal and European instruments.

		<p>In addition to other rights, children in particular should have the right to: a. maintain regular and meaningful contact with parents, family and friends through visits and correspondence, except when restrictions are required in the interests of justice and the interests of the child. Restrictions on this right should never be used as a punishment; b. receive appropriate education, vocational guidance and training, medical care, and enjoy freedom of thought, conscience and religion and access to leisure, including physical education and sport; c. access programmes that prepare children in advance for their return to their communities, with full attention given to them in respect of their emotional and physical needs, their family relationships, housing, schooling and employment possibilities and socio-economic status.</p> <p>CoE Guidelines on CFJ, § 73:</p> <p>Particular attention should be paid to the way detained children are treated given their inherent vulnerability.</p> <p>Practical measures for detention of children are suggested in many Council of Europe instruments, for example, Recommendation CM/Rec(2008)11 on the European Rules for juvenile offenders subject to sanctions or measures, or the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.</p>
<p>RIGHT OF CHILDREN TO APPEAR IN PERSON AT, AND PARTICIPATE IN, THE TRIAL</p>	<p>Art. 12, UNCRC:</p> <p>1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.</p> <p>Art. 16, directive (EU) 2016/800:</p> <p>1. Member States shall ensure that children have the right to be present at their trial and shall take all necessary measures to enable them to participate effectively in the trial, including by giving them the opportunity to be heard and to express their views. 2. Member States shall ensure that children who were not present at their trial have the right to a new trial or to another legal remedy, in accordance with, and under the conditions set out in, Directive (EU) 2016/343.</p>	<p>CRC Committee, General Comment 10: Children's Rights in Juvenile Justice, § 46:</p> <p>A fair trial requires that the child alleged as or accused of having infringed the penal law be able to effectively participate in the trial, and therefore needs to comprehend the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed.</p> <p>Beijing Rule 14 provides that the proceedings should be conducted in an atmosphere of understanding to allow the child to participate and to express himself freely. Taking into account the child's age and maturity may also require modified courtroom procedures and practices.</p> <p>CoE Guidelines on CFJ, "A. Participation", p. 17 and § 32-34 and 61:</p> <p>This includes giving due weight to the children's views bearing in mind their maturity and any communication difficulties they may have in order to make this participation meaningful. 2. Children should be considered and treated as full bearers of rights and should be entitled to exercise all their rights in a manner that takes into account their capacity to form their own views and the circumstances of the case.</p>

		<p>32. The principle of participation, that is, that children have the right to speak their mind and give their views in all matters that affect them is one of the guiding principles of the United Nations Convention on the Rights of the Child. While this does not mean that their opinion will always be adhered to, the guidelines require that their opinions be taken into account seriously and given due respect, according to their age, maturity and the circumstances of the case, subject to national procedural law.</p> <p>33. The reference made to the term "capable of forming his or her own views" should not be seen as a limitation, but rather a duty on the authorities to fully assess the child's capacity as far as possible. Instead of assuming too easily that the child is unable to form an opinion, states should presume that a child has, in fact, this capacity. It is not up to the child to prove this.</p> <p>34. States are discouraged from introducing standardised age limits.</p> <p>61. Court sessions involving children should be adapted to the child's pace and attention span: regular breaks should be planned and hearings should not last too long. To facilitate the participation of children to their full cognitive capacity and to support their emotional stability, disruption and distractions during court sessions should be kept to a minimum.</p>
<p>PRESUMPTION OF INNOCENCE</p>	<p>Art. 40.2 (b), UNCRC:</p> <p>(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: (i) To be presumed innocent until proven guilty according to law;</p> <p>Art. 48, EU CFR:</p> <p>1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.</p> <p>Art. 6.2, ECHR:</p> <p>Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.</p> <p>Recital 43, directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence:</p> <p>Children are vulnerable and should be given a specific degree of protection. Therefore, in respect of some of the rights provided for in this Directive, specific procedural safeguards should be established.</p>	<p>CRC Committee, General Comment 10: Children's Rights in Juvenile Justice, § 42 and 80:</p> <p>42. The presumption of innocence is fundamental to the protection of the human rights of children in conflict with the law. It means that the burden of proof of the charge(s) brought against the child is on the prosecution. The child alleged as or accused of having infringed the penal law has the benefit of doubt and is only guilty as charged if these charges have been proven beyond reasonable doubt. The child has the right to be treated in accordance with this presumption and it is the duty of all public authorities or others involved to refrain from prejudging the outcome of the trial. States parties should provide information about child development to ensure that this presumption of innocence is respected in practice. Due to the lack of understanding of the process, immaturity, fear or other reasons, the child may behave in a suspicious manner, but the authorities must not assume that the child is guilty without proof of guilt beyond any reasonable doubt.</p> <p>80. In addition, the States parties should take adequate legislative and other measures to reduce the use of pre-trial detention. Use of pre-trial detention as a punishment violates the presumption of innocence.</p>

	<p>Art. 3, directive (EU) 2016/343:</p> <p>Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty according to law.</p> <p>Art. 4, directive (EU) 2016/343:</p> <p>Member States shall take the necessary measures to ensure that, for as long as a suspect or an accused person has not been proved guilty according to law, public statements made by public authorities, and judicial decisions, other than those on guilt, do not refer to that person as being guilty.</p> <p>Art. 5, directive (EU) 2016/343:</p> <p>1. Member States shall take appropriate measures to ensure that suspects and accused persons are not presented as being guilty, in court or in public, through the use of measures of physical restraint.</p>	<p>CoE Guidelines on CFJ, "E. Rule of law", § 46:</p> <p>The application of the rule of law with respect to children necessitates, inter alia, enforcement of the right to the presumption of innocence.</p> <p>ECTHR, 10 February 1995, Allenet de Ribemont v. France:</p> <p>Presumption of innocence may be infringed not only by a judge or court but also by other public authorities.</p>
<p>RIGHT TO REMAIN SILENT AND NOT TO INCRIMINATE ONESELF</p>	<p>Art. 40.2 (b), UNCRC:</p> <p>(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees: (iv) Not to be compelled to give testimony or to confess guilt.</p> <p>Art. 7.5, directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence:</p> <p>The exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned.</p> <p>Art. 3, directive 2012/13/UE:</p> <p>1. Member States shall ensure that suspects or accused persons are provided promptly with information concerning at least the following procedural rights, as they apply under national law, in order to allow for those rights to be exercised effectively: ... (e) the right to remain silent.</p> <p>Recital 29, directive (EU) 2016/800:</p> <p>Where a child who was not initially a suspect or accused person, such as a witness, becomes a suspect or accused person, that child should have the right not to incriminate him or herself and the right to remain silent, in accordance with Union law and the ECHR, as interpreted by the Court of Justice of the European Union (Court of Justice) and by the European Court of Human Rights.</p>	<p>ECTHR, 17 December 1996, Saunders v. The United Kingdom:</p> <p>Although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6.</p> <p>ECTHR, 2 March 2010, Adamkiewicz v. Poland:</p> <p>In this case, the Court held that the fact that the child was questioned without the presence of a lawyer and was not informed of his right to remain silent and not incriminate himself had amounted to a violation of Article 6 § 3 c) in conjunction with Article 6 §1 ECHR.</p> <p>European Commission, Impact Assessment accompanying the document "Proposal for a directive on procedural safeguards for children suspected or accused in criminal proceedings", Brussels, 27 November 2013, p. 77:</p> <p>A child who is a suspect in a police investigation must be able to consider whether he should use his right not to incriminate himself and, if so, how he should act. It must be said that it can be intellectually highly demanding for any suspect to make the right decision in this regard. The child can then consider what stance he should take on whether to exercise his right to remain silent and what consequences might follow.</p>

<p>REMEDIES</p>	<p>Art. 19, directive (EU) 2016/800:</p> <p>Member States shall ensure that children who are suspects or accused persons in criminal proceedings and children who are requested persons have an effective remedy under national law in the event of a breach of their rights under this directive.</p>	<p>CoE Guidelines on CFJ, "D. Child-friendly justice during judicial proceedings", § 34-35:</p> <p>34. As bearers of rights, children should have recourse to remedies to effectively exercise their rights or act upon violations of their rights. The domestic law should facilitate where appropriate the possibility of access to court for children who have sufficient understanding of their rights and of the use of remedies to protect these rights, based on adequately given legal advice.</p> <p>35. Any obstacles to access to court, such as the cost of the proceedings or the lack of legal counsel, should be removed.</p>
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TECHNICAL SHEET 5

TS 5 - CONTROL BODIES

This sheet reminds briefly which bodies ensure that the States parties to international and regional instruments are respecting their obligations.



For each of the standards listed in the posters referred to in **TS 1**, a control body has been put in place.

At the United Nations level, at the Council of Europe level and at the European Union level, the EU Member States are controlled by the following bodies.

1. AT INTERNATIONAL LEVEL (UN)

a. The UN Committee on the Rights of the Child (CRC Committee)

The CRC Committee is the body of 18 independent experts that monitors the implementation of the UNCRC¹ and of its three Optional Protocols on the involvement of children in armed conflict², on the sale of children, child prostitution and child pornography³ and on a communications procedure (OP3 UNCRC)⁴.

This last Protocol allows children to submit complaints regarding specific violations of their rights under the UNCRC and its two first Optional Protocols⁵. Several complaints have been submitted, however, the CRC Committee has not issued any decisions yet.⁶

¹ UNCRC, Part II, arts. 42-45.

² Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted and opened for signature, ratification and accession by General Assembly Resolution A/RES/54/263 of 25 May 2000, entered into force on 12 February 2002.

³ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted and opened for signature, ratification and accession by General Assembly Resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002.

⁴ Optional Protocol to the Convention on the Rights of the Child on a communications procedure, adopted and opened for signature, ratification and accession by General Assembly resolution of A/RES/66/138 of 19 December 2011, entered into force on 14 April 2014.

⁵ See, in particular, arts 5 (Individual communications), 7 (Admissibility), 12 (Inter-State communication) of the OP3 CRC.

⁶ See for the list of pending cases: <http://www.ohchr.org/Documents/HRBodies/CRC/TablePendingCases.pdf>.

All States parties are obliged to submit regular reports to the CRC Committee on how children's rights are being implemented at national level. States must submit an initial report two years after acceding to the UNCRC and then periodic reports every five years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations".

The Committee also publishes its interpretation of the content of the UNCRC provisions, known as "General Comments" on thematic issues⁷ (i.e., as already mentioned, CRC GC N°10 and N°12).

⁷ *General comment No. 1 (2001): The Aims of Education; General comment No. 2 (2002): The Role of Independent National Human Rights Institutions in the Protection and Promotion of the Rights of the Child; General comment No. 3 (2003): HIV/AIDS and the rights of the children; General comment No. 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child; General Comment No. 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child; General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin; General comment No. 7 (2005): Implementing child rights in early childhood; General Comment No. 8 (2006): The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment; General Comment No. 9 (2006): The rights of children with disabilities; General Comment No. 10 (2007): Children's rights in juvenile justice; General Comments No. 11 (2009): Indigenous children and their rights under the Convention; General Comments No. 12 (2009): The right of the child to be heard; General comment No. 13 (2011): The right of the child to freedom from all forms of violence; General comment No. 14 (2013): The right of the child to have his or her best interests taken as a primary consideration; General comment No. 15 (2013): The right of the child to the enjoyment of the highest attainable standard of health; General comment No. 16 (2013): State obligations regarding the impact of the business sector on children's rights; General comment No. 17 (2013): The right of the child to rest, leisure, play, recreational activities, cultural life and the arts; General comment No. 18 (2014) on harmful practices; General comment No. 19 (2016) on public budgeting for the realization of children's rights; General comment No. 20 (2016) on the implementation of the rights of the child during adolescence and General comment No. 21 (2017) on children in street situations.*

b. The Human Rights Council (HRC) and the UN Special Procedures⁸

The HRC is an inter-governmental body within the United Nations system responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them.

The HRC has established an Advisory Committee, which serves as the Council's "think tank", providing it with expertise and advice on thematic human rights issues, and the Complaint Procedure which allows individuals and organizations to bring human rights violations to the attention of the Council.

The Universal Periodic Review (UPR) is a State-driven process, under the auspices of the HRC, which provides each State with the opportunity to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations.

The HRC also works with the UN Special Procedures established by the former Commission on Human Rights and now assumed by the HRC. These are made up of Special Rapporteurs⁹, special representatives and independent experts and working groups that monitor, examine, advise and publicly report on human rights. The UN bodies have the opportunity to visit country-specific situations after agreement with the State concerned. Recommendations are made public and presented to the UN HRC but are not binding on States.

⁸ See <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx>.

⁹ *Special Rapporteur on the right to education*: <http://www.ohchr.org/EN/Issues/Education/SREducation/Pages/SREducationIndex.aspx>;

Special Rapporteur on the Independence of Judges and Lawyers: <http://www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIndex.aspx>;

Special Rapporteur on the sale of children, child prostitution and child pornography: <http://www.ohchr.org/EN/Issues/Children/Pages/ChildrenIndex.aspx>.

2. AT COUNCIL OF EUROPE LEVEL

a. The Council of Europe Commissioner for Human Rights

The Commissioner for Human Rights is an independent non-judicial institution within the Council of Europe, mandated to promote the awareness of and respect for human rights in the 47 Council of Europe States parties¹⁰.

The activities of this institution focus on three major, closely-related areas: 1. Country visits and dialogue with national authorities and civil society; 2. Thematic reporting and advising on human rights systematic implementation; 3. Awareness-raising activities.

Like the UN bodies, the Commissioner carries out visits to all States parties to monitor and evaluate the human rights situation. In the course of such visits, he meets with the highest representatives of government, parliament, judiciary, civil society and national human rights structures. He also talks to ordinary people with human rights concerns and visits places of human rights relevance, including prisons, psychiatric hospitals, centres for asylum seekers, schools, orphanages and settlements populated by vulnerable groups.

Following the visits, a report or a letter may be addressed to the authorities of the country concerned containing an assessment of the human rights situation and recommendations on how to overcome shortcomings in law and practice.

The Commissioner also has the right to intervene as a third party in proceedings at the European Court of Human Rights, either by submitting written information or taking part in its hearings.

The Commissioner also conducts thematic work on subjects central to the protection of human rights in Europe. He provides advice and information on the prevention of human rights violations and releases opinions, Issue Papers and reports.

¹⁰ Resolution (99) 50 of the Council of Europe Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999 at its 104th Session (<http://www.coe.int/web/commissioner>).

b. The European Court of Human Rights (ECtHR)

The ECtHR is an international court situated in Strasbourg, under the Council of Europe's ambit. This Court mainly decides on individual applications (lodged in accordance with Articles 34 and 35 of the European Convention on Human Rights)¹¹ alleging violations of the rights set out in the ECHR and in its Protocols¹².

The ECtHR's judgments are binding for the 47 Council of Europe Member States that have ratified the ECHR (i.e. all the EU Member States, for more information, see p. 45 [□□](#)).

c European Committee of Social Rights (ECSR)

The ECSR is a body of 15 independent and impartial experts that rules on the conformity of national laws and practices with the European Social Charter (ESC), either through the collective complaints procedure or the national reporting procedure¹³.

The ESC guarantees a broad range of everyday human rights related to employment, housing, health, education, social protection and welfare.

The ECSR is an important monitoring body for the protection of children's rights. Despite the fact that criminal justice issues are outside the scope of the ESC, the collective complaints mechanism could be used in guaranteeing the educational, protective and welfare character of the juvenile justice system.

¹¹ The ECtHR may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto (art. 34 ECHR). Art. 35 of the ECHR sets out the admissibility criteria for the individual applications.

¹² The ECtHR's jurisdiction extends to all matters concerning the interpretation and application of the ECHR and its Protocols (art. 32 of the ECHR).

¹³ Designated national and international organisations can engage in collective complaints against states that are party to the ESC and have accepted the complaints procedure. For more information, see the ECSR website: <https://www.coe.int/en/web/turin-european-social-charter>.

3. AT THE EUROPEAN UNION LEVEL

At EU level, the European Commission (in the first place) and the Court of Justice of the European Union (CJEU) are the bodies responsible for controlling whether a European Union Member State has transposed a directive correctly and/or on time.

More information is provided on the transposition process of the European directive in **TS 2**.



a. The European Commission

The European Commission has the role of “Guardian of the Treaties” and is responsible for monitoring the correct application of EU law. In this regard, the Commission has the power to start infringement proceedings against a Member State accused of violating EU law¹⁴.

In relation to infringement procedures against EU Member States that fail to comply with the duty to transpose the EU directives on fair trial rights correctly and on time, the European Commission has started pre-litigation procedures after the expiry of the transposition deadlines against:

- 9 EU Member States in relation to the transposition of the directive 2013/48/EU on the right of access to a lawyer¹⁵;
- 16 EU Member States concerning the transposition of the directive 2010/64/EU on the right to interpretation and translation¹⁶;
- 7 EU Member State in relation to the directive 2012/13/EU on the right to information¹⁷.

The main characteristics of this particular procedure will be schematically outlined below.

¹⁴ Also a Member State can bring an action against another Member State for an alleged infringement of an obligation under the Treaties but before bringing the matter before the Court of Justice, the State shall inform the European Commission (see art. 259 TFEU for more information about the procedure).


¹⁵ Luxembourg, Bulgaria, France, Slovenia, Croatia, Greece, Slovakia, Cyprus and Germany (Letter of formal notice).

¹⁶ Lithuania, Belgium, Slovenia, Romania, Luxembourg, Greece, Ireland, Italy, Slovakia, Austria, Spain, Finland, Hungary, Malta, Bulgaria and Cyprus.

¹⁷ Luxembourg, Cyprus, Malta, Slovenia, Slovakia, Spain and Czech Republic.

1. The infringement procedure

A Member State can be subjected to an infringement procedure according to article 258 of the TFEU which states that:

 *“If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union”¹⁸.*

It follows from that article that the infringement procedure starts always with a “formal procedure” composed of a number of steps laid out in the TFEU:

1. The “pre-litigation stage”: The European Commission sends a letter of formal notice requesting further information from a Member State. By this letter, the Commission allows the Member State in question to present its views regarding a specific violation of EU law. A reply is requested within a specified period, usually 2 months;
2. The “reasoned opinion”: If no reply to the letter of formal notice is received or if the observations presented by the Member State in reply to that notice cannot be considered satisfactory, the Commission will move to the next stage of the infringement procedure, which is the “reasoned opinion”. In this stage the Commission explains why it considers that the Member State is breaching EU law and calls on the Member State to notify the Commission of the measures taken in order to comply with its specifications within a specified period, usually 2 months.
3. If a Member State still fails to ensure compliance with EU law, the European Commission may¹⁹ then decide to refer it to the Court of Justice (CJEU) for *the “judicial stage”*.

¹⁸ More explanation on the website of the European Commission itself: https://ec.europa.eu/info/law/law-making-process/overview-law-making-process/applying-eu-law/monitoring-implementation-eu-directives/infringement-procedure_en.

¹⁹ The European Commission has the power but not the obligation to refer a Member State to the CJEU.

The rules of this second stage of the infringement procedure are described by article 260 TFEU²⁰:

1. If the CJEU finds that a Member State has failed to fulfil an obligation under the Treaties, it declares a violation and asks the Member State concerned to take the necessary measures to comply with EU law (mere declaratory judgment of the CJEU);
2. If the Member State does not take the necessary measures to comply with the judgment of the CJEU, the Commission shall give that State the opportunity to submit its observations. In this phase, the Commission shall also inform the State of the penalties that it considers appropriate to impose upon it;
3. The European Commission may then bring the case before the CJEU again and explicitly ask the Court to impose penalties on the Member State, based on the duration and severity of the infringement and on the size of the Member State involved;
4. If the Court finds that the Member State concerned has not complied with its judgment, it may impose a financial penalty on it (Judgment of conviction of the CJEU).

By derogation from these general rules, the Treaty of Lisbon has introduced a specific procedure for a Member State that fails to inform the European Commission of the national measures adopted to transpose an EU directive.

In this particular circumstance, a second proceeding before the CJEU is not required to sanction a Member State with a financial penalty. This means that when the European Commission refers a Member State to the Court of Justice for the first time, it can propose to the Court the penalties which it considers appropriate and, consequently, when the Court of Justice rules on such a case for the first time, it may already be in a position to sanction the Member State concerned.²¹

²⁰ Guidance on the following link:

https://ec.europa.eu/home-affairs/sites/homeaffairs/files/news/docs/infringements/article_260.pdf.

²¹ TFEU, art. 260.3: "When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court finds that there is an infringement, it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment".

b. The Court of Justice of the European Union (CJEU)²²

The CJEU is responsible for ensuring the uniform and coherent application of EU law in all EU Member States and issues decisions regarding many types of legal actions, in particular:

- Infringement procedure (discussed above ☐).
- Actions for annulment²³;
- Actions for failure to act²⁴;
- Actions for damages²⁵;
- Preliminary rulings (analysed below ☐);

I. The preliminary ruling

One of the most important instruments of the Court of Justice, to guarantee legal certainty by uniform application of EU law, is the preliminary ruling (TFEU, art. 267).

As already mentioned in the Manual, to date, the most of CJEU judgments relevant to children are in the context of the free movement of persons and on issues relating to EU citizenship and have been delivered after a request for a preliminary ruling by a national court²⁶.

With the EU's obligation to promote the protection of the rights of the child (TEU, art. 3), the incorporation of the four core principles of the UNCRC into EU primary law (EUCFR, arts. 24 and 21) and, in particular, with the adoption of the directive (EU) 2016/800, it is likely that the CJEU will be seized with questions relating to the procedural rights of children in conflict with the law in the future.

²² It is important to remember the division of powers between the Court of Justice and the General Court. The General Court has jurisdiction to hear and determine at first instance actions brought by individuals. The Court of Justice has jurisdiction to hear and determine actions brought by the Member States. It may also hear appeals brought against judgments given by the General Court at first instance. In the latter case, the Court of Justice rules only on questions of law and cannot re-examine the facts.

²³ Through the action for annulment, the claimant (Member States, the Commission, the European Parliament, the Council and the individuals under certain conditions) requests the annulment of an act adopted by a European Union institution, body, office or organisation. The CJEU shall annul the act concerned if it's judged to be contrary to EU law (TFEU, art. 263).

²⁴ The Parliament, the Council and the Commission must make certain decisions under certain circumstances. If they don't, EU governments, other EU institutions or (under certain conditions) individuals or companies can complain to the CJEU (TFEU, art. 265).

²⁵ Any person or company who has had their interests harmed as a result of the action or inaction of the EU or its staff can take action against them through the CJEU (TFEU, arts. 268 and 340).

²⁶ For the case-law of the CJEU see https://curia.europa.eu/jcms/jcms/j_6/en/.

Even if, to date, no cases have been brought to the CJEU concerning the interpretation of article 24 of the EUCFR, in conjunction with one of the directives devoted to the rights of suspected or accused persons in criminal proceedings, the preliminary ruling can surely be a useful instrument to argue for the promotion and protection of the rights of children in conflict with the law.

For these reasons, the main characteristics of this powerful judicial instrument are listed schematically below.

Purpose of the preliminary ruling:

To enable national judges to question the CJEU on the interpretation or validity of EU law if this is of relevance in the case pending before them²⁷.

Types of references for a preliminary ruling:

- 1) Reference for a ruling on the interpretation of EU primary and secondary law: the national judge requests clarification from the Court of Justice in order to apply a specific provision correctly;
- 2) Reference for a preliminary ruling on the validity of an EU act of secondary law issued by a Union institution, body, office or agency in order to check its validity. The same mechanism can be used to determine whether a national law or practice is compatible with EU law.

²⁷ The Court of Justice only gives a decision on the constituent elements of the reference for a preliminary ruling made to it. The national court remains competent for the original case and the national proceeding shall be stayed until the CJEU has given its ruling.

How a preliminary ruling works:

a. The request

- National courts/tribunals should always refer to the Court of Justice in case of doubts which can give rise to a wrong application/interpretation of EU law in a pending case²⁸;
- The request shall contain a clear definition of the factual and legal elements of the case and also of the dispositions of EU law which are relevant and applicable;

b. Limits:

- a) A request for a preliminary ruling cannot be based on a virtual/hypothetical or manifestly irrelevant case;
- b) If the specific matter could have been the subject of an action for annulment, it cannot be contested through a preliminary ruling;
- c) A preliminary ruling may be requested by one of the parties involved in the dispute of the judge, but the decision to refer the case to the CJEU rests with the national judge/court;

Nevertheless, according to article 267 of the TFEU, national courts which act as a court of final appeal (i.e. against whose decisions there is no judicial remedy) are obliged to make a reference to the Court of Justice for a preliminary ruling.

There are some exceptions to this last rule, which enable national courts of final appeal not to be obliged to refer to the CJEU for a preliminary ruling, when:

- 1) The CJEU has already ruled on the same matter;
- 2) The interpretation of the EU rule of law in question is obvious;
- 3) There is a settled case-law of the CJEU on that issue;

c. Effects on the pending case

The national dispute is suspended until the decision of the CJEU on which the final decision of the referring court shall be based.

²⁸ For more information, see the Recommendations of the CJEU to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (2016/C 439/01): [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016H1125\(01\)&from=IT](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016H1125(01)&from=IT).

d. Types of procedures in urgent cases

Article 267 of the TFEU states that “*with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay*”. In this regard, the Rules of Procedure of the CJEU provide two particular procedures for the preliminary ruling²⁹:

- 1) The expedited procedure: a reference for a preliminary ruling may be subject to an expedited procedure when the nature of the case and exceptional circumstances require it to be handled quickly;
- 2) The urgent procedure: this procedure only applies in the areas relating to freedom, security and justice. It has already been used by the Court of Justice in a lot of cases concerning children’s rights in issues relating, mostly, to parental responsibility³⁰. This procedure should be used also in cases involving children in conflict with the law, in particular if they are deprived of liberty.

e. Legal effects of the preliminary ruling

- Today there is no doubt that each decision taken by the CJEU in a preliminary ruling has an “*erga omnes effect*” which means that it is binding not only for the national referring court but also for the national courts of the other Member States. In practice, the decisions of the CJEU are considered as binding precedents;
- In the context of a reference for a preliminary ruling concerning validity, if a disposition or a legislative instrument of EU law is declared invalid, all of the other instruments adopted that are based upon it, are automatically invalid. Normally, the decisions of the CJEU have retroactive effects but the Court can also decide to declare invalid an act of EU law with *ex nunc* effects in order to preserve the legal certainty and the protection of legitimate expectations.

²⁹ Arts. 105–114 of the Rules of Procedure of the CJEU.

³⁰ See, for example, CJEU, 23 December 2009, *Detiček* (C-403/09); CJEU, 1 July 2010, *Povse* (C-211/10); CJEU, 5 October 2010, *McB* (C-400/10); CJEU, 22 December 2010, *Aguirre Zarraga* (C-491/10); CJEU, 22 December 2010, *Mercredi* (C-497/10). See also the CJEU “Report on the use of the urgent preliminary ruling procedure by the Court of Justice”, delivered to the Council in accordance with the statement annexed to its decision of 20 December 2007 (OJ L 24 of 29 January 2008, p. 44): https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-07/en_rapport.pdf.



TECHNICAL SHEET 6

TS 6 - SCOPE OF APPLICATION OF THE SET OF EU DIRECTIVES ON FAIR TRIAL RIGHTS

This data sheet aims to clarify one of the most important issues of interpretation regarding the type of proceedings concerned by the scope of application of EU directive (EU) 2016/800 and, consequently, of all the EU directives on fair trial rights¹.

The scope of the directive (EU) 2016/800 was extended to provide more protection to children. This directive applies to children from the time they are made aware that they are suspected or accused of having committed a criminal offence, irrespective of whether they are deprived of liberty².

All the directives adopted in the framework of the Council's *Roadmap*³ apply until the conclusion of the criminal proceedings which is understood to mean the final determination of the question whether the suspect or accused child has

The scope of application of these directives depends then on the definition of the terms “criminal” proceedings and “criminal” offence.



In this regard, recital 17 of directive (EU) 2016/800 states that: *“This directive should apply only to criminal proceedings. It should not apply to other types of proceedings, in particular procedures specifically designed for children which could result in the imposition of protective measures, corrective measures or educational measures”*.

To understand that recital, it is important to know that, in the EU Member States, there can be considerable differences among the types of proceedings involving children in conflict with the law.

In some States, for example, the juvenile justice system in place derives from the welfare system's conception and is not considered as criminal *per se* (for example

¹ See the Council's Roadmap with the aim to strengthen the procedural rights of suspects or accused persons in a criminal procedure (Council Resolution regarding the Roadmap to strengthen the procedural rights of suspects or people prosecuted in a criminal procedure, 30 November 2009, JO C/295/1).

² See art. 2.1. This is in line with directive (EU) 2016/343 on presumption of innocence which should apply even before a person is made aware that he is suspected or accused.

³ See reference in footnote n. 1.

in Belgium and in Poland). In some other States, part of the juvenile justice system is considered as being only administrative and thus also not criminal *per se* (for example in Bulgaria, when a person is suspected of having committed an offence).

Following our research, there are two main reasons that have led to the introduction of recital 17 in directive (EU) 2016/800:

1) The first derives from the willingness to respect the principle of subsidiarity since the non-criminal proceedings could not give rise to judicial cooperation in criminal matters among Member States, going beyond the EU competences⁴.

In reply to this, it is important to note that there have already been cases in which, for example, a European Arrest Warrant (EAW), issued against a child, has been executed by the executing Member State even if the EAW was not based upon criminal proceedings.⁵

2) The second reason is to avoid placing Member States under an obligation to define as “criminal” certain acts committed by a child which, in certain national systems, are not considered to be criminal offences, in order to prevent these States from transforming their juvenile justice systems in criminal systems *stricto sensu*, which would result in the child being brought into a traumatic process.

However, a restrictive interpretation (or definition) of the “criminal” nature of juvenile proceedings could limit the application of the international and regional instruments offering the best guarantees to protect the rights of children in conflict with the law.

In directive (EU) 2016/800, there is no definition of the concepts “criminal proceedings” or “criminal offence”.

In the absence of such a clarification by the EU legislation, the interpretation of recital 17⁶ and, therefore, of the scope of directive (EU) 2016/800 (but also, *a fortiori*, of all the other directives on fair trial rights), must be interpreted in line with the international general principles of juvenile justice. In particular:

⁴ D. De Vocht, M. Panzavolta, M. Vanderhallen, M. Van Oosterhout, *Procedural safeguards for juvenile suspects in interrogations. A look at the Commission's Proposal in light of an EU comparative study*, in *New Journal of European Criminal law*, Vol. 5, Issue 4, 2014, p. 486.

⁵ The reference is an EAW requested by the Belgian authorities (judicial order from the Family Court) to Poland and concerned a 17 years old child. The EAW had been issued in Belgium during a stage in which the proceeding had not yet been considered to be “criminal” (see Council of the European Union, *Evaluation report on the fourth round of mutual evaluations, “The practical application of the European arrest warrant and corresponding surrender procedures between member states”. Report on Poland, 14 December 2007 (ST 14240/1/07)*, p. 22–24).

⁶ The appearance of recital 17 in directive (EU) 2016/800 only occurred at an advanced stage of the legislative procedure (it was not included in the Commission's original proposal, available on <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2013:0822:FIN>).

a) It is important to underline that all EU Member States are parties to the ECHR and, therefore, they shall comply with the ECtHR's judgments. The ECtHR's case-law is also regularly used by the CJEU to interpret EU law and, consequently, must be taken into account when interpreting the scope of application of the abovementioned EU directives from that perspective.

In its judgment *Engel and Others v. Netherlands*, the ECtHR has outlined three cumulative criteria for determining the criminal nature of an offence and, therefore, the application of article 6 of the ECHR (Right to a fair trial): (1) the classification in domestic law, (2) the nature of the offence and (3) the severity of the penalty that the concerned person risks incurring⁷.

Moreover, the ECtHR has affirmed an important principle precisely regarding the procedural safeguards for children in conflict with the law in its recent judgment *Blokhin v. Russia*: ***“A child may in no case be deprived of procedural safeguards for the sole reason that under domestic law the procedure, which could lead to deprivation of liberty, is intended to protect the interests of the minor rather than to punish”***⁸.

ECtHR (GC), 23 March 2016, *Blokhin v. Russia*, n. 47152/06:

“The Grand Chamber saw no reason to depart from the Chamber’s findings that the proceedings against the applicant constituted criminal proceedings within the meaning of article 6 of the Convention. Like the Chamber, it stressed the need to look beyond appearances and the language used and to concentrate on the realities of the situation. The placement for thirty days in the temporary detention centre for juvenile offenders had clear elements of both deterrence and punishment”.

⁷ ECtHR, 8 June 1976, *Engel and others v. The Netherlands*, n. 5100/71, § 82.

⁸ ECtHR, 23 March 2016, *Blokhin v. Russia*, n. 47152/06, § 196, p. 64. See also ECtHR, 2 March 2010, *Adamkiewicz v. Poland*, n. 54729/00.

In this sense, the national classification of a proceeding as “criminal” or “non-criminal” is not decisive for the application (or not) of the procedural safeguards enshrined in article 6 of the ECHR. Following this line of reasoning, the ECtHR has stated that the guarantees of a fair trial must be applied also in family and administrative proceedings that are substantively criminal.

The ECtHR is therefore extremely clear: it is contrary to the ECHR to deny children the enjoyment of the procedural safeguards of a fair trial on the sole basis of the “protective/welfare” national classification of juvenile justice proceedings.

b) Secondly, it is also fundamental to underline that the UNCRC has an important status in the case-law of the ECtHR (in contrast to the case-law of the CJEU⁹) and, therefore, the ECtHR’s judgments represent an important vehicle through which the UNCRC’s principles and rights can permeate indirectly into EU law.

In this sense, the provisions of the UNCRC shall also be taken into account as indicators for interpreting the scope of application of the EU directives, such as, in particular, article 40 which enshrines several procedural guarantees also contained in directive (EU) 2016/800.

c) Thirdly, regarding EU law, it should be pointed out that an autonomous definition of the term “criminal offence”, independent of national classifications, has already been given by the CJEU in its case-law¹⁰.

The CJEU has indeed used the “Engel criteria”, laid down by the ECtHR, in several of its judgments¹¹ and, in this regard, also the recital 11 of directive (EU) 2016/343 on the presumption of innocence makes a clear reference to the ECtHR by stating that: ***“This directive should apply only to criminal proceedings as interpreted by the Court of Justice of the European Union (Court of Justice), without prejudice to the case-law of the European Court of Human Rights”.***

⁹ To date, only one reference to the UNCRC has been made by the CJEU (CJEU, 14 February 2008, *Dynamic Medien Vertriebs GmbH v. Avides Media AG* (C-244/06)).

¹⁰ CJEU, 14 November 2013, *Baláz* (C-60/12), point 42: “the term ‘court having jurisdiction in particular in criminal matters’, (...) is an autonomous concept of Union law and must be interpreted as covering any court or tribunal which applies a procedure that satisfies the essential characteristics of criminal procedure”.

¹¹ CJEU, 5 June 2012, *Łukasz Marcin Bonda* (C-489/10), point 37; CJEU, 26 February 2013, *Akerberg Fransson* (C-617/10), point 35.

Furthermore, during the process for the adoption of directive (EU) 2016/800, an autonomous interpretation of the term “criminal offence” was explicitly requested by both the European Economic and Social Committee (which delivered its opinion on the EC proposal)¹² and the European Parliament¹³.

Following these interpretations, all the EU directives on fair trial rights should apply to every kind of proceeding that can be defined as criminal according to the “Engel criteria”, irrespective of their national classification.

¹² *Opinion of the European Economic and Social Committee on the proposal for a directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings*, 25 March 2014, point 1.5: “The Committee holds the view that the term ‘criminal proceedings’, along the lines of European Court of Human Rights case-law in this domain, should be able to be interpreted in European law independently of its classification in Member States’ laws. So as to best guarantee this possibility of independent interpretation, the Committee recommends that the statement in the recitals of the proposals for directives, to the effect that the safeguards should not apply to administrative proceedings leading to sanctions, be deleted”.

¹³ *Amendments proposed by the European Parliament in this regard*: “(6a) Given the case-law of the Court of Justice of the European Union and the European Court of Human Rights, the criminal nature of proceedings cannot always be determined purely on the strength of their classification, and of the penalties which may be imposed in national law. In order to achieve the aims of the Treaties and of this directive and to ensure full respect for fundamental rights, including those set out in the Charter and the ECHR, it is therefore appropriate, for the purposes of this directive, to take into account not only the formal classification of proceedings in national law, but also their effects on the lives and development of the children concerned. This Directive should be applied, in any event, where there is a possibility that proceedings will result in a criminal record (Justification: the recital is based on the precedent set by the Engel case, consistently followed by both the Strasbourg and the Luxembourg Court and emphasises the need to ensure that Member States fully respect fundamental rights and to prevent violations giving rise to European court rulings)”; “(6c) The safeguards provided for in this directive should therefore be applied, with such adjustments as might be necessary, to all proceedings which might entail restrictive measures or, at any rate, significant consequences for children’s lives and hence influence the development processes that shape their personalities, and in cases where, although no punishment is ordered, proceedings could lead to a decision giving to understand – if only implicitly – that the child concerned was responsible for the offence with which he or she had been charged. In all such cases, the application of this directive should not be ruled out by the fact that the proceedings did not result from actions classified as criminal offences in national law, do not take place in a criminal court, or entail penalties formally classified as criminal in national law (Justification: The recital is based on the precedent set by the Engel case, consistently followed by both the Strasbourg and the Luxembourg Court, and emphasises the need to ensure that Member States fully respect fundamental rights and to prevent violations giving rise to European court rulings. The reference to ‘such adjustments as might be necessary’ reflects the flexible approach that needs to be brought to bear when applying the directive to the cases concerned)”. See “Draft European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings” (A8-0020/2015) – Amendments 4 and 6.

IN CONCLUSION, IN ORDER TO DETERMINE THE SCOPE OF APPLICATION OF THE EU DIRECTIVES ON FAIR TRIAL RIGHTS, IT IS NECESSARY TO:

1) Consider national juvenile justice proceedings in the light of both the above mentioned CJEU and ECtHR's case-law and the international and regional instruments ratified by all EU Member States, with regard to their substantial nature and consequences for children and not only to their national classification;

2) Keep in mind that recital 3 of directive 2016/800/EU on procedural safeguards for children in conflict with the law states that "although the Member States are parties to the European Convention on human rights and fundamental freedoms (ECHR), the International Covenant on civil and political rights and the United Nations Convention on the rights of the child, experience has shown that such accession does not in itself always ensure a sufficient degree of confidence in criminal justice systems of other Member States".

Since the other EU directives on fair trial rights also contain a similar provision¹⁴, this means that EU Member States have to strengthen their compliance with the procedural safeguards contained in these international instruments in order to guarantee correct implementation of the EU directives on fair trial rights;

3) Understand that it is in the interest of the EU Member States to take all necessary measures to respect their international commitments in the field of juvenile justice and also the principle of primacy of EU law in order to prevent violations giving rise to proceedings before the ECtHR and the CJEU.



TECHNICAL SHEET 7

TS 7 - CHECKLIST ON THE RIGHT TO A LAWYER

1. ACCESS TO A LAWYER AT ALL STAGES OF THE JUVENILE JUSTICE PROCEDURE

A) INFORMATION & FACILITATION

- How does the child get information on access to a lawyer?
- Does the State play a role in giving information to the child? (e.g. Public campaigns,...)
- Does education play a role in giving this information? (e.g. Is that information included in school curricula)?
- Do organisations and associations act as intermediaries to facilitate the dissemination of the information?
- If the child is deprived of liberty, how does he receive information on his rights? From whom?
- Is the information provided in child-friendly language?
- Is the information provided in the child's mother tongue or in a language spoken/understood by the child?

B) ACCESS TO A LAWYER

I. Choice of his own lawyer

- Does the child have the choice of his lawyer?
- Are there mechanisms to facilitate the child's choice of a lawyer? How do they work?
- If the child has no lawyer, will one be assigned to him automatically? How?
- How do children enter into contact with lawyers?
- Does the child receive any help to do so? From whom?

II. Legal aid system

- Is there a legal aid system in place at national level?
- Is the system accessible to children? Under what circumstances?
- How does the child receive information about the existence of such a system?
- Is there a specific section for children implicated in criminal proceedings? Or perhaps a youth section?
- In the legal aid system, must lawyers undergo specific training in order to defend/assist children?
- If the child benefits from legal aid, can he choose his lawyer?
- If the child benefits from legal aid, can he change lawyer during the same procedure? Under what circumstances?
- Is there a permanent lawyer (in Court, at the legal aid bureau...) to help and counsel children who don't have a lawyer? Is he specialised in juvenile justice?

C) INTERPRETATION AND TRANSLATION

- Can the child benefit from a free interpreter if he needs one? When/at which stages of the procedure?
- Can the child benefit from free translations of the essential documents?

2. THE LAWYER FOR CHILDREN

A) CURRENT POSITION

- Do associations of lawyers for children exist in your country? If yes, what is their role?
- Do lawyers for children work in collaboration with other professionals? Which ones? How?

B) ROLE AND MISSION

- Is the role of the lawyer for children defined in legislation? How?
- Does the role of the lawyer differ according to the age of the child and/or his capacity of discernment?
- Is there a special status of the lawyer for children?

C) TRAINING

- Is there training for lawyers for children?
- Is the training mandatory?
- Is the training accessible/affordable?
- How long does it last?
- Is the training homogeneous and organised at national level?
- Is there continuous training through the lawyers' career? What are the requirements?
- What is the design and content of the training? Is it theoretical/practical (or both)? Is it exclusively juridical or is it multidisciplinary training with psycho-socio aspects? Does the training include a dimension of child support/assistance, for example?
- By whom is it organised (Universities, bar associations, NGOs or other associations, etc.)?
- Do children participate to the lawyers' training? If yes, how are they involved in the process?

D) MATERIALS

- Do tools exist at national level on the role and mission of lawyers for children (Manuals, self-training tools/ reports, etc.)?
- Do reports exist on child views (participation) and professional views on the lawyers for children system (role, mission, training, etc.)?

3. ASSISTANCE BY A LAWYER DURING JUVENILE JUSTICE PROCEEDINGS

B) GENERAL

- Is there an obligation for the suspected/accused child to be assisted by a lawyer? When/at what stages?
- What happens when there is no lawyer present and the child has to be assisted? Will the competent authorities postpone the hearing, the questioning, investigative/ evidence-gathering acts, etc., during which the child must be assisted by a lawyer?
- Is the lawyer's presence recorded at each intervention?

B) AT THE DIFFERENT STAGES OF THE PROCEDURE

- Does the child have the right to meet with his lawyer before he is questioned by the police or by other law enforcement or judicial authorities? Is this right effective?
- Can the lawyer for children be present and effectively assist his client when the child is questioned (according to article 3.3 b) of directive 2013/48/EU)? Is the lawyer allowed to intervene? How? Can he talk to his client when he is questioned? Is he allowed to comment on the police report, etc.?

- Is the lawyer present upon the conducting, by investigating or other competent authorities, of an investigative or other evidence-gathering act such as identity parades, confrontations or reconstructions of the scene of crime (according to article 3.3 c of directive 2013/48/EU and article 6.3 b of directive 2016/800/EU)?
- Does the child have the right to meet with his lawyer without undue delay after deprivation of liberty? Is this right effective (according to article 3.2 c of directive 2013/48/EU and article 6.3 c of directive 2016/800/EU)?
- When the child has been summoned to appear before a court having jurisdiction in criminal matters, does he have the right to meet with his lawyer in due time before they appear in court? Is this right effective (according to article 3.2 d of directive 2013/48/EU and article 6.3 d of directive 2016/800/EU)?

C) WHAT IS THE RELATIONSHIP BETWEEN THE LAWYER FOR CHILDREN AND HIS CLIENT?

- Is communication always private and confidential?
- Can a lawyer communicate easily with a child deprived of liberty?
- Are the meeting places comfortable for a child?
- Can the same lawyer intervene at all stages of the procedure?

D) DEROGATIONS (REGARDING ARTICLE 6.8 OF DIRECTIVE 2016/800/EU)

- Do derogations exist to the right to be assisted by a lawyer? Under which circumstances?
- Are those derogations frequently used?

4. THE CHILD'S BEST INTERESTS

- Are the child's best interests taken into account in the legislation on the right of access to/assistance by a lawyer? How?
- Are the child's best interests taken into account to assess the use of derogations? How?

5. SOCIO LEGAL DEFENCE CENTRES (see Appendix [□□](#))

- Do socio-legal defence centres (or similar structures) exist at a regional/national level?
- If yes, how does they work? Who works there?



TECHNICAL SHEET 8

TS 8 – CHECKLIST ON THE RIGHT TO AN INDIVIDUAL ASSESSMENT

(ART. 7 DIRECTIVE 2016/800/EU)

This checklist has been drafted by Child Circle.

This checklist aims to help EU Member States in establishing their domestic legal provisions on the individual assessment of children in conflict with the law.

1. HOW IS THE INDIVIDUAL ASSESSMENT TO BE CARRIED OUT?

SCOPE OF THE ASSESSMENT:

- Who decides on the scope of the assessment, in particular considering that it is possible “to adapt the extent and detail of an individual assessment according to the circumstances of the case”?
- What role does the lawyer have in determining the scope of the assessment?

SOURCES OF INFORMATION FOR THE ASSESSMENT:

- Who contributes to the assessment?
- Is there a mechanism that allows the lawyer to propose sources for the assessment, based on the child’s circumstances or characteristics?

CHILD’S PARTICIPATION IN THE ASSESSMENT:

- What is the consequence of the child failing to cooperate?
- How is the lawyer involved?

- What mechanisms are in place to ensure that the assessment is carried out in a child sensitive way, so as to ensure the participation of the child, to secure disclosure of important and relevant information and to avoid alienation or traumatising of the child?
- What is the role of the lawyer in this regard?

2. TAKING THE ASSESSMENT INTO ACCOUNT

TYPE OF OUTPUT:

- Are the outcomes of the assessment provided to the child and his lawyer?
- How is the output(s) shared with the lawyer?
- Which “competent authorities” receive the assessment outcomes? (e.g. Law enforcement authorities, judges, prosecutors, social professionals, medical professionals, centres where a child can be deprived of his liberty?)
- Whose responsibility is it to ensure that the assessment is brought before the judge?

APPENDIX

SOCIO-LEGAL DEFENCE CENTRES: IMPLEMENTATION PLAN

Introduction

This implementation plan is intended to provide guidance to DCI National Sections interested in establishing and/or improving a SLDC model. A SLDC is not necessarily a separate structure or institution that DCI would have to create, but rather a mechanism that performs specific functions. Though SLDCs require resources to function efficiently, it is important to note that this does not necessarily mean separate or exclusive resources. SLDCs can be mainstreamed within existing projects and be financed by the project.

Key concepts

SLDCs are structures run by a multidisciplinary team actively offering children (i.e. individuals under 18 years of age) as well as adults, who are confronted with children's rights violations, direct access to justice and corresponding quality social-legal support (including information provision, referrals to other service providers, and legal advice and representation - including in court).

At an individual level, on a case-by-case basis, the SLDC informs the child (victim, alleged perpetrator, witness) of his human rights and ensures that these can be effectively exercised by providing relevant assistance. A SLDC provides legal assistance (through a lawyer or paralegal, who is a specialist in the rights of the child) free of charge (the professional being paid by the legal aid system). In this way children can actively participate in the decisions concerning them, both amicably and legally, and be informed about all aspects of their situation (the legal procedure, the role and the function of the various actors involved in the legal proceedings, and so on). The child can then make informed choices and say how he would like to be defended, becoming the master of his own defence (for example, whether to plead guilty or not guilty). SLDCs go also beyond mere legal support, ensuring a holistic child-centred approach, having its team of staff composed of professionals from different disciplines (legal, social, educational, psychological, etc.). As far as possible a SLDC guarantees parents' involvement so that they can fulfil their responsibility to protect and educate their child.¹

At the collective level, through collective or social advocacy, the SLDC builds a 'child-friendly' society that provides protection and possibilities of empowerment for children, along with a system of national laws and services that respect children's rights. The SLDC promotes structural social changes

¹ UNCRC, arts 3 and 5.

by promoting the adoption of laws, policies and practices that are specific to the rights of children and respect international laws and standards. Through advocacy based on their practice, SLDCs formulate proposals and build capacity for improving the situation of children in their social environment, appealing to authorities when children's rights are not fully respected. SLDCs strengthen the capacity of authorities to implement basic human rights for the benefit of all children. SLDCs are often the first to identify systematic violations of children's rights, raising public awareness and seeking to counter such violations.

To work properly, SLDCs should have the status of independent entities, decentralized to reach the largest number of children possible, composed of multidisciplinary teams (social workers and lawyers, as well as psychologists, educators, and other professionals) benefiting from adequate training. Beyond legal advice, mediation and counselling, a referral pathway is provided whereby children may be referred to other services, depending on their specific needs (health, education, and so on). Cases and data received are systematically registered and used for monitoring and mapping, as well-as follow-up mechanism. SLDCs also serve as a preventative entity through the provision of information and education to empower the children.

RESULT	OBJECTIVES	ACTIVITIES
<p style="text-align: center;">-1-</p> <p>SLDC model consolidated and popularized among DCI national sections, donors and the international community</p>	<p>Build the capacity of DCI national sections to effectively and sustainably implement the SLDC model</p>	<ul style="list-style-type: none"> - Development of a Guideline document with a series of annexes (including training tools and tools for case management) - Training of trainers between DCI national sections - Organise DCI regional and cross-regional meetings to share experiences
	<p>Through SLDCs build the image of DCI, making it attractive to donors and the international community</p>	<ul style="list-style-type: none"> - Ensure coordination and quality control by giving technical advice to DCI national sections (through a Guideline document and expertise from an apposite SLDC Task Force) - Document specific promising practices and success stories from DCI national sections and share through website and other channels - Develop and share reports with donors, the international community and relevant UN agencies - Present the SLDC model and success stories within regional and international fora - Fund raising

<p style="text-align: center;">-2-</p> <p style="text-align: center;">Increased number of children accessing justice through the help of DCI's SLDCs at national level</p>	<p>Increase awareness, visibility and support towards SLDCs at national levels</p>	<ul style="list-style-type: none"> - Formal launch of SLDC model at national level, with DCI national sections officially inviting government, donors and CSOs - Dissemination of information on SLDCs through the media by DCI national sections
	<p>Strengthen SLDCs in order to increase their coverage and efficiency</p>	<ul style="list-style-type: none"> - Contribute to the development of a Guideline document with a series of annexes (including training tools and tools for case management) - Training of DCI local staff, volunteers and other professionals - Establish a data base, and link it to the government's data base where possible - Establish a referral network within the SLDC, ensuring that it is linked to justice institutions, community mechanisms and NGO services - Provide legal and social services to children in contact with the law, child victims of violence and child witnesses
	<p>Empower children to be able to participate in the SLDC programme as both actors and beneficiaries</p>	<ul style="list-style-type: none"> - Training of child and youth groups/clubs in schools and communities about the SLDC and how to disseminate information among their peers, neighbours and families - Outreach to children in schools and communities and inform them about the SLDC - Produce and distribute child friendly materials on SLDCs among children

<p style="text-align: center;">-3-</p> <p style="text-align: center;">SLDC model formalized and sustainable</p>	<p>Ensure accountability and attract government and donor support towards SLDCs</p>	<ul style="list-style-type: none"> - Documentation of promising practices and success stories - Production of annual/periodic reports - Dissemination of reports to the public using media channels - Presentation of the SLDC model and success stories at important interagency meetings, conferences and other fora at national level - Seek government and donor support towards SLDCs
	<p>Work with government to fulfil their obligations under the UNCRC, by promoting and complementing national strategies, policies and legislation as well as providing specialized training on children's rights</p>	<ul style="list-style-type: none"> - Carry out stakeholder analysis and build strategic alliances involving UNICEF and other influential organisations to build adequate child protection services (e.g. the African Child Policy Forum in the African region; the League of Arab States in the Middle East) - Organise strategic lobbying meetings with relevant stakeholders/authorities - Participate in, and contribute to, the development of justice related policies, national plans of action, strategic plans, etc. (whether exclusively for children or in general), and ensure that child justice issues are mainstreamed

English edition

Manual for EU Member States: How to ensure the rights of children in conflict with the law?

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This Manual, with the Practical Guide addressed to lawyers for children, marks the final outcome of the project “My lawyer, My Rights”, a project coordinated by Defence for Children International (DCI)-Belgium and funded by the Justice Programme of the European Union.

On the premise that too many children in conflict with the law are still victims of violations of their fundamental human rights in the European Union, this Manual aims to support EU Member States in the concrete transposition, implementation and application of the set of EU directives on fair trial rights, in line with the standards and principles of juvenile justice established at international and regional level.

The Manual has been designed in a way that it provides an overview of legal instruments and findings of obstacles and inspiring practices from juvenile justice systems in several EU Member States. It aims to serve as a tool for general directions on the implications of and challenges in implementing these EU directives.

It is designed to be used by legislators, policy makers and practitioners at national, regional or local level, who work with the implementation of the EU directives and related instruments. It could also be used by civil society organisations and other organisations to advocate for correct implementation of EU directives.

“There is no field where the demand for justice is stronger than that of juvenile justice. Inadequate responses, inappropriate for children in conflict with the law, can harm their future, sometimes forever, and even further contribute to insecurity. Lost lives, shameful societies. The stakes are fundamental and the responsibility of the decision-makers is enormous. Yet, paradoxically, juvenile justice is often neglected, if not forgotten.

In this respect, the interest and the added value of this excellent handbook are to provide guidance to Member States to fulfil their legal obligations, including some recommendations to address common shortcomings and obstacles”.

**Foreword by Françoise TULKENS,
Former Vice-President of the European Court of Human Rights (ECtHR)**

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