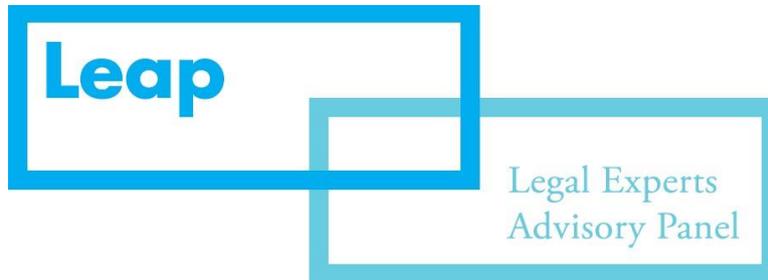
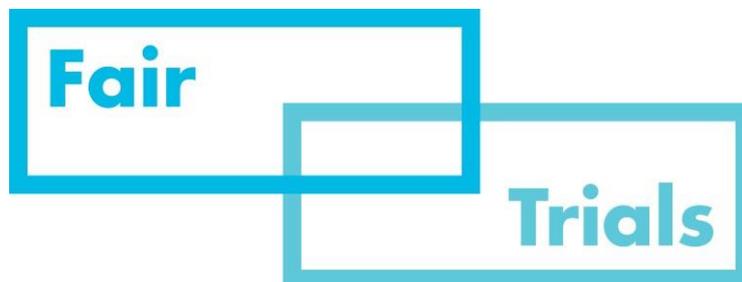


## ROADMAP PRACTITIONER TOOLS



## EU DIRECTIVE ON PROCEDURAL SAFEGUARDS FOR CHILDREN WHO ARE SUSPECTS OR ACCUSED PERSONS IN CRIMINAL PROCEEDINGS:

### IMPLEMENTATION TOOLKIT



## About Fair Trials

Fair Trials is an international human rights organisation with offices in London, Brussels and Washington, D.C., focused on improving the right to a fair trial in accordance with international standards. Our work is premised on the belief that fair trials are one of the cornerstones of a just society: they prevent lives being ruined by miscarriages of justice, and make societies safer by contributing to transparent and reliable justice systems that maintain public trust. Although universally recognised in principle, in practice the basic human right to a fair trial is being routinely abused. Fair Trials' work combines: (a) helping suspects to understand and exercise their rights; (b) building an engaged and informed network of fair trial defenders (including NGOs, lawyers and academics); and (c) fighting the underlying causes of unfair trials through research, litigation, political advocacy and campaigns.

## About the Legal Experts Advisory Panel

The Legal Experts Advisory Panel (or LEAP) is an EU-wide network of experts in criminal justice and human rights which works to promote fair and effective judicial cooperation within Europe. There are currently over 155 organisational members, with representatives from law firms, CSOs, and academic institutions, covering all 28 EU Member States.

Through Fair Trials' coordination, LEAP is able to offer an expert view on a broad range of EU criminal justice topics, while also boosting cooperation between human rights defenders in crossborder work. LEAP's importance has been acknowledged by the EU, which has recognised the network's contribution to EU Justice.

Fair Trials and LEAP would like to give special thanks to **Stephanie Rap** of Leiden University for providing her expertise on children's rights, and for helping us to put together this toolkit.

For further information, please contact:

**Ralph Bunche**  
Regional Director Europe  
+32 (0)24242354

**Silvia Lorenzo Perez**  
Legal and Policy Assistant  
+32 (0)2425 8447

**Gianluca Cesaro**  
Communications Officer  
+32 (0)24258447

[ralph.bunche@fairtrials.net](mailto:ralph.bunche@fairtrials.net)

[silvia.lorenzoperez@fairtrials.net](mailto:silvia.lorenzoperez@fairtrials.net)

[gianluca.cesaro@fairtrials.net](mailto:gianluca.cesaro@fairtrials.net)

*This publication has been produced with the financial support of the Justice Programme of the European Union. The contents of this publication are the sole responsibility of Fair Trials International and can in no way be taken to reflect the views of the European Commission*



## Table of Contents

CHILDREN DIRECTIVE TOOLKIT.....	4
I. INTRODUCTION AND BACKGROUND .....	4
A. Scope and objectives .....	4
B. Definitions.....	4
C. Core concepts in juvenile justice .....	4
D. The Procedural Rights Roadmap.....	6
II. THE CHILDREN DIRECTIVE .....	7
A. The Children Directive.....	7
B. Provisions of the Directive .....	8
III . KEY PRINCIPLES IN THE CHILDREN DIRECTIVE .....	14
A. Scope of juvenile justice .....	14
B. Best interests of the child .....	15
C. Effective participation.....	17
D. The Right to Legal Assistance.....	19
E. Protection of privacy and confidentiality.....	22
IV. PRACTICAL IMPLEMENTATION OF THE CHILDREN DIRECTIVE.....	23
A. Arrest and police interrogation.....	23
Right to legal assistance .....	23
Effective participation.....	25
Right to be heard .....	25
Right to information.....	26
Privacy and confidentiality.....	28
Diversion .....	28
B. Pre-trial Detention .....	29
Measure of Last Resort for the Shortest Appropriate Period of Time.....	29
Right to information.....	32
Welfare.....	32
C. Court proceedings.....	33
Right to information.....	33
Right to be Heard .....	34
Protection of privacy.....	35

After the hearing..... 36

VI. CONCLUSION..... 37

# CHILDREN DIRECTIVE TOOLKIT

## **I. INTRODUCTION AND BACKGROUND**

### **A. Scope and objectives**

1. The rights of children in juvenile justice systems have developed steadily over several decades through a variety of international and European legal instruments. Most of the key principles underpinning juvenile justice and the rights of child suspects and accused are enshrined in these standards, only some of which are binding and directly enforceable. Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (the **Children Directive**), which was adopted in 2016, is designed to reaffirm the same principles in a binding legal measure which practitioners across the EU can refer to more easily.
2. This Toolkit is a guide for lawyers and other practitioners working with children in conflict with the law, especially as they use the **Children Directive** in domestic litigation. It provides an overview of the relevant provisions of the Directive, as well as more detailed information about the ways in which the Directive can be used to assert and defend the rights of children in conflict with the law at different stages of criminal proceedings.
3. We hope it will also encourage LEAP members and their networks to identify continuing problems with national law and practice which the Directive can address, with a view to provide a framework for developing strategies to inform further reform in law and practice at the domestic and regional level.

### **B. Definitions**

4. First, some terms common among the various international standards require definition:
  - A 'child' means any person below the age of 18 years (see Article 1 UN Convention on the Rights of the Child (**CRC**) and further discussion in section III below).
  - 'Children in conflict with the law' are all children that are suspects or accused persons in criminal proceedings.
  - 'Juvenile justice' is understood as the set of standards that recognise the child in conflict with the law as a human being with the right to a fair trial, but also with a special status requiring child specific treatment. This approach is recognised in Article 40 of the CRC, the core juvenile justice provision.
  - A 'lawyer' means any person who, in accordance with national law, is qualified and entitled to provide legal advice and assistance to suspects or accused persons.

### **C. Core concepts in juvenile justice**

5. The concept of juvenile justice has been developed and refined through a number of international legal instruments, including those adopted by the United Nations and by the Council of Europe. The most influential of these instruments were passed by the UN in the 1980s and include:
- The UN Standard Minimum Rules for the Administration of Juvenile Justice (the **Beijing Rules**, 1985);
  - The UN Convention on the Rights of the Child (**CRC**, 1989)
  - The Rules for the Protection of Juveniles Deprived of their Liberty (the **Havana Rules** 1990); and
  - General Comment No. 10 on children’s rights in juvenile justice, passed by the UN Committee on the Rights of the Child (**CRC Committee**).
6. Similar standards have subsequently been developed the Committee of Ministers of the Council of Europe (**CoE**) to further strengthen protections for children in conflict with the law. These include:
- The European Rules for juvenile offenders subject to sanctions or measures (**European Rules**, 2008);
  - The Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (the **Guidelines**).<sup>1</sup> Neither the European Rules nor the Guidelines are binding per se, but they have played a significant role in shaping the jurisprudence of the European Court of Human Rights (**ECtHR**).<sup>2</sup>
7. Though only the CRC is binding, this network of ‘soft law’ instruments have defined the core concepts which underpin the **Children Directive**. ‘Juvenile justice’ was originally defined in in the Beijing Rules as a system that emphasises the well-being of the child and the proportionality of the reaction to child offenders and their offences.<sup>3</sup> This concept was developed significantly by the CRC, which requires children in conflict with the law to be treated in a way which accords with two basic principles.
- The first is that every child is entitled to be treated fairly, with full respect for his human dignity and his right to a fair trial.
  - The second is that every child is entitled to be treated in a special and child-friendly way.<sup>4</sup> This means, among other things, that every juvenile justice intervention should aim to reintegrate the child into society and allow him<sup>5</sup> to play a constructive role. In other words, children should be able to learn from their mistakes and should receive support to prevent reoffending, and this should all be done in a fair manner.<sup>6</sup>
8. Measures taken in relation to children must align with the objectives of juvenile justice. They must enhance the well-being of the child; they must be proportionate, child-friendly, and respectful to the child’s human dignity and right to a fair trial; and they must enable the child to reintegrate into society. The CRC also requires that measures comply with the general principles of the CRC contained in Articles 2 (non-discrimination), 3 (best interest of the child), 6 (right to life) and 12 (right to be heard).<sup>7</sup>

---

<sup>1</sup> Liefwaard 2016.

<sup>2</sup> Liefwaard 2016; See also: ECtHR *Blokhin v Russia* (2016), appl. no. 47152/06, at paras. 80, 170 and 203; ECtHR *M & M. v Croatia* (2015), appl. no. 10161/13, at para. 102; ECtHR *Z.J. v Lithuania* (2014), appl. no. 60092/12, at paras. 73 and 104; ECtHR *M.D. and others v Malta* (2012), appl. no. 64791/10, at para. 38.

<sup>3</sup> Beijing Rule 5.

<sup>4</sup> Liefwaard 2015.

<sup>5</sup> For practical reasons, this manual refers to children and lawyers in the masculine form. Feminine children and lawyers are to be considered included in the references as well.

<sup>6</sup> Liefwaard 2015.

<sup>7</sup> General Comment (**GC**) 10, para. 5.

Article 3 CRC requires that authorities adopt a holistic approach towards the child and think beyond narrow legal provisions, taking into consideration the child's physical, mental, spiritual, moral, psychological and social development.<sup>8</sup>

9. Moreover, Article 40(2) CRC contains a list of minimum standards, specifying the right of all children in conflict with the law to fair treatment and to trial. According to the CRC Committee, these standards include the prohibition of retroactive juvenile justice; the presumption of innocence; the right to effective participation in the proceedings; the right to prompt and direct information of the charge(s); the right to legal or other appropriate assistance; the right to decisions without delay and with the involvement of parents; freedom from compulsory self-incrimination; equality of arms; the right to appeal; the right to free assistance of an interpreter; and, the right to full respect of privacy.<sup>9</sup>
10. The European Rules similarly include a requirement that sanctions or measures be based on the best interests of the child and be subject to the principle of proportionality, i.e. the sanctions or measures will depend on the gravity of the offence committed and take account of the child's age, physical and mental well-being, development, capacities and personal circumstances.<sup>10</sup> Moreover they require that measures be tailored individually,<sup>11</sup> implemented without undue delay,<sup>12</sup> and follow the principle of minimum intervention.<sup>13</sup>
11. The CRC approach to juvenile justice is that every child is entitled to be treated in a special and child-friendly way. This is the basis of the notion of child-friendly justice, which was clarified in detail at the European level with the adoption of the Guidelines. Child-friendly justice has become part of the European legal and political framework concerning the position of children in criminal justice systems.<sup>14</sup> In particular, it refers to justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child.<sup>15</sup> Child-friendly justice principles apply to every judicial and administrative procedure involving children (any person under the age of 18, Guideline II(a)).

#### **D. The Procedural Rights Roadmap**

12. EU Member States have been cooperating closely on cross-border law enforcement issues, principally through mutual recognition mechanisms such as the European Arrest Warrant (**EAW**). The effectiveness of such mechanisms relies on mutual confidence between judicial authorities that each will respect the rights of those concerned, in particular as guaranteed by the European Convention on Human Rights (**ECHR**).
13. However, cooperation has been undermined by the fact that judicial authorities called upon to cooperate with one another do not, in reality, have full confidence in each other's compliance with these standards.
14. In order to strengthen the system, the EU has begun imposing minimum standards to regulate certain aspects of criminal procedure through a programme called the 'Procedural Rights Roadmap'

---

<sup>8</sup> GC 14, para. 4.

<sup>9</sup> GC 10, para. 41-67.

<sup>10</sup> European Rule 5.

<sup>11</sup> European Rule 6.

<sup>12</sup> European Rule 9.

<sup>13</sup> European Rule 10.

<sup>14</sup> Liefwaard 2016.

<sup>15</sup> Guideline II(c).

**(Roadmap)**. Whilst these measures have their origin in ensuring mutual trust, the result is a set of directives, providing minimum standards to ensure mutual trust. Crucially, these bind national authorities in all cases, including those which have no cross-border element.

**Table 1: Overview of Directives based on the Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings**

	Directive	Date of Adoption
1.	Directive 2010/64 on the right to interpretation and translation in criminal proceedings ( <i>Interpretation and Translation Directive</i> )	20 October 2010
2.	Directive 2012/13 on the right to information in criminal proceedings ( <i>Information Directive</i> )	22 May 2012
3.	Directive 2013/48 on the right of access to a lawyer in criminal proceedings and European arrest warrant proceedings ( <i>Access to a Lawyer Directive</i> )	22 October 2013
4.	Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and the right to be present at the trial in criminal proceedings ( <i>Presumption of Innocence Directive</i> )	9 March 2016
5.	Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings ( <i>Children Directive</i> )	11 May 2016
6.	Directive on 2016/1919 legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings ( <i>Legal Aid Directive</i> )	26 October 2016

15. This toolkit focuses on Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings (the **Children Directive**), which was adopted in 2016.

## II. THE CHILDREN DIRECTIVE

### A. The Children Directive

16. The EU Commission recognised that despite the existence of numerous international and European standards in the field of juvenile justice, the level of procedural safeguards for children in conflict with the law was insufficient to guarantee children’s effective participation in criminal proceedings, and that improvements needed to be made to foster mutual trust between Member States.<sup>16</sup> In particular, it considered that the CRC was too broad and limited in its applicability to criminal proceedings, and it recognised that other international and regional standards on children in conflict with the law lacked binding effect on Member States. The jurisprudence of the ECtHR on children’s rights was seen to be scattered, and it had resulted in divergent interpretations and varying degrees of implementation.<sup>17</sup>
17. The **Children Directive** was adopted in May 2016, and the deadline for its transposition is 11 June 2019 (i.e. by that date each member state must have given force to the directive within their national law by passing appropriate implementation measures).
18. The **Children Directive** establishes common minimum standards on procedural safeguards for children that are binding across the EU, and it is designed to make the effective assertion of child suspects’ rights more straightforward by giving them binding force under EU Law. It builds on the principles

<sup>16</sup> Commission Impact Assessment, 4.1.1.

<sup>17</sup> Ibid.

found in existing international and European standards, including the Guidelines,<sup>18</sup> and contains a ‘non-regression’ clause which states that the protections provided by the Directive cannot be construed in a way that falls below those of the CRC and the ECHR. For lawyers, this means that the CRC and the ECHR, as well as providing authoritative guidance through various means such as case-law, general comments, and soft-law principles, could also help to both interpret the provisions of the Directive and fill in any remaining gaps.

## B. Provisions of the Directive

19. A summary of the key provisions of the **Children Directive** is provided below. These provisions are discussed in more detail throughout the second half of this chapter.

Provision	Topic	Notable Aspects
<b>Article 1</b>	Subject Matter	The Directive covers two categories of children: <ul style="list-style-type: none"> <li>• Suspects and accused persons in criminal proceedings (recital 17 excludes those proceedings which are specifically designed for children that lead to protective, educative, or corrective measures); and</li> <li>• Individuals subject to EAW proceedings.</li> </ul>
<b>Article 2</b>	Scope	The Directive applies until the final determination of the case (which does not include the imposition of punishment after sentence), including any appeals for children who are under 18, or turn 18 during the criminal proceedings (however Recital 12 encourages member states to extend safeguards until age 21).
<b>Article 3</b>	Definitions	<ul style="list-style-type: none"> <li>• A ‘Child’ is someone under the age of 18, but there is a presumption that an individual is a child if there is uncertainty regarding their age.</li> <li>• ‘Holder of parental responsibility’ refers to the person with all rights and duties relating to the person or the property of a child given to a natural or legal person by judgment, operation of law, or an agreement having legal effects, including rights of custody and rights of access.</li> </ul>
<b>Article 4</b>	Right to Information	When children are made aware that they are suspects or accused persons in criminal proceedings, they must be informed promptly of, firstly, their rights under the Information Directive (2012/13/EU) and, secondly, general aspects of the conduct of the proceedings. An explanation of a child’s rights should be given in simple and accessible language and should be recorded. Where the child is provided a Letter of Rights, the Letter should include a reference to their rights under the Children Directive.

<sup>18</sup> Recital 7.

		<p>Children are to be informed <i>promptly</i> of their rights under the Right to Information Directive, as well as the particular rights children have under the Children Directive, including the:</p> <ul style="list-style-type: none"> <li>• Right to have the holder of parental responsibility informed;</li> <li>• Right to assistance by a lawyer;</li> <li>• Right to privacy;</li> <li>• Right to be accompanied by the holder of parental responsibility; and</li> <li>• Right to legal aid.</li> </ul> <p><i>At the earliest possible stage of their proceedings</i>, children should be informed of additional rights, including the:</p> <ul style="list-style-type: none"> <li>• Right to an individual assessment;</li> <li>• Right to a medical examination;</li> <li>• Right to limitation of deprivation of liberty and use of alternative measures;</li> <li>• Right to be accompanied by the holder of parental responsibility during court hearings;</li> <li>• Right to appear in person at trial; and</li> <li>• Right to effective remedies.</li> </ul> <p><i>Upon deprivation of liberty</i>, information shall be provided of the:</p> <ul style="list-style-type: none"> <li>• Right to specific treatment during deprivation of liberty.</li> </ul>
<p><b>Article 5</b></p>	<p>Right to have the holder of parental responsibility informed</p>	<p>The Directive requires Member States to ensure the holder of parental responsibility is informed of the child’s rights. According to Recital 22, this should be done as soon as possible and in such detail necessary to safeguard the fairness of proceedings and the effective exercise of the rights of the child.</p> <p>Another appropriate adult, nominated by the child and accepted by the competent authorities, should be informed if:</p> <ul style="list-style-type: none"> <li>• Informing the holder of parental responsibility would be contrary to the child’s interest; or</li> <li>• After reasonable attempts, it is not possible to identify or reach the holder of parental responsibility; or</li> <li>• It could jeopardise criminal investigations (such as when there is suspicion that the holder of parental responsibility is complicit in the crime).</li> <li>• If the child does not appoint an appropriate adult, or the designated adult is not acceptable to the competent authorities, the competent authorities should designate another person, taking into account the best interests of the child.</li> </ul>

<b>Article 6</b>	Assistance by a lawyer	<p>Child suspects and accused persons have the right of access to a lawyer in accordance with the Access to a Lawyer Directive (2013/48/EU).</p> <p>Member States must ensure children are assisted by a lawyer to allow them to exercise their rights effectively.</p> <p>Children shall be assisted by a lawyer without undue delay once they are made aware that they are suspects or accused persons:</p> <ul style="list-style-type: none"> <li>• Before they are questioned by the police or other law enforcement or judicial authority; or</li> <li>• At the commencement of investigative or evidence-gathering acts (these include, at least, identity parades; confrontations and reconstructions of the scene of a crime); or</li> <li>• After deprivation of liberty; or</li> <li>• Where they have been summoned to appear before a court, in due time before they appear before that court.</li> </ul> <p>Such assistance includes:</p> <ul style="list-style-type: none"> <li>• The right to meet and communicate in private, including prior to questioning;</li> <li>• To be assisted by a lawyer during questioning; and</li> <li>• To be assisted during investigative acts.</li> </ul> <p>Member States may derogate from some of the above provisions, but in any event, children have a right to the assistance of a lawyer:</p> <ul style="list-style-type: none"> <li>• When they are brought before a court or judge to decide on detention; and/or</li> <li>• During detention.</li> </ul> <p>Member States must respect the right to confidentiality between the lawyer and child, and the right to confidentiality is non-derogable.</p>
<b>Article 7</b>	Right to an individual assessment	<p>Member States must ensure that specific needs of the child, such as protection, education, training, and social integration, are taken into account. To do so, an individual assessment must be carried out by qualified personnel, following, as far as possible, a multidisciplinary approach to assess the child's personality, maturity and their economic, social and family background, as well as any vulnerabilities (such as intellectual disabilities and communication difficulties). Assessments should be carried out at the earliest possible stage and with close involvement of the child.</p> <p>The assessment can establish and note relevant information that could be helpful in the determination of:</p> <ul style="list-style-type: none"> <li>• Whether any specific measures are of benefit to the child;</li> <li>• The appropriateness and effectiveness of precautionary measures; and</li> </ul>

		<ul style="list-style-type: none"> <li>• Decisions in the criminal proceedings, including sentencing.</li> </ul>
<b>Article 8</b>	Right to a medical examination	Children deprived of liberty have the right to a medical examination without undue delay with a view to assessing their mental and physical condition. It should be carried out by a professional and should be as non-invasive as possible. The results of the medical examination should be taken into account when determining the capacity of child to be subject to questioning and other investigative acts or measures to be taken towards the child. A request for a medical examination can be made by the child, the holder of parental responsibility, or the child's lawyer.
<b>Article 9</b>	Audio-visual recording of questioning	The Directive requires that the questioning of a child is subject to audio-visual recording when proportionate in the circumstances of the case, taking into account circumstances such as the presence of a lawyer or whether the child is deprived of liberty, always keeping in mind the best interests of the child.
<b>Article 10</b>	Limitation of deprivation of liberty	Deprivation of liberty should be used as a measure of last resort and for the shortest appropriate time. The decision to deprive a child of liberty must be reasoned and subject to judicial review, at regular intervals, at the request of the child, the child's lawyer, or of a judicial authority which is not a court. Decisions should be made without undue delay.
<b>Article 11</b>	Alternative measures	Alternative measures to detention should be made available when appropriate.
<b>Article 12</b>	Specific treatment in the case of deprivation of liberty	Children should be held separately from adults unless it is not in the child's best interest to do so. In the case of police custody, member states may deviate from this when exceptional circumstances make separation impossible, or when it is in the best interest of the child. When children are detained, appropriate measures should be taken to: <ul style="list-style-type: none"> <li>• Ensure and preserve health, and mental and physical development;</li> <li>• Ensure the right to education and training, including where they have disabilities;</li> <li>• Ensure effective and regular exercise of the right to family life (Recital 51);</li> <li>• Ensure access to programmes that foster development and reintegration into society;</li> <li>• Ensure respect for their freedom of religion or belief (Recital 52); and</li> <li>• Allow the child to meet with the holder of parental responsibility as soon as possible, so long as this is compatible with investigative and operational requirements.</li> </ul>

<b>Article 13</b>	Timely and diligent treatment of cases	Member States must take all appropriate measures to ensure criminal proceedings are treated as a matter of urgency, with due diligence, and that the child is treated in a manner that protects their dignity and is appropriate for their age, maturity, and level of understanding (taking into account special needs, including any communication difficulties).
<b>Article 14</b>	Right to protection of privacy	<p>Member States should ensure that the child’s right to privacy during criminal proceedings is protected. Court hearings involving children should either be held in the absence of the public, or courts and judges may decide to hold such hearings in the absence of the public.</p> <p>Member States should also encourage the media to implement self-regulatory measures to achieve this objective.</p>
<b>Article 15</b>	Right to be accompanied by the holder of parental responsibility during proceedings	<p>Member States should ensure that children have the right to be accompanied by the holder of parental responsibility during court proceedings. An appropriate adult may be appointed in such circumstances and by such methods as outlined in Article 5.</p> <p>Member States should ensure the holder of parental responsibility or another appropriate adult is present at proceedings, other than at court hearings, if it is in the child’s best interest and the presence of that person does not prejudice criminal proceedings.</p>
<b>Article 16</b>	Right to appear in person at, and to participate in, their trial	<p>Member States must ensure that children have the right to be present at trial and to take all necessary measures to enable the child to participate effectively, including the opportunity to be heard and to express their views (under Recital 60, Member States should also take appropriate measures to secure the child’s attendance at trial, including sending summons to the holder of parental responsibility).</p> <p>Children who are not present at trial have the right to a new trial or another legal remedy.</p>
<b>Article 17</b>	European arrest warrant proceedings	<p>The Directive protects certain rights for children subject to EAW proceedings. These rights include the:</p> <ul style="list-style-type: none"> <li>• Right to legal assistance;</li> <li>• Right to have the holder of parental responsibility informed;</li> <li>• Right to medical examination;</li> <li>• Right to a limitation on deprivation of liberty; and</li> <li>• Right to be accompanied by the holder of parental responsibility in criminal proceedings.</li> </ul>
<b>Article 18</b>	Right to legal aid	Legal aid must be made available where necessary to guarantee the effective exercise of the right to be assisted by a lawyer.

<b>Article 19</b>	Remedies	Children have a right to an effective remedy under national law in the event of a breach of their rights under the Directive.
<b>Article 20</b>	Training	Member States must take appropriate measures to ensure that judges and prosecutors have specific competence or have effective access to specific training. They should also take appropriate measures to promote training for lawyers working with children and to encourage initiatives enabling those providing children with support and restorative justice services to receive adequate training.
<b>Article 23</b>	Non-regression	The Directive should in no way be interpreted as a regression from the Charter, ECHR, or international law, including the UN CRC.

### **III. KEY PRINCIPLES IN THE CHILDREN DIRECTIVE**

20. The **Children Directive** is significant largely because it gives specificity and direct enforceability to some of the core concepts of juvenile justice developed in other international and European standards. The form each takes in the Directive is now examined in turn, addressing each of the key protections the directive provides and placing them in the broader context of international and European law (particularly the CRC). Areas of ambiguity in the Directive's provisions are addressed here, and their implications in practice examined more closely in section IV.

#### **A. Scope of juvenile justice**

21. The **Children Directive** defines a 'child' as anyone under the age of 18,<sup>19</sup> and requires that where there is uncertainty as to age, a presumption that the defendant is a child should operate.<sup>20</sup> The Directive also provides explicitly that in the event a child turns 18 during the course of criminal proceedings, it will still apply to those proceedings.<sup>21</sup> The Directive also applies whenever the child is deprived of liberty, irrespective of the stage of criminal proceedings.<sup>22</sup>
22. The directive is thus more stringent than the CRC, which is applicable to anyone below the age of 18 years, unless under the national law applicable to the child, maturity is attained earlier (Article 1 CRC). Both the Beijing Rules and the Havana Rules also grant the domestic legislator some flexibility in defining which children come under special legal protections.<sup>23</sup> However, the Directive does not go as far as the European Rules, which encourage states to extend the scope to juvenile justice to 'young adult offenders', meaning persons between the ages of 18 and 21 who are alleged to have or have committed an offence.<sup>24</sup>
23. The **Children Directive** also does not apply to cases involving minor offences (provided that detention cannot be imposed as a sanction, and the imposition of any sanction can be appealed to a court).<sup>25</sup> This may create some uncertainty, given that 'minor offences' are not clearly defined, leaving room for EU Member States to exclude certain offences from the scope of the.
24. Lawyers should be aware that even if an offence is classified as minor under domestic law, it may nevertheless be characterised as a criminal charge in accordance with Article 6 ECHR. Under the ECHR, criminal charge has an autonomous meaning. It is ultimately the ECtHR that decides what qualifies as a criminal charge and thus what offences require a fair trial (including the right to legal assistance) in accordance with Article 6 ECHR.<sup>26</sup>

---

<sup>19</sup> Article 3(1) Children Directive.

<sup>20</sup> Article 3(1) Children Directive.

<sup>21</sup> Article 2(3) Children Directive.

<sup>22</sup> Article 2(6) Children Directive

<sup>23</sup> A 'juvenile' according to the Beijing Rules is a child or young person who, under the respective legal system, may be dealt with for an offence in a manner which is different from an adult (Rule 2.2 (a) Beijing Rules). In effect, the Beijing Rules grant the domestic legislator leeway to define 'juvenile' in relation to their own juvenile justice system. By contrast, a 'juvenile' according to the Havana Rules is every person under the age of 18. The Havana Rules however also stipulate that the age limit below 18 permitted to deprive a child of his or her liberty, should be determined by law (Rule 11(a) Havana Rules).

<sup>24</sup> European Rules 17 and 21.2.

<sup>25</sup> The other directives of the Roadmap contain similar clauses. They are however not identical to the one in the Children Directive.

<sup>26</sup> ECHR *Engel v Netherlands* (1976), appl. no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72.

## B. Best interests of the child

25. It is clear that the best interests of the child is a key concept in the **Children Directive**, which emphasises that Member States ‘should ensure that the *child’s best interests* are always a primary consideration’ (emphasis added).<sup>27</sup> The concept of the child’s best interests is flexible and adaptable. It should be adjusted and defined on an individual basis.<sup>28</sup> The expression ‘primary consideration’ means that the child’s best interests may not be considered on the same level as all other considerations.<sup>29</sup> This strong position is justified by the special situation of the child: ‘dependency, maturity, legal status and, often, voicelessness.’<sup>30</sup> The Directive also provides explicitly that the best interests of the child should be the determinative factor in a wide range of decisions,<sup>31</sup> including those that concern access to a lawyer, the role of parents and other appropriate adults, and pre-trial detention.
26. This approach reflects Article 3(1) CRC, which gives the child the right to have his best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him, both in the public and private sphere.<sup>32</sup> This means that lawyers have an important duty to ensure that the child’s best interests are being taken into account throughout criminal proceedings.
27. The CRC Committee stressed that the child's best interest is a threefold concept which operates variously as:
- A substantive right, requiring consideration of the child’s interests over and above other factors whenever a decision is made concerning the child, even if there are other compelling interests at stake. Children are often unable to advocate their own interests, so authorities are under a legal obligation to be aware of their interests and treat them as being of the utmost importance;<sup>33</sup>
  - An interpretative legal principle, whereby if a provision is ambiguous, the interpretation which most effectively serves the child’s best interests should be chosen; and
  - A procedural right, whereby any decision which affects a child must be arrived at by a process which includes an evaluation of the possible impact on the child. States should consider that children differ from adults in their development and needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law, and mean that the traditional objectives of criminal justice, such as deterrence and retribution, must give way to rehabilitation and restorative justice objectives when dealing with child offenders.<sup>34</sup>

### *Determining the best interests of the child*

28. What is in the interest of each particular child must be determined on a case-by-case basis, and may change over time.<sup>35</sup> This means that lawyers and other actors in the juvenile justice system have an ongoing duty to determine a child’s best interests. Lawyers should not prioritise their own intuitive

---

<sup>27</sup> ECHR Recital 8.

<sup>28</sup> GC 14, para. 32.

<sup>29</sup> GC 14, para. 37.

<sup>30</sup> GC 14, para. 37.

<sup>31</sup> Note that the references in the Children Directive to the child's best interests can be considered superfluous, as Article 24 (2) of the Charter of Fundamental Rights of the European Union requires EU Member States to consider ‘*the child’s best interests*’ as a ‘*primary consideration*’ in ‘*all actions relating to children*’ (emphasis added).

<sup>32</sup> GC 14, para. 1. See also GC 10, para 5, under which any juvenile justice action or decision should be taken and implemented in accordance with this right

<sup>33</sup> GC 14, para. 37.

<sup>34</sup> GC 10, para. 10.

<sup>35</sup> GC 14, para. 32.

judgement to determine the best interests of the child, and should also be cautious about accepting authorities' assessments of the child's best interest. They should determine the best interests of their child clients both by listening to the views of their child clients, and by conducting a holistic assessment of their circumstances.

29. Children have the right to express their views, which should be given due weight by the authorities in all matters affecting them,<sup>36</sup> and this means that they have a significant role in determining what is in their own best interests. Lawyers should consider children as fully-fledged clients, and ensure that their views are heard.<sup>37</sup> However, lawyers need to be able to determine the extent to which their clients are capable of understanding the legal implications of their own decisions,<sup>38</sup> and so the weight given to the child's views for the purpose of determining their best interests should be assessed on a case-by-case basis. The more the child knows and understands, the more the lawyer should be guided by the views of the child in determining their best interests.<sup>39</sup>
30. In order to assess the best interests of the child, lawyers need to acquaint themselves with the child's physical, mental, spiritual, moral, psychological and social state.<sup>40</sup> They should take a holistic view of the child's development, and this means that they will usually need to establish good rapport with the child to gain first-hand knowledge of the problems and challenges facing them (even beyond the confines of the legal case).<sup>41</sup> This also means that lawyers may need to consult social workers, the child's school, parents and other relevant persons who can provide the lawyer with a comprehensive analysis of the child's circumstances. A multi-disciplinary and multi-agency approach is necessary to ensure a holistic approach and the continuity of care of children.<sup>42</sup>
31. Lawyers may also find it helpful to have knowledge of the adolescent brain, developmental science, poverty, mental illness, abuse, alcoholism, family dysfunctions, etc.,<sup>43</sup> to inform their determination of the child's best interests. They must consider, as must the authorities, that children differ from adults in their physical and psychological development, and their emotional and educational needs, and that these differences constitute the basis for the lesser culpability of children in conflict with the law.

*Best interests of the child as a procedural right*

32. It is important for lawyers to ensure that children can access the procedures that enable the assessment of their best interests to occur. The **Children Directive** establishes that Member States have a duty to ensure that the child's specific needs (in terms of protection, education, training, social integration, etc.) are taken into account,<sup>44</sup> and requires an individual assessment to be carried out for that purpose. The results of the assessment can be useful both in determining whether any specific measures would be of benefit to the child and the appropriateness of precautionary measures, as well as in sentencing.
33. Article 8 of the **Children Directive** creates a separate right to a medical examination to assess the child's mental and physical condition. This should be taken into account when determining the

---

<sup>36</sup> Article 12 CRC and GC 14, para. 43.

<sup>37</sup> Guideline 40.

<sup>38</sup> Article 5 CRC (regarding the evolving capacities of the child) plays a role here.

<sup>39</sup> Beijer & Liefwaard 2011 and GC 14, para. 44.

<sup>40</sup> Guidelines 16 and 17.

<sup>41</sup> GC 14, para. 14; See also Chapter 3 on communication and information.

<sup>42</sup> European Rule 15.

<sup>43</sup> Polansky, 2015, 4.

<sup>44</sup> Article 7(1) Children Directive.

capacity of each child to be subject to questioning, other investigative acts, or other measures taken towards the child. A request for a medical examination can be made by the child, the holder of parental responsibility, or the child's lawyer.

### C. Effective participation

34. Effective participation has been identified by the ECtHR as a guiding principle in juvenile justice and also by the CRC Committee as requisite for a fair trial.<sup>45</sup> It is clear from the EU Commission's impact assessment for the **Children Directive** that the facilitation of effective participation of children was intended as a primary objective of the Directive. The Commission adopted the ECtHR's definition of effective participation in the case of *S.C. v. the United Kingdom* as recognising that:

*'in the case of a child, it is essential that he/she will be dealt with in a manner which takes full account of his/her age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his/her ability to understand and participate in the proceedings, including conducting the hearing in such a way as to reduce as far as possible his feelings of intimidation and inhibition'.<sup>46</sup>*

35. This makes it clear that effective participation means not only that a child should be heard, but also that states should ensure that the child has a broad understanding of the nature of the investigation and of what is at stake for him.<sup>47</sup>

#### *Effective Participation: Right to be Heard*

36. The right to be heard is a principle enshrined in Article 12 of the CRC, and Article 16 of the **Children Directive** gives effect to this right by confirming that all children have the right to appear in person at their trial and to participate. This right must be observed at all stages of the process, starting with the pre-trial stage.<sup>48</sup>
37. However, the right to be heard requires states to do more than simply provide opportunities for the child to speak. Children do not express themselves in the same way as adults, and are likely to be less familiar or comfortable with the language, formality and atmosphere of a trial (or in the intimidating setting of a police interview). Ensuring that they are given a real opportunity to express their views freely therefore requires the provision of special support,<sup>49</sup> and those views should be given due weight in accordance with the age and maturity of the child.<sup>50</sup>
38. Whenever the child is being heard by the authorities (including in court) and the lawyer is present, the lawyer must ensure that there is an atmosphere that enables the child to express himself freely.<sup>51</sup> Proceedings should generally be conducted in a child-friendly manner as required by the Guidelines,<sup>52</sup> and lawyers should be prepared to intervene when this is not the case, for example, when police officers are being hostile to the child or court proceedings take too long and no breaks are taken.

---

<sup>45</sup> GC 10, para. 46.

<sup>46</sup> Commission Impact Assessment.

<sup>47</sup> ECtHR *S.C. v the United Kingdom* (2004), appl. no. 60958/00 para. 29.

<sup>48</sup> GC 10, para. 44.

<sup>49</sup> Guidelines 54-63.

<sup>50</sup> Article 12 (1) CRC, ECtHR *T. v the United Kingdom* (1999), appl. no. 24724/94.

<sup>51</sup> Beijing Rule 14.2.

<sup>52</sup> Guideline 54.

39. Children should also be consulted on the manner in which they wish to be heard.<sup>53</sup> A child should not be precluded from being heard solely on the basis of age. Whenever a child takes the initiative to be heard in a case that affects him or her, the judge should not (unless it is in the child's best interests) refuse to hear the child and should listen to his or her views and opinion on matters concerning him in the case.<sup>54</sup> Lawyers should provide the child with all necessary information and explanations concerning the possible consequences of the child's views and/or opinions.<sup>55</sup>
40. The CRC Committee notes that the child has the right to be heard directly and not only through his representation if it is in his best interests.<sup>56</sup> At this point the importance of a multidisciplinary approach towards assessing the child's best interests should be reiterated. With the help of other professionals (social workers or perhaps school teachers), the maturity of the child can be assessed and his views be given due weight. Any communication difficulties which could hamper meaningful participation should be identified at this stage.<sup>57</sup>
41. The right to be heard applies also to the period of implementation of any imposed measures, such as deprivation of liberty. Except in the case of very short periods of deprivation of liberty, an overall educational plan, tailored to the individual characteristics of the child must be developed. The views of the child should thereby be taken into account throughout the time in which he is under the supervision or control of the authorities.<sup>58</sup>

*Effective participation: Right to Information*

42. The right to information is enshrined by Article 4 of the **Children Directive**, and it further affirms that an explanation of a child's rights should be provided in simple and accessible language. The ECtHR recognised in *S.C. v. the United Kingdom* that the accused needed to have a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed, in order for the individual to participate effectively in the proceedings. It must be noted however, that neither S.C. nor the Directive requires children to understand every aspect of the trial.
43. The position adopted by the Directive and the ECtHR reflects that of the CRC, whereby making children aware of their rights is essential to securing juvenile justice.<sup>59</sup> Rights can only be exercised effectively if they are aware of them and have ways of seeking a remedy against possible violations of these rights. Lack of knowledge about their rights and accusations against them could also prevent children from expressing their views effectively, preventing their best interests from being treated with appropriate importance.
44. The CRC Committee has indicated that the child must also be informed of the juvenile justice process as a whole and of the possible measures that can be taken.<sup>60</sup> Article 40(2)(b)(ii) CRC provides specifically that a child suspected of having committed an offence has the right to be informed of the charges against him 'promptly and directly' (i.e. when a prosecutor or judge initially takes procedural steps against the child or when authorities decide to deal with a case without judicial proceedings).

---

<sup>53</sup> Guideline 44.

<sup>54</sup> Guideline 47.

<sup>55</sup> Guideline 41.

<sup>56</sup> GC 10, para. 44.

<sup>57</sup> Guideline III (A)(1).

<sup>58</sup> European Rules 62.6 (c) and (d).

<sup>59</sup> Article 12 CRC.

<sup>60</sup> GC 10, para. 44.

45. It is the child that has to understand the accusations against him. The authorities should not leave this to the parents, legal guardians or the child's lawyer.<sup>61</sup> This means that the information and explanations should be communicated to the child directly and not via the parents or the lawyer.<sup>62</sup> Article 5 of the **Children Directive** also creates a distinct right for the child to have the holder of parental responsibility (or another appropriate adult) informed of the child's rights as soon as possible and in enough detail to safeguard the fairness of the proceedings.
46. The Guidelines explain the right to information in more detail. They require the provision of information that may not be directly linked to the legal proceedings, but which may nevertheless be necessary for the child's reintegration into society, such as information regarding relevant support systems. According to the Guidelines, children should from their first involvement with the justice system or any other authority (such as the police) be adequately informed of: (a) their rights; (b) the system and procedures involved; (c) relevant support mechanisms; (d) the consequences of the judicial or non-judicial proceedings; (e) the charges; (f) the time and place of court proceedings where relevant; (g) the general progress and outcome of the proceedings or intervention; (h) the availability of protective measures; (i) mechanisms for review of decisions; (j) opportunities to obtain reparation from the offender or state; (k) the availability of services (such as health, psychological, social, interpretation and translation, and other) and the means of accessing such services (with financial support); and (l) any special arrangements if they are resident in another state.<sup>63</sup>

#### **D. The Right to Legal Assistance**

47. The right of access to a lawyer is a crucial fair trial right, given the important role that legal assistance can play towards ensuring that other rights can be enjoyed. This right is especially significant for children, whose age and inexperience can amount to additional obstacles that compromise their ability to participate effectively in their criminal proceedings.
48. To this end, the **Children Directive** provides for the right of assistance by a lawyer, in addition to the right to of access to a lawyer granted to all suspects and accused persons in the Access to a Lawyer Directive.<sup>64</sup> This means that Member States have a positive obligation to ensure that the child is assisted by a lawyer, irrespective of whether the child has asserted his right of access to a lawyer.<sup>65</sup> The scope of the right to legal assistance is discussed in more detail in Chapter 4 of this manual, but it should be noted at this stage that the provisions relating to the right to legal assistance largely reflect the provisions in the Access to a Lawyer Directive. Member States are required to ensure that children are assisted by a lawyer without undue delay from the moment they are made aware that they are suspects or wanted persons (namely, before being questioned by the police, upon an investigation, after deprivation of liberty or after summons to appear in court).<sup>66</sup>
49. The **Children Directive** accords with (and arguably builds upon) the position taken by the ECtHR in *Salduz v. Turkey*, which emphasised that the right to defend oneself in person or through legal assistance is especially relevant before a case is sent to trial. Lawyers are reminded that although

---

<sup>61</sup> GC 10, para. 48.

<sup>62</sup> Liefwaard et al., 2016.

<sup>63</sup> Guideline IV(A)1(a-l).

<sup>64</sup> The Children Directive has given effect to Article 40(2)(b)(ii) CRC, the right to legal or 'other appropriate assistance' in preparing their defence, and Article 37(d), the right of access to legal assistance for children deprived of their liberty. However the Children Directive has gone beyond those articles in requiring the provision of actual assistance by a lawyer in certain circumstances, and not merely the right to legal (or other appropriate) assistance.

<sup>65</sup> Preamble Children Directive, para. 25.

<sup>66</sup> Article 6(3) Children Directive.

*Salduz* has significant implications on the right of access to a lawyer for all suspects and accused persons, the case concerned a minor who had been denied access to a lawyer following his arrest. Under *Salduz*, the rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction, regardless of the existence of compelling reasons to justify a denial of access to a lawyer.<sup>67</sup>

50. In subsequent cases, however, the ECtHR has suggested that these rulings do not amount to a ‘bright line rule’. In 2016 ECtHR ruled in *Ibrahim & Others v. the United Kingdom* that the absence of compelling reasons when a suspect has no access to a lawyer does not in itself entail a breach of Article 6 ECHR.<sup>68</sup> When examining the proceedings as a whole the ECtHR attaches weight to a non-exhaustive list of factors, and the vulnerability and age of the suspect or accused is listed as a relevant factor.<sup>69</sup> However, it is not clear what weight the ECtHR attaches to this factor in its overall assessment of the fairness of the proceedings.

### *Derogations*

51. The **Children Directive** explicitly recognises that there are limitations to the right to legal assistance.<sup>70</sup> According to Article 6(6) of the Directive, derogations are allowed where the assistance of a lawyer would not be proportionate in light of the circumstances of the case, taking into account the seriousness of the alleged criminal offence, the complexity of the case and the measures that could be taken in respect of such an offence, it being understood that the child's best interests must always be a primary consideration. There is no derogation from the child's right to access to a lawyer in any case, whether during detention, when brought before a judge in order to decide on detention at any stage of the proceedings, when deprivation of liberty is to be imposed as a criminal sanction, or during trial hearings before a court.<sup>71</sup>
52. Member States may also derogate temporarily from the obligation to ensure that children are assisted by a lawyer in exceptional cases at pre-trial stages, to the extent justified by the circumstances of the case. This is possible if there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person, or where immediate action by the investigation authorities is imperative to prevent substantial jeopardy to criminal proceedings in relation to a serious criminal offence.
53. Again, the child's best interests have to be taken into account. The decision to proceed with questioning without the presence of lawyer under this derogation may be taken only on a case-by-case basis, either by a judicial authority or by another competent authority, on the condition that the decision can be submitted to judicial review.<sup>72</sup> The provisions relating to the derogation of the right of access to a lawyer largely mirror those relating to the right of access to a lawyer in Articles 3 and 8 of the Right of Access to a Lawyer Directive, and there is further discussion of derogations in the Fair Trials toolkit on the Lawyer's Directive.

### *Waivers*

<sup>67</sup> ECtHR *Salduz v Turkey*(2009), appl. no. 36391/02, para. 55.

<sup>68</sup> ECtHR *Ibrahim & Others v UK* (2016) appl. nos. 50541/08, 50571/08, 50573/08 and 40351/09 para. 262.

<sup>69</sup> *Supra*, para. 274.

<sup>70</sup> It was foreseen that the right to legal assistance could have substantial financial implications for Member States and a proportionality clause was inserted in the Children Directive (Cras 2016, 113).

<sup>71</sup> Article 6(6) Children Directive.

<sup>72</sup> Article 6(8) Children Directive.

54. Like other suspects and accused persons, children are often pressured to waive certain rights prior to the appointment of a lawyer. However, given their lesser experience and more limited capacities for judgement and decision-making, it is likely that children will be more susceptible to pressure than adults. To give a common example, a child told by a police officer that he 'doesn't need a lawyer and will probably be free to go after he answers a few questions' is much less likely to insist on having a lawyer present than an adult.
55. The Access to a Lawyer Directive recognises that the right of access to a lawyer can be waived, so long as the suspect or accused person has been given sufficient information about their rights and the consequences of the waiver, and the waiver is given voluntarily and unequivocally.<sup>73</sup> The initial proposal for the **Children Directive** included an explicit proposal which stated that the right of access to a lawyer cannot be waived by a child,<sup>74</sup> but this was subsequently removed. The existing **Children Directive** has no explicit references to waivers, but it can be argued that children cannot waive their right to legal assistance (as opposed to the right of access to a lawyer).
56. The jurisprudence of the ECtHR is clear that the right of access to a lawyer may be waived by the child, although the practical implications of the requirements for such a waiver are not clarified. The ECtHR held that a waiver must be expressed in an explicit and unequivocal manner, and that the child should be able to reasonably foresee what the consequences are of his conduct.<sup>75</sup> The ECtHR considered that given the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings, a waiver by him or on his behalf of legal assistance can only be accepted after the authorities have taken all reasonable steps to ensure that he is fully aware of his defence rights and can appreciate, as far as possible, the consequence of his conduct.<sup>76</sup> It is not clear what the ECtHR considers 'explicit' and 'unequivocal', but it is clear that conveying information on the right to legal assistance to a parent while the child is being interrogated, does not meet the required standard.<sup>77</sup>
57. This position has been challenged. It has been suggested that the need to provide the child with protection outweighs the obligation to provide them with autonomy, and children should not be permitted to waive their right to a lawyer in such an early stage of the proceedings.<sup>78</sup>
58. Article 6 of the **Children Directive** is framed as an obligation upon Member States to ensure that a child has legal assistance, as opposed to an obligation on Member States to facilitate individuals getting legal assistance.<sup>79</sup> The preamble of the **Children Directive** states that assistance by a lawyer under the Directive presupposes that the child has the right of access to a lawyer under the Access to a Lawyer Directive.<sup>80</sup> The preamble also states that where the application of a provision of the Access to a Lawyer Directive would make it impossible for the child to be assisted by a lawyer, such provision should not apply.<sup>81</sup> Given the vulnerability of the child during the stages where the **Children Directive**

---

<sup>73</sup> Access to a Lawyer Directive, Article 9, and recitals 39-41. Recital 55 of this directive explicitly states that suspects and accused persons, including children, are provided with adequate information to understand the consequences of waiving a right under the directive and that any such waiver is made voluntarily and unequivocally.

<sup>74</sup> Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings (COM/2013/0822 final - 2013/0408 (COD)).

<sup>75</sup> ECtHR *Panovitz v Cyprus* (2009), appl. no.4268/04, paras. 68 and 73.

<sup>76</sup> *Supra*, para. 68.

<sup>77</sup> *Supra*, paras. 70 and 77.

<sup>78</sup> Liefwaard & Van den Brink 2014, 214.

<sup>79</sup> See the text of Article 6(2) Children Directive; "Member States shall ensure that children are assisted by a lawyer (...)." See also Cras 2016.

<sup>80</sup> Recital 25 Children Directive.

<sup>81</sup> Recital 26 Children Directive.

requires states to provide assistance by a lawyer, lawyers may wish to advocate that the most favourable reading of the Directive should be applied. This reading stresses that states should guarantee the presence of a lawyer, irrespective of the child's desire to waive legal assistance.

#### **E. Protection of privacy and confidentiality**

59. A child suspect and accused person's right to privacy must be protected at every stage of the proceedings.<sup>82</sup> The period encompassed by 'all stages of the proceedings' begins with the initial contact with law enforcement (e.g. a request for information and identification) and ends only with the final decision by a competent authority, or release from supervision, custody or deprivation of liberty.<sup>83</sup> This has implications for publicity related to child suspects, the confidentiality of the child's communication with his lawyer and the child's privacy during court hearings.
60. Article 14 of the **Children Directive** reiterates that Member States should take all appropriate measures to ensure the child's right to privacy during criminal proceedings is protected. Court hearings involving children should be held in private, or courts and judges should be allowed to use their discretion in that regard. There is also an obligation on Member States to encourage self-regulation by the media to achieve this objective.
61. The Commentary to Beijing Rule 8 stresses that children are particularly susceptible to stigmatisation. As such, no information that may lead to the identification of a child offender may be published.<sup>84</sup> Authorities should limit press releases related to the child to very exceptional cases.<sup>85</sup> Journalists who violate the right to privacy of a child in conflict with the law should be sanctioned with disciplinary and/or penal law sanctions.<sup>86</sup>
62. Similarly, court or other hearings should take place behind closed doors.<sup>87</sup> Public hearings in juvenile justice should only be permitted in specific cases, clearly stated by law. The verdict should be pronounced in public at a court session in such a way that the identity of the child is not revealed. Any criminal records relating to the child should be kept strictly confidential except for those directly involved in the investigation and adjudication of, and the ruling on, the case.<sup>88</sup> The transfer of such data should occur only in accordance with the best interest of the child, and with data protection legislation.<sup>89</sup>
63. The protection of the child's privacy complements the lawyer's obligation, existing in all European countries, to keep clients' matters confidential.<sup>90</sup> For lawyers to be effective in defending their clients' rights there must be confidence that communications between them and their clients are kept confidential. Article 6 of the **Children Directive** is therefore explicit in stating that the child's right to assistance by a lawyer includes the right to confidentiality between the lawyer and child, and the right to confidentiality is non-derogable. The state must secure the privacy and confidentiality of

---

<sup>82</sup> Article 16 CRC and GC 10, para. 64.

<sup>83</sup> GC 10, 64. See also Beijing Rules 8.1.

<sup>84</sup> Beijing Rules 8.2, Guideline 6.

<sup>85</sup> GC 10, para. 65.

<sup>86</sup> GC 10, para. 65.

<sup>87</sup> GC 10, para. 66, Guideline 9

<sup>88</sup> GC 10, para. 66.

<sup>89</sup> Guideline 8.

<sup>90</sup> CCBE 2016, p. 9, see also Guideline 10.

communications between the child who is detained or arrested and his lawyer.<sup>91</sup> Lawyers must be able to visit the child unrestrictedly and unsupervised.<sup>92</sup>

64. Lawyers themselves must also strictly observe rules of confidentiality. Without a real guarantee that their communications with their lawyer are privileged, there is a danger that the child will no longer sufficiently trust the lawyer to disclose further relevant information. A breach of this kind therefore often amounts to denying the child effective representation.<sup>93</sup> The only exception is where there is a real risk of harm to the child, meaning that in such a case confidentially disclosed information should be shared with other professionals in order to prevent further harm to the child.<sup>94</sup>

1.1.

## **IV. PRACTICAL IMPLEMENTATION OF THE CHILDREN DIRECTIVE**

65. The previous sections have provided an overview of the rights afforded to children by international and European law, particularly the **Children Directive**. This section outlines the practical implications of the Directive and other international and regional standards at the various stages in criminal proceedings.

### **A. Arrest and police interrogation**

66. The initial stages of criminal proceedings, in which a child could be arrested and taken to the police station, will often be a child's first ever contact with the police and the criminal justice system. It is a crucial and stressful moment for any suspect or accused person, but it is particularly challenging for children. Children could be scared, desperate and confused when they are arrested, and they are especially vulnerable during the moments immediately following the arrest and during their interrogation.
67. The lawyer's role at this first encounter is crucial: the child requires appropriate support at a moment of intense stress, and for their rights to be asserted as fully as possible from the offset of proceedings. At this delicate moment, the lawyer has to establish a relationship with their client, using the communication skills, developmental understanding and legal instruments discussed in previous chapters.
68. Lawyers are not alone in having a duty to ensure that the child's rights and interests are protected. This duty is shared with other actors in the juvenile justice system, including police officers, who are legally bound under Article 3 of the CRC to treat the child's best interests as a primary consideration. The process of arrest and interrogation, however, is not designed in a way that gives much effect to that obligation, because they are usually deployed to secure confessions, and to obtain information helpful for the police for ongoing criminal investigations. In some countries, police officers undergo special training to ensure that their conduct and procedures are specifically adapted for children, but such training is not always effective, and lawyers should always take a cautious approach to ensure that police officers are acting in the best interests of their child clients.

### **Right to legal assistance**

---

<sup>91</sup> Havana Rules 18(a); European Rule 120.2.

<sup>92</sup> European Rule 120.2.

<sup>93</sup> CCBE 2016, 9.

<sup>94</sup> Guideline 10.

69. The lawyer's presence and legal assistance at the police station helps children to access their fair trial rights, including those that are specific to child suspects and defendants. For example, lawyers can play a key crucial role in ensuring that children understand their rights, and that they benefit from procedural adaptations that would enable them to participate effectively during the crucial initial moments of their criminal proceedings. For these reasons, it is generally in the interests of the child that lawyers are appointed as soon as possible after the child comes into contact with the criminal justice system as a suspect or an accused person.

*Scope of the right of access to legal assistance*

70. As mentioned in para. 1.2.4, Article 6 of the **Children Directive** requires Member States to ensure that a child suspect or accused person is assisted by a lawyer. Article 6 makes it clear that a child suspect or accused person has the right of access to legal assistance from the earliest moment in their criminal proceedings. More specifically, this provision states that children should be assisted by a lawyer 'without undue delay' once they are made aware that they are suspects or accused persons, including before they are questioned by the police or judicial authority, and following the deprivation of liberty.<sup>95</sup>
71. The preamble to the **Children Directive** however makes clear that the obligation for Member States to provide children with assistance by a lawyer does not include providing support during the stages of identifying the child; determining whether an investigation should be started; or verifying the possession of weapons or other similar safety issues. Nor does it include carrying out investigative or evidence-gathering acts other than those specifically referred to in the 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.<sup>96</sup>
72. The **Children Directive** mirrors the provisions found in the Access to a Lawyer Directive by confirming that legal assistance includes private lawyer-client consultations before questioning, as well as effective participation during questioning.<sup>97</sup> In other words, Member States are not only required to ensure that a lawyer is present during police interrogations, but they should also allow them to take an active role during the interrogations. This is particularly significant for child suspects and defendants who may require interruptions and interventions from their lawyers during questioning to ensure that they are heard and that their best interests are taken into consideration.

*Derogations and waivers*

73. The right to legal assistance under the **Children Directive** is not absolute. Derogations are permitted. Given that Article 6 of the Directive is framed not as a right for children, but as an obligation upon Member States, it seems that children cannot (in our opinion) waive their right to legal assistance (see para. 1.2.4). However, under Article 6(6) of the Directive, derogations are not permissible during detention, and this seems to include cases in which a child is in police custody. In practice, lawyers may not always have an influential role in determining how decisions regarding derogations and waivers are made during the initial stages of criminal proceedings, but in these situations, the role of other actors, such as holders of parental responsibility and appropriate adults, could be significant. They could help to ensure that the child makes an informed decision about getting legal assistance, and to resist pressure from police officers who may try to dissuade the child from getting a lawyer.

---

<sup>95</sup> Other points at which legal assistance should be provided include during investigative acts, during confrontations and reconstructions of crime scenes, and after being summoned to appear in court.

<sup>96</sup> Children Directive, Recital 28.

<sup>97</sup> Children Directive, Article 6(4).

### Effective participation

74. Lawyers need to make sure that children are able to participate effectively during police interrogations. This is not satisfied merely by ensuring that children are asked questions and given opportunities to respond. Instead, the lawyer, and other actors in the proceedings must make sure that the child understands the questions they are asked, and the implications and potential consequences of answers they could give, as well as of remaining silent. Lawyers can and should also ensure that police questions and actions are appropriate to the child's needs and characteristics, and that the child's responses and behaviour are not misinterpreted. This is especially important when children have disabilities or learning difficulties that need to be taken into account.
75. This means that it is especially important for lawyers to have the opportunity to get to know their child clients, and to assess their needs and capabilities prior to their interrogation. If possible, also make sure that an appropriate medical and individual assessment takes place at the earliest stage, so that appropriate procedural adaptations can be sought.

### Right to be heard

76. Lawyers have an important role to ensure that the child is able to have his own views heard (rather than those of the parents or the lawyer). This includes making sure that the child is able to give their own account of events without being influenced by intimidation, but also ensuring that the child is as free as possible to give their account of events rather than being discouraged, for example, from giving a particular answer because they are embarrassed by the reaction of a parent, or because they are afraid of incriminating someone else. Lawyers should not only ensure that the child's voice is heard during the police interrogation itself, but also make sure that they understand his prior to the interrogation, so that they are properly informed, and in a position to give effect to those views.
77. During the police interrogation, the right to be heard must also be balanced with the right to remain silent, and the lawyer should advise the client on the right strategy to deploy during a police interrogation. Lawyers should however, be careful when advising their child clients to make use of their right to remain silent. It has been suggested that lawyers are often too eager to advise this as a strategy, even in minor cases in which the child's guilt seems obvious. Relying on the right to remain silent could also prevent the use of diversion mechanisms, which may require the child's co-operation.<sup>98</sup>
78. As discussed earlier, the **Children Directive** requires Member States to enable lawyers to participate actively during police interrogations. This means that lawyers should be able to intervene, for example, to ensure that questions are phrased in a way that their child client can understand, to check that their child client has understood the questions, and to also ensure that their responses are not misinterpreted. Lawyers should also be prepared to interrupt and protest where the questioning is unfair or if the conduct of the police officer is unduly intimidating.
79. Children are most likely to be able to participate effectively if they feel comfortable. This means, for example, that lawyers should ensure that children are given appropriate breaks for rest, food and drinks, particularly if they are in danger of feeling overwhelmed. This is part of the process of securing the child's general welfare, but lawyers should keep in mind that it can have a very direct effect on the child's ability to participate effectively.

80. The role of other actors

---

<sup>98</sup> Liefwaard & Van den Brink 2014.

81. The role of other actors can be instrumental in ensuring that the child is heard. Lawyers can and should try to get to know their clients so that they are able to identify their needs and to assess their capabilities. In practice, however, the time given to lawyers to do this prior to police interrogations will often be insufficient, and in these situations, the role of others who know the child better, including social workers and those with parental responsibility, could be very significant. They could, for example, have a pre-existing understanding of how the child's communication and language skills, that could help to ensure that the child is heard.
82. Member States are required by the **Children Directive** to ensure that children are accompanied by a holder of parental responsibility or an appropriate adult during their legal proceedings, so long as it is considered that this would be in their best interests, and the presence of that person does not prejudice the proceedings.<sup>99</sup> The preamble of the Directive recognises police interrogations as a stage at which this obligation is engaged.<sup>100</sup> Having a familiar face at a stressful time can help children feel more comfortable, and help them express their views, but as mentioned above, holders of parental responsibility could also have a damaging impact on a child's right to be heard. This is particularly so if parents take an over-active role during questioning, or if the children feel intimidated or embarrassed about speaking openly in their presence.

### **Right to information**

83. A child's ability to understand their position, and to make sense of the information given to them by the police and by their own lawyer is generally more limited than that of an adult, for reasons discussed in Chapter 2. Lawyers must also bear in mind that a child who has been arrested by the police might be encountering the justice system for the first time, and that they could find the experience more stressful than most adults. The lawyer must take special care to ensure that a child suspect understands the information being given to them, whether by interpreting it themselves, or by prompting the police to use simple, child friendly language, and by explaining the implications for the case.
84. As explained earlier, children are required under ECtHR case law to have a 'broad' understanding of the process, and of what is at stake.<sup>101</sup> This means that lawyers need to ensure that their child clients understand most relevant aspects of applicable laws and procedures, as a minimum the elements stipulated in Article 4 (the right to information) of the **Children Directive**, to enable the child to participate effectively in the proceedings.

### *Scope of the right to information*

85. The Information Directive contains provisions about the scope of the information that must be provided to suspects and accused persons, irrespective of their age, and about the way in which such information should be provided. In particular, all suspects and accused persons should be given information promptly about certain procedural rights, and about the information about the criminal act that they are suspected or accused of having committed.<sup>102</sup>
86. The **Children Directive** reaffirms that there is a specific obligation upon Member States to inform children of their rights, and it refers to the Information Directive, but it elaborates further on the rights that must be provided, and how and when this should be done. Article 4(1) of the **Children Directive**

<sup>99</sup> Children Directive, Article 15(4).

<sup>100</sup> Children Directive, Recital 59.

<sup>101</sup> ECtHR *S.C. v. the United Kingdom* (2004), appl. no. 60958/00.

<sup>102</sup> Information Directive, Articles 3, 4, and 6.

recognises that there are different rights that must be explained to children at different stages of the proceedings these are. It provides that the following rights must be provided promptly when the child is made aware that they are suspects or accused persons:

- a) The right to have the holder of parental responsibility informed;
- b) The right to be assisted by a lawyer;
- c) The right to protection of privacy;
- d) The right to be accompanied by the holder of parental responsibility during stages of the proceedings other than court hearings; and
- e) The right to legal aid.

87. The Directive also specifies that some rights need to be explained to the child ‘at the earliest appropriate stage’ and others ‘upon deprivation of liberty’, which are discussed in more detail later, but it is important to note that amongst these rights are the right to an individual assessment, the right to a medical examination, the right of limitation of deprivation of liberty, the right of specific treatment during deprivation of liberty, all of which could be relevant at the very early stages of the proceedings. Lawyers should therefore ensure that information about these rights is also made available to the children at the earliest possible stage.

#### *Procedure*

88. The **Children Directive** makes it clear that the information needs to be provided orally, in writing, or both, in simple and accessible language, and that, as provided under the Information Directive, children should be given a letter of rights. Lawyers should note that the obligation to provide children with letters of rights are not satisfied providing the same letter of rights given to adults. This is not only because the language used in the letter of rights might not be comprehensible to children, but also because it will not contain information about rights that are specific to children.<sup>103</sup>
89. In certain jurisdictions, like England and Wales, police officers often use letters of rights that are specifically adapted for children in order to provide information about their rights, but lawyers should not assume that the mere use of special procedures will not only ensure that children understand their rights, but also that they are given accurate information about their rights.

#### *Audio-visual recording*

90. The **Children Directive** requires Member States to ensure that the questioning of children is audio-visually recorded, where this is ‘proportionate in the circumstances of the case’, and it is in the best interests of the child. Decisions on the proportionality of audio-visual recording in a specific case should take into account, inter alia, whether a lawyer is present or not and whether the child is deprived of liberty or not.<sup>104</sup> If no recording is made, the questioning should be recorded in another appropriate manner, such as by written minutes that are duly verified.<sup>105</sup>
91. Audio-visual recording can be an effective safeguard that helps to ensure that the rights of suspects and accused persons during police interrogations are protected. It can, for example, act as a strong deterrent to ill-treatment or coercive interrogation techniques, and it can provide evidence of the level of the child’s effective participation, should this become an issue at a later stage. The recording could also protect police officers from unjustified accusations of poor treatment, enabling them to demonstrate to have treated a child fairly.<sup>106</sup> It is not an absolute obligation, however, as authorities

---

<sup>103</sup> Children Directive, Article 4(3).

<sup>104</sup> Children Directive, Article 9(1).

<sup>105</sup> Children Directive, Article 9(2).

<sup>106</sup> Cras 2016, p. 116.

have discretion under the **Children Directive** to decide whether a recording is proportionate. In practice, a recording should be demanded in almost all cases, and lawyers should point out the advantages of audio-visual recording to both their client and the police officers.

### Privacy and confidentiality

92. As noted before, lawyers have to keep matters between them and their clients strictly confidential, and this is reinforced by Article 14 of the **Children Directive**, and this applies throughout the proceedings. The Directive further stipulates (in a non-derogable provision) that Member States must respect the confidentiality of communication between children and their lawyers. Such communication includes meetings, correspondence, telephone conversations and other forms of communication permitted under national law.<sup>107</sup> States have to respect this confidentiality and may not intercept communications between a lawyer and a client.
93. Article 6(5) of the **Children Directive** appears to be non-derogable, but this provision is without prejudice to procedures that address the situation where there is a suspicion that the lawyer is involved with the child in a criminal offence.<sup>108</sup> It is moreover without prejudice to a breach of confidentiality that is incidental to a lawful surveillance operation by competent authorities and to the work that is carried out, for example, by national intelligence services to safeguard national security.<sup>109</sup>

### Diversions

94. Once lawyers have obtained a clear, holistic picture of the child's situation, they may, as long as this is in the best interests of the child and in agreement with the child's views, try to steer the police towards diverting the case out of the criminal justice system. Lawyers should be mindful that the objectives of juvenile justice discourage a purely punitive approach,<sup>110</sup> so when diversion offers a better opportunity to reintegrate the child back into society, that option should be chosen. The lawyer has a substantial role to play in advocating for such a measure. Diversion programmes differ greatly from country to country, and lawyers should have a good understanding of such programmes, in order to determine whether diversion would be in the best interests of their child clients. An individual assessment could help to determine the appropriateness of diversion.
95. Arguably, it is usually in the interests of the child to be diverted from the justice system. Programmes that allow children to maintain their family ties and keep attending school seem to yield better results than prisons in which family life, education and work are of a different standard.<sup>111</sup> Detention (especially when children are placed in isolation) tends to deliver lower levels of education, and higher rates of reoffending and crime. The impact on the individual is no less detrimental, leaving many convicts mentally and emotionally scarred, having lost their connection to their resources or support systems when returned into the community.<sup>112</sup>
96. In many countries, police have a broad discretion to divert juvenile cases from the system by referring the child to a diversion program. Studies from the United States of the nature and effects of this informal diversion process suggest that the primary factors influencing the decision to divert a case include: the seriousness of the offense; the age of the child; the child's prior record of convictions, charges, prior contacts with the police; the race, gender, and socio-economic status of the child; the

<sup>107</sup> Article 6 (5) Children Directive. See also Havana Rules, Rule 18(a).

<sup>108</sup> Children Directive, Recital 33.

<sup>109</sup> Children Directive, Recital 34.

<sup>110</sup> CRC, Article 40(1).

<sup>111</sup> Polansky 2015 paras. 53 and 56.

<sup>112</sup> Polansky 2015, para. 55.

demeanour of the child (youths who seem respectful to the officers and fearful of sanctions are viewed as “salvageable” and therefore diverted from the system); the comments and attitude of the parents upon being informed of the child’s arrest (with the officer assessing whether the parents are likely to appropriately punish the child and control his misbehaviour in the future); and, finally, the individual officer’s personal feelings about the efficacy of the juvenile justice system and the likelihood that a child will derive any benefits from court.<sup>113</sup> Lawyers should point the police officers to these elements whenever favourable for the case of the child, to persuade the police officer to divert the case.

## **B. Pre-trial Detention**

97. Depriving a child of his liberty is almost never in his best interests. Deprivation of liberty produces severe adverse impacts on children. Even short periods of detention can undermine a child’s psychological and physical well-being and compromise cognitive development.<sup>114</sup> Children deprived of their liberty are at a heightened risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with posttraumatic stress disorders. Reports on the effects of depriving children of liberty have found higher rates of suicide and self-harm, mental disorder and developmental problems.<sup>115</sup> In institutions around the world where children are deprived of liberty, there are serious concerns with regard to violence, including peer-to-peer violence, violence between staff and children and forms of self-inflicted violence.<sup>116</sup>
98. Lawyers must assist children in three main ways if they are in pre-trial detention, or they are at risk of being detained. They must ensure that their child clients are only detained as a matter of last resort and for the shortest period of time, they must ensure that they are receiving effective legal assistance during detention, and they must also help to ensure that their rights and welfare are protected in detention.

### **Measure of Last Resort for the Shortest Appropriate Period of Time**

99. The ECtHR has affirmed in the case of *Güveç v. Turkey* that the pre-trial detention of a child is only permissible as a measure of last resort, and must be for the shortest possible time. This position has been adopted in Article 10 of the [Children Directive](#), which requires Member States to limit deprivation of liberty of a child at any stage of the proceedings to the shortest appropriate period of time, taking the age and individual situation of the child, and the particular circumstances of the case into account.<sup>117</sup> Member States are moreover obliged to impose deprivation of liberty as a measure of last resort, and to base it on a reasoned decision and subject it to judicial review by a court.<sup>118</sup>
100. Given the significant adverse impact of pre-trial detention on children, and the serious human rights implications of the deprivation of liberty, lawyers should assume that it is in the best interests of the child to request their release. However, it is crucial that lawyers also understand their clients and their circumstances. This is because knowledge about the child’s circumstances could strengthen arguments in favour of their release, and identify suitable alternatives to pre-trial detention. Lawyers need to inform themselves of any factors that might mean that their release is against their best interests. In particularly difficult cases, children might be at risk of direct harm released to the custody of their parents or usual carers, whether because of an abuse or because of an ongoing and unsafe

---

<sup>113</sup> Hertz et al 2012, p. 15.

<sup>114</sup> UN Rapporteur on Torture 2015, para. 16.

<sup>115</sup> UN Rapporteur on Torture 2015, para. 16.

<sup>116</sup> Joint report 2012, para. 8.

<sup>117</sup> Children Directive, Article 10(1).

<sup>118</sup> Children Directive, Article 10(2).

situation in which particular needs are not being met. The possibility of such circumstances makes the possibility of requesting an individual assessment and a medical examination all the more important.

#### *Time limits*

101. The **Children Directive** does not give a minimum timeframe for the (pre-trial) deprivation of liberty of children. What amounts to the ‘shortest appropriate period of time’ and ‘measure of last resort’ in a specific case is left open to interpretation. This approach is consistent with that taken by the ECtHR in the case of *Nart v. Turkey*, in which the ECtHR held that the question of whether or not a period of detention is reasonable cannot be assessed *in abstracto*. The ECtHR opined that this had to be determined on a case-specific basis, by considering whether or not there is a genuine requirement of public interest that outweighs the rule or respect of individual liberty.<sup>119</sup>
102. In *Nart v. Turkey*, the ECtHR found a violation of the ECHR (Article 5(3)), since the applicant was still a child while in pre-trial detention for forty-eight days.<sup>120</sup> The ECtHR found in *Güveç v. Turkey*, in which the applicant was detained from the age of fifteen and kept in pre-trial detention for a period in excess of four and a half years, excessive and in violation of Article 5(3) ECHR.<sup>121</sup> In *Selçuk v. Turkey* the ECtHR considered pre-trial detention of a child for a period of four months in breach of Article 5(3) ECHR.<sup>122</sup>
103. In contrast, in the case of *J.M. v. Denmark*, in which a minor was held in pre-trial detention for over 16 months, the ECtHR found no violation of Article 5(3) ECHR. The child had been placed in a secure institution for young offenders, where his mental status was examined. Moreover, the lawfulness of the continued detention was regularly assessed by the domestic courts. The detention was not only based on the gravity of the accusation, but also on the public reaction: it would have offended the public sense of justice if J.M., who had confessed to the rape and homicide of an eighty-five-year old woman, had been released pending completion of the mental status examinations.<sup>123</sup>
104. When children are detained in police custody, lawyers should refer to the CoE Recommendation (2003)20 concerning new ways of dealing with juvenile delinquency and the role of juvenile justice.<sup>124</sup> It states that where children are detained in police custody, they should not be detained for longer than forty-eight hours in total and for younger offenders every effort should be made to reduce this time.

#### *Last resort and alternatives to pre-trial detention*

105. Last resort presupposes that deprivation of liberty of children can only be used if alternative options are not considered adequate, or have proven to be inadequate in light of the objectives of the deprivation of liberty. This means that objectives of the deprivation of liberty in should be clear and explicit in each. If there are no clear objectives, it will be difficult to assess the necessity of the placement and/or the use of alternatives.
106. Member States have an obligation under Article 11 of the **Children Directive** to ensure that alternative measures are available. Alternative measures should be available at any point a child is at risk of being

---

<sup>119</sup> Para. 29.

<sup>120</sup> Para. 36.

<sup>121</sup> Paras. 109 and 110.

<sup>122</sup> ECtHR *Selçuk v. Turkey* (2006), appl. no. 21768/02, para. 37

<sup>123</sup> Para. 62

<sup>124</sup> Recommendation Rec(2003)20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice (Adopted by the Committee of Ministers on 24 September 2003 at the 853rd meeting of the Ministers’ Deputies), para. 15.

detained, including during the pre-trial stage. Pre-trial alternatives to detention could include police cautioning, release on bail, probation, community service, the imposition of fines, educational measures and mentoring, care-based and therapeutic measures and restorative approaches.<sup>125</sup>

107. Lawyers should familiarise themselves with suitable alternatives to pre-trial detention in order to strengthen applications in favour of their release. However, they should be cautious not to advocate for measures or conditions that are inappropriate or unworkable. For example, subjecting children to too many conditions could make it difficult for them to understand and remember all of them, and it could make it difficult to ensure compliance with those conditions. A US study found that children remember only one-third of court-ordered release conditions.<sup>126</sup>
108. It is important to note that there are no 'one-size-fits-all' measures. The advice and input of other actors (social workers, mental health and other medical experts in particular) is especially valuable in making the lawyer and the authorities aware of the best available option for each child, and ensuring that suitable arrangements are in place to ensure that he can be released. In 2017, the U.K. Home Office adopted a 'Concordat on Children in Custody' which contains guidelines on how different actors, including the police and local authorities, should coordinate their activities to ensure that children are not kept in detention for prolonged periods. The concordat emphasises that resource limitations, particularly in relation to accommodation for the child, do not constitute a good reason for failing to provide a level of support that is in accordance with the child's best interests.<sup>127</sup>
109. Despite the wide range of alternative sanctions and measures available, challenges still remain in encouraging the maximum possible use of these alternatives to detention. One key challenge which must be addressed is that of encouraging authorities to make use of alternative measures. In many countries, detention is still seen as the first option for children, even for minor offending, and reliance is still placed on the retributive tools of traditional criminal justice systems.<sup>128</sup> Lawyers should advocate for the measure that suits the best interests of the child, ideally after the individual assessment and/or medical examination so that the lawyer can substantiate his arguments (see further chapter on needs assessment, at paras. 3.3-3.4).

#### *Review of pre-trial detention*

110. Decisions on pre-trial detention must be subjected to periodic review, at reasonable intervals of time, by the court, at the request of the child, or the lawyer.<sup>129</sup> A number of guarantees under international human rights law are relevant at this point. The CRC Committee stipulates that that this should take place within 24 hours after arrest and detention.<sup>130</sup> Furthermore, the Committee has recommended that states ensure through strict legal provisions that the legality of pre-trial detention of a child is reviewed regularly, preferably every two weeks.<sup>131</sup> Children in detention, like other detainees, have the right to bring proceedings of their own initiative to challenge the legality of their detention (with the assistance of a lawyer if necessary).<sup>132</sup> The CRC Committee adds that children have the right to a prompt decision following such an action, not later than two weeks after the challenge is made.<sup>133</sup>

---

<sup>125</sup> Kilkelly, Forde & Malone 2016.

<sup>126</sup> National Juvenile Defender Centre, p. 4.

<sup>127</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/655222/Concordat\\_on\\_Children\\_in\\_Custody\\_ISBN\\_Accessible.pdf\\_p.21](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/655222/Concordat_on_Children_in_Custody_ISBN_Accessible.pdf_p.21) (placeholder reference)

<sup>128</sup> Kilkelly, Forde & Malone 2016.

<sup>129</sup> Children Directive, Article 10(2).

<sup>130</sup> GC 10, para. 83.

<sup>131</sup> Ibid.

<sup>132</sup> Article 9(4) International Covenant on Civil and Political Rights and article 37(d) CRC.

<sup>133</sup> GC 10, para. 84.

## Right to information

111. The **Children Directive** require children to be informed both about the limitations on the deprivation of liberty and their right to specific treatment during their detention.<sup>134</sup> Furthermore, the Information Directive provides requires Member States to inform the suspects and accused persons, irrespective of age, of the maximum number of hours or days they may be deprived of liberty before being brought before a judicial authority.<sup>135</sup> As with other rights mentioned earlier, lawyers should ensure that information about these rights are provided to their child client promptly, orally and in writing, and in a way that they are understood.
112. The stress imposed by the criminal justice process and by detention in has a significant impact on a child's capacity to understand and retain information. Throughout a period of detention, a lawyer must take particular care to ensure that a child is aware and properly understands the evolving situation, and can participate effectively in preparations for a trial or hearing. Sadly, in many countries, lawyers only visit their child clients in detention very rarely, which sometimes adds to their confusion and anxiety, and some children have resorted to contacting their judge or prosecutor to obtain information about their trial.<sup>136</sup>

## Welfare

113. Children must be detained separately from adults, unless it is considered to be in the child's best interests not to do so.<sup>137</sup> Member States also have to separate children from adults when taken into police custody.<sup>138</sup> Research from the United States shows that children in adult institutions reoffend more often than those placed in juvenile institutions. This may be due to the lack of age appropriate services and supports in adult institutions, and because of the greater risk of being influenced by other detainees.<sup>139</sup>
114. Member States moreover have to ensure that detained children (a) preserve their health and their physical and mental development (b) ensure their right to education and training, including where 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, all in proportion and appropriately to the duration of the detention.<sup>140</sup> Out of these requirements, (a) and (e) apply also to situations of deprivation of liberty other than detention (such as police custody). Requirements (b), (c), and (d) 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. Lastly, children who are deprived of liberty should be able to meet with the holder of parental responsibility as soon as possible, where such a meeting is compatible with investigative and operational requirements.<sup>141</sup>

## *III-Treatment*

---

<sup>134</sup> Children Directive, Articles 4(1)(b)(iii), 4(1)(c).

<sup>135</sup> Art. 4 (2)(d) Information Directive.

<sup>136</sup> ADRC Experts' Meeting, July 2017, Discussion paper.

<sup>137</sup> Art. 12(1) Children Directive; Rule 29 Havana Rules.

<sup>138</sup> Art. 12(2) Children Directive.

<sup>139</sup> Ziedenisberg 2011, p. 19.

<sup>140</sup> Art. 12(5) Children Directive.

<sup>141</sup> Art. 12(6) Children Directive.

115. At the international and European level, there is a growing recognition of the widespread and intense violence children face in state institutions, including police custody.<sup>142</sup> This concern is also reflected in the general comments of the CRC Committee, which recognized that children in conflict with the law are at increased risk of violence by police officials, which may even amount to torture.<sup>143</sup>

In *Zherdev v. Ukraine*, the ECtHR found that the stripping of a child in police custody of his clothes, without any explanation to the failure of the authorities to provide him with replacement clothes, keeping him in such a state for two and a half hours in a state of uncertainty and vulnerability, and subsequently placing him in a cell with adult detainees for three days amounted to a violation of the prohibition of torture and ill-treatment of Article 3 ECHR.<sup>144</sup> Assistance by a lawyer has been recognised by the ECtHR as important mechanism for preventing torture and ill-treatment.<sup>145</sup>

116. Safeguarding the welfare of children in detention is not the sole responsibility of lawyers, but lawyers can play a crucial role of monitoring their treatment, and if needed, they need to record and report incidences of poor treatment, so that appropriate action can be taken. It must also be pointed out that lawyers can only monitor and report incidences of poor treatment if they visit their child clients in detention regularly.

### **C. Court proceedings**

117. Depending on the situation and the jurisdiction, the approach of the courts towards children in conflict with the law may be punitive or paternalistic, and there are varying degrees to which court procedures are adapted to suit the needs of children. Supporting a child through the process of appearing in court involves the management of issues ranging from simple practical problems (can the child see and hear from where they are sitting?) to more complex legal questions (such as whether a child has a right to a public trial, or to privacy).
118. Judges and prosecutors should be informed before the start of the trial about the child's personality and level of maturity, as well as their economic, social and family background, and any specific vulnerability that the child may have. This is essential so that appropriate procedural adaptations can be identified, and reasonable accommodations are made to serve the best interests of the child. If an individual assessment of the child's needs has not been carried out by this point then it is absolutely necessary before the commencement of the hearing, though lawyers should properly seek for a thorough assessment at a much earlier stage (see para. 5.2.3 above).
119. Lawyers, judges, and prosecutors may wish to agree on the types of procedural adaptations needed for the court hearing as a preliminary matter at the beginning of the trial. This could help to avoid unnecessary arguments and delays later in the proceedings.

### **Right to information**

120. Communication challenges for children are manifest in the courtroom. The difficulties with retaining information which occur during pre-trial detention also arise in the stressful and often fast-moving situation in the courtroom. Lawyers should remember that the procedure and formality of the courtroom are likely to be more difficult to understand for a child than they are for most adults. In the

---

<sup>142</sup> Joint Report 2012 , paras. 5, 29, 38-40.

<sup>143</sup> CRC GC 13, para. 3(i).

<sup>144</sup> ECtHR *Zherdev v Ukraine* (2017), appl. No. 34015/07, paras. 84-95.

<sup>145</sup> ECtHR *Salduz v. Turkey* (2008), appl. no. 36391/02, para. 51.

same US study mentioned above, one quarter of children surveyed believed that no prosecutor was present in the courtroom during their hearing, or were not sure of their presence.<sup>146</sup>

121. According to Article 4 of the **Children Directive**, children have to be informed promptly about general aspects of the proceedings. The preamble of the Directive clarifies that children should, in this respect, be given a brief explanation about the next procedural steps in the proceedings insofar as this is possible, and about the role of the authorities involved. Explaining the process and the order in which various stages occur will help the child understand what is expected of him during the proceedings and when he will be able to give his views to the court.<sup>147</sup> It is equally important to ensure that children are properly informed during the court proceedings, so that they are able to follow them, and participate, where appropriate. Judges and lawyers may need to take time to explain to children what is happening, so that they do not feel lost. In addition to procedure, lawyers must also ensure throughout the proceeding (but especially before and during their trial) that their child clients understand the accusations against them, and the possible outcomes.
122. Article 4 also specifies that children must be informed about their right to be accompanied by a holder of parental responsibility, and the right to appear in person at trial. Children can be involved in criminal proceedings for lengthy periods, and it could be months before their case reaches trial, during which period they might have had multiple encounters with the police. It cannot be assumed that they have remembered all the information they were given previously, including information about their rights.<sup>148</sup> Lawyers must also bear in mind that children are more likely than other clients to struggle not only to understand or retain complex information about their situation, but also to become confused by changes as their cases progress. The responsibility of informing children of their rights is an ongoing one, rather than one which can be discharged at a particular moment.

#### *Preparing for court*

123. It could be helpful for lawyers to arrange courtroom visits for children, so that they get a better understanding of its layout and procedures in a more relaxed setting. Such visits could also help children feel more at ease during the court hearing itself, and help them participate more effectively.
124. A helpful tool in explaining the juvenile justice process, its participants and the order of the proceedings taking place in court is to draw a map of the courtroom, together with the child. While drawing the map, the different actors and their roles can be explained and the order in which they will appear or speak in court. It is also important to explain to the child the goal of the court hearing; what will be decided during the hearing and what is at stake for the child (e.g. is it a pre-trial hearing, a hearing in which a plea will be arranged, a full trial, a review hearing, etc.). The visual representation of the courtroom can help children to understand and to remember what will happen in court. The child can take a photo of the map or take it home with him

#### **Right to be Heard**

125. Member States must ensure that children have the right to be present at their trial and 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 (Article 16 (1) **Children Directive**).

#### *Communication in the courtroom*

---

<sup>146</sup> National Juvenile Defender Centre, p. 5.

<sup>147</sup> Liefwaard et al 2016, 64.

<sup>148</sup> Liefwaard et al 2016, 64.

126. During court hearings, lawyers should monitor whether the child is being addressed at his level of understanding and maturity, and whether the child understands the information given to him correctly so that the child will be able to give his views. It could be helpful for lawyers to establish 'ground rules' on the types of questioning that can and cannot take place in advance of the court hearing. If a judge or prosecutor fails to address the child in an appropriate manner during the hearing, the lawyer should intervene, pointing out the child's level of understanding and maturity, underscore the importance of the participation of the child in his own trial, and request them to adjust their language in a child-friendly way. It can be particularly challenging to ensure the effective participation of children in legal systems that have adversarial procedures that allow the cross-examination of children.
127. Depending on the circumstances, adaptations that lawyers may wish to pursue may include:<sup>149</sup>
- Agreeing not to use questions that put the prosecution's case to the child (for example, 'you stole the bicycle, didn't you?'; 'you left your house before 7 o'clock, didn't you?');
  - Agreeing to use short, simple questions;
  - Agreeing not to use aggressive questioning techniques intended to put pressure on the child;
  - Setting time limits on questioning; and
  - Using visual aids, such as models and body plans
128. Lawyers may need additional assistance to ensure that children are able to communicate effectively with the court, and they may wish to consider requesting the assistance of an intermediary in order to help 'interpret' on for the child.

#### *Practical adaptations*

129. The right to be heard is not only facilitated by ensuring that children are able to understand and respond, but by creating an atmosphere in which they are able to express themselves as far as possible, without feelings of intimidation and inhibition.<sup>150</sup> Most courtrooms and court procedures are not designed with the interests of children in mind, and lawyers may need to ask for various practical adaptations so that their clients are able to participate effectively, and to make them heard. These might include:
- Allowing children to sit next to, or close to their parents;
  - Allowing children to sit close to their lawyer;
  - Having all parties seated at the same level as the child;
  - The removal of gowns and wigs, or any other 'unusual' courtroom attire; and
  - In certain countries, it might be possible to arrange the court hearing to take place where the child is being detained, so that he does not need to adjust to an unfamiliar environment.
130. It is also important to ensure that the court hearing takes place in accordance with a timetable that takes into account a child's inability to concentrate for long periods. This means that where possible, lengthy proceedings should be avoided, and regular breaks should take place.

#### **Protection of privacy**

131. Publicity can have a highly damaging effect on child suspects and accused persons, not only because it affects their welfare and rehabilitation. The right to privacy in juvenile justice proceedings are accordingly protected by the CRC.<sup>151</sup> However, it has also been recognised that the need to protect

---

<sup>149</sup> These examples are adapted from the England & Wales Criminal Procedure Rules, 3.9(7)(b)

<sup>150</sup> *T v. the United Kingdom*, para. 85; see also Beijing Rules, Rule 14.2.

<sup>151</sup> Article 40(2)(b)(vii).

the privacy of children during criminal proceedings should be balanced against the right to an open hearing, as protected by Article 6 ECHR.<sup>152</sup>

132. The CRC Committee has recognised that as a general rule, court hearings should take place in private, but that there could be ‘very limited’ exceptions to this rule.<sup>153</sup> This position is reflected to some extent in Article 14 of the **Children Directive**, which provides that court hearings involving should either usually be held in private, that courts should allow such hearings to take place in private. This is a very loosely worded provision, and the preamble of the Directive suggests that this is due to the differences in Member States’ legal systems.<sup>154</sup>
133. The ECtHR looked into the issue of private court hearings involving children in the cases of *T v. the United Kingdom* and *V v. the United Kingdom*. T and V, who were children aged 10 at the time of the crime and 11 at the time of the trial, were convicted of murder. Although a number of special measures were used, the trial was a public one, and the children’s names were published following their conviction. Whilst recognising the interest in the open administration of justice, the ECtHR remarked that this interest could have been satisfied by providing for ‘selected attendance rights’ and ‘judicious reporting’. In other words, even if interests of justice require trials involving children to be held in public, there should be limitations on the openness of such trials. Lawyers should also note that the CRC Committee and the Beijing Rules have both stated that the identity of the child must be kept anonymous.<sup>155</sup>
134. Lawyers may not always be able to ensure that trials involving child accused persons are entirely closed to the public, and may not even be able to exclude members of the press, but they should ensure that public access to the court proceedings is limited, and that the identity of the child remains unknown to the public.

### After the hearing

135. After the court hearing has taken place, lawyers must remember to explain the outcome and the likely implications of the decision. When a decision is taken against the wishes of a child, it is important that he understands how the decision has been reached, and the extent to which his own views have played a role in the considerations and what the decision means for him.<sup>156</sup> Explaining the outcome is of great importance also because it might help the child to understand the consequences of his behaviour, and because it might help him to ‘accept’ the decision.<sup>157</sup> A comprehensible explanation of the reasons behind a certain decision leads to a better insight of the child into his delinquent behaviour.
136. Explaining the reasons behind a certain decision and the concrete content of the decision should take place in a manner and language that is comprehensible for the child. Children often do not understand the consequences of a certain legal decision, especially when they are first-time offenders.<sup>158</sup> For example, it is often unclear to a child what a community sentence entails, (e.g. when he should perform the community service, what the work will be, where it will take place and how much time it will take him to complete the measure).

---

<sup>152</sup> Cras 2016, 118.

<sup>153</sup> GC 10, para. 66.

<sup>154</sup> Children Directive, Recital 56.

<sup>155</sup> GC 10, para 66; Beijing Rules, Rule 8.

<sup>156</sup> Archard & Skivenes, 2009

<sup>157</sup> Rap, 2013, Cashmore & Parkinson, 2007; Schuytvlot, 1999; Tyler, 2006; 2003

<sup>158</sup> Plotnikoff & Woolfson, 2002

## Appeals

137. Furthermore, it is important that the child receives information on the possibilities of appeal against the decision that is taken. Article 40(2)(b)(v) CRC provides that the child has the right to have the decision and any measures imposed reviewed by a higher competent, independent and impartial body.<sup>159</sup> In the *Guidelines on Child-friendly Justice* it is stated that the child's lawyer, guardian ad litem or legal representative should give the necessary information concerning appeal, after the decision or judgment is given to the child.<sup>160</sup> A private meeting with the child after the court hearing is also of importance to discuss with him the possibilities of appeal and to advise the child on that matter.

## **V. CONCLUSION**

138. The primary purpose of this toolkit is to provide guidance for lawyers who work with children in conflict with the law as part of their day to day practice. It is intended to support those practitioners in using the Children's Directive to assert and defend their clients' rights.

139. However, we encourage members of the LEAP network and other practitioners to identify continuing problems with national law and practice, especially where the Directive's provisions, or their implementation, provide incomplete protection at the national level. Sharing this information enables us to consider the possibility of using strategic litigation to clarify the meaning of the Directive in a way which enhances the protection it gives to fair trial rights, or to otherwise influence the movement towards more extensive protection for vulnerable suspects through national and European legislation.

140. Furthermore, while this toolkit is intended to stand alone as a source of information and guidance for using the Children's Directive, effective work with child suspects routinely requires skills and knowledge beyond the boundaries of legal training. For that reason, Fair Trials has developed and piloted a fuller holistic training programme *Advancing the Defence Rights of Children*, which incorporates information on adolescent development and material designed to develop 'soft skills' necessary for working successfully with children under stress. More information on this training programme, including links to the online training module which accompanies the training, is available [here](#).

141. Practitioners looking for further information about the rights of children in conflict with the law, and a practical step-by-step guidance on assisting their child clients are also encouraged to consult the practical guidance produced by Defence for Children International ('DCI').<sup>161</sup> DCI has also produced a manual for Member States to assist with the implementation of the Children Directive and other international standards on juvenile justice.<sup>162</sup>

142. This Toolkit will be circulated to thousands of lawyers across Europe, all of whom are invited to:

- [Contact us](#), let us know how you are getting on using the directive in your day-to-day practice.
- Let us know if courts issue positive decisions in light of the Directive. These can be of use to people in other countries.

---

<sup>159</sup> See also GC 10, paras. 60-61

<sup>160</sup> Guidelines, Para. 75

<sup>161</sup> DCI-Belgium, 'Practical Guide for Lawyers – How to defend a child in conflict with the law?', available at: <http://www.mylawyermyrights.eu/wp-content/uploads/2016/05/PRACTICAL-GUIDE-FOR-LAWYERS.pdf>

<sup>162</sup> DCI-Belgium, 'Manual for Member States – How to ensure the rights of children in conflict with the law?', available at: [http://www.mylawyermyrights.eu/wp-content/uploads/2016/05/MANUAL-FOR-EU-MS\\_Web\\_EN.pdf](http://www.mylawyermyrights.eu/wp-content/uploads/2016/05/MANUAL-FOR-EU-MS_Web_EN.pdf)

- Visit our website [www.fairtrials.org](http://www.fairtrials.org) regularly for updates on key developments relating to the Directives, and news about in-person trainings.

**LEAP**  
**Fair Trials**  
**Spring 2018**