

Social Fieldwork Research (FRANET)

Procedural safeguards for children who are suspects or accused persons in criminal proceedings

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PART A. EXECUTIVE SUMMARY

C.1. General implementation of the procedural safeguards for children who are suspects and accused persons in criminal proceedings as regulated by the Directive (EU) 2016/800

In Belgium, the general position is that **youth law procedures** are **not criminal in nature** and therefore not subject to the requirements of the Directive. However, the procedural safeguards for children are considered to be very important. In practice, the **ambition** clearly is to **adhere to the safeguards** enshrined in the Directive.

One of the safeguards relates to the **training of the professionals** that interact with children. This warrants looking into the training and the extent to which children's right and vulnerabilities are included. The mandatory **police** training only **marginally** looks into youth law and skills to interact with children. The **judges and prosecutors** working in youth law matters receive a mandatory training on youth law and family law, including not only legal but **also non-legal modules**, including communication with children. This training is said to be multidisciplinary and interactive, but could be even more interactive to be really useful in practice. In general, children are assisted by specifically trained youth lawyers. **Lawyers** can obtain a **certificate** when following a year-long training with weekly seminars or workshops. This (**voluntary**) training is considered to be very useful.

As anticipated to when drawing up the profiles of the interviewees, some of the older and more experienced practitioners did not receive any training. In general, all interviewees indicate that existing mandatory trainings are still **too theoretical** in nature, even though they are multidisciplinary and comprise workshops and roll plays on communication with children. The specific (currently non-mandatory) training of **lawyers** is considered to be the **most effective**. It is suggested to make the specific training of lawyers mandatory whilst considering whether it needs to be complemented with follow up training and/or a monitoring mechanism to ensure high quality legal assistance to children.

C.2. Age assessment and the presumption to be a child in case of remaining uncertainty

Age assessments are conducted when no official documents are available to attest the age of the child. Assessments are done via a **medical examination** that is usually limited to a **single bone scan** of the wrist and is only exceptionally extended to a **triple test** (of wrist, collar bone and teeth). Because of the large margin of error and the lack of reliability of these medical examinations, they are contested in literature. This controversy is however not found in youth law practice even though there have been several cases where different medical examinations resulted in **conflicting age assessment**. The lack of controversy in practice can be brought back to the **large margins** used and the fact that persons involved will be **presumed underaged** when there is the slightest possibility they are underaged. In the event of conflicting results in different assessments, the one that is most beneficial to the child will always take precedence.

C.3. The right to information, having the holder of parental responsibility informed and audio-visual recording of the questioning

a. Right to information

The right to receiving information about the context of the police **interrogation** is well embedded in a solid legal framework. Written information is (to be) provided to children. However, it is clear that the added value of this **written (and overly complicated) information** is undermined in absence of an oral explanation. The efforts of the police seem to vary significantly. At the level of the prosecutor or the youth judges, no standardised information **brochures** are available. There too, the **efforts vary significantly** between individual actors.

The most important actor to provide information to the child, is the **youth lawyer**. This finding supports the argument that training of youth lawyers is of utmost importance.

b. Right to have the holder of parental responsibility informed

The rights in relation to the holders of parental responsibility are not well elaborated on. In general it is clear that parents should be informed **when the child is deprived of its liberty**, be it in case of an arrest, a pre-trial detention or following the execution of a youth law reaction involving deprivation of liberty. However, there are very little legal provisions detailing what parents should be informed of.

The interviewees often shifted between the **right of the child** to have his/her parents informed and the **right of the parents** to be informed about what is happening with that child. This shift is caused by the dual position parents have in youth justice procedures. On the one hand, they are the parents of the child and in that capacity best placed to support the child throughout the procedure. On the other hand they are responsible for that child and in that capacity a party to some parts of the procedure.

c. Right to an audio-visual recording

In general, audio-visual recording of the interrogation of child suspects is **very rare** in Belgium. When audio-visual recordings of the interrogations are made, these concern serious offences such as sexual offences. For other offences, it is rarely or never used. According to the interviewees, this is due to practical matters. The causes of the low usage mentioned in the interviews are therefore **a lack of infrastructure, trained police officers, time and budget**. Interviewees are divided in their opinions on its usefulness. Reference is made to the advantage of being able to see the child's body language and attitude during the interrogation. It is argued that this allows for a better assessment of the child.

Disadvantages mentioned are that there is a lot of administration involved, it is more expensive and takes more time which slows down the process. It is also indicated that children feel less comfortable with an audio-visual recording. Additionally, some interviewees argued that 'audio-visual interviews' as we know them today go beyond the mere recording of a traditional interview, but come with a very specific interview technique which is said to be not suitable for offenders.

C.4. The rights to be assisted by a lawyer and legal aid

a. Mandatory assistance free of charge

Being assisted by a lawyer throughout the procedure, is embedded in the existing legal framework. Children do not have 'the right' to be assisted, but 'the obligation' to be assisted as **they cannot waive** their right. Assistance is state funded and therefore **free of charge** for the children involved.

b. "One child one lawyer": The idea behind ensuring the effectiveness of the assistance

Youth lawyers are usually appointed when a child has its first contact with the police. The idea is that **the appointed lawyer continues** to be the lawyer of this child not only throughout the pending procedure but also **in any future proceedings**. This idea to ensure the effectiveness of the assistance presupposes that e.g. police authorities actively inquire whether a lawyer has been assigned in the past and whether that lawyer is available to assist the child in a new proceeding. The fact that in practice often lawyers 'on call' are contacted to assist children arrested by the police, undermines this idea and is flagged by the lawyers as undermining the effectiveness of their assistance to children. This **effectiveness** is said to be influenced not only by the legal possibilities of the lawyer to **act**, but also by the **relationship** of trust established between lawyer and child. Although most children will be assisted by trained youth lawyers, who are therefore also trained in communicating with children, this does not guarantee effective **communication** between lawyer and child.

c. Different views on how to assist a child

From the interviews it becomes clear that there are various views on the way in which a youth lawyer should assist the child; what effective participation should mean. Whereas some lawyers try to construe '**the best interest of the child**' based on their assessment of the case file, other lawyers will consider the opinion of the child what is in their best interest. This divides lawyers in either **objective** or **subjective** defenders of the best interest of the child. Most lawyers seem to combine elements of these two approaches. This diversity in opinions can also be found in the cooperation between the youth lawyer and **the holders of parental responsibility**. Whereas some lawyers will try and involve the parents as much as possible and consider themselves to be 'working with **the child and his/her family**', other lawyers are very strict in differentiating between either assisting the child or assisting the parents. They will **not interact with the parents** altogether. Most lawyers seem to combine elements of these two approaches.

C.5. The right to an individual assessment

There are two types of individual assessments in Belgium. Firstly, there is the individual assessment carried out **by the police**. This assessment is not standard practice and takes many different shapes

and sizes. Exceptionally this assessment will amount to a full-fledged social inquiry at the individual initiative of a police officer. In general, the aim of this assessment, in whatever shape it may take, is to inform the public prosecutor of the current situation of the child in all aspects of life. This allows the prosecutor to order the appropriate measures for the child in the specific situation.

Secondly, there is the individual assessment carried out **by the social service** on behalf of the youth court. This individual assessment is carried out **in execution of Article 50 Federal Youth Act**. Here too, the aim is to form a broad **picture of the child's life**. The **Signs of Safety methodology** is used for this purpose, with solutions ultimately being formulated. The aim of this investigation is to inform the juvenile judge about the current situation in which the child finds itself and to **advise** about possibly **appropriate measures**. Moreover, a second goal of the individual assessment is to see if there is no underlying problematic parenting situation. It has been flagged that these assessments are that **not always updated** and **not always of high quality**. Both problems are said to be due to the enormous **workload** of the social service consultants and the high staff **turnover**.

C.6. Deprivation of liberty as a last resort and safeguards for children who are deprived of their liberty

Deprivation of liberty of children is legally **anchored as a measure of last resort**. In practice there are some **differences in opinion** as to what 'last resort' should entail. In general, the interviewees feel that deprivation of liberty is something that is **not considered lightly**. Some interviewees indicate however that deprivation of liberty is **sometimes used too easily**. References are made to violations of Covid-restrictions.

The **legal framework** governing children deprived of their liberty is not elaborate nor included into one specific legal instrument. **Rights and rules are scattered** over different legal instruments. Discussions are ongoing as to the need to adopt a more comprehensive and self-standing legal framework.

Due to the lack of an overarching legal framework, **a lot of uncertainty** exists among practitioners who are not working inside closed facilities. Questions on medical examination upon entry and access to health care whilst residing in a close facility, received vague answers.

The **education and training** inside facilities is better known as it is something that is particularly relevant to most practitioners, be it police officers, prosecutors, lawyers, judges or social workers. As the education of children is considered to be of utmost importance this is reflected in all the interviews. Whereas there are **some concerns** with the ability of the facilities to organise a meaningful alternative to a normal school path, there are **numerous good practices** of children being allowed to attend classes in a regular school, outside the facility.

Similarly important is the possibility to stay in close **contact with family members and friends**. The rules are considered to be rather strict, but the strictness is deemed **necessary to monitor** the contacts of the child and ensure that children are not approached by people considered to be of bad influence.

C.7. The rights to effectively participate in and be accompanied during the trial

The **right to effective participation** is enshrined as the **right to be heard**. Some decisions cannot be taken without the child being heard. At the level of the **youth judge**, the right to be heard is enshrined

in a **general** fashion. At the level of the **prosecution**, the right to be heard is **scattered** across different provisions and therefore **not always provided** for.

It can be concluded that the practice of allowing children to participate still has **room for improvement**. To begin with, the **setting** is often not very child-friendly or even intimidating. However, it is stated that the setting is not the most important when aiming to support good participation of the child. The attitude of the actors towards the child is more important. In addition, it seems as if very little has been changed in the **conduct of the proceedings** to allow children to participate. The main difference is that the focus is on the child and not on the lawyer's plea as is the case in criminal cases. In particular, children are often given the floor first. The extent to which the voice of children is taken into account, is the responsibility of each individual actor. Based on the results of the interview round, it seems that today the right to participation is insufficiently guaranteed. Children are still **involved too little** throughout the procedure and things are still decided over their heads.

When it comes to the **right to be accompanied**, it is noted that involved parents (provided that they are invited) are present at the hearing. In addition, it is noticeable that children make **little use of support persons** during hearings, but that consultation with their lawyer is usually possible.

PART B. INTRODUCTION

In total, **20 interviews** were carried out in the timeframe of 28 April 2021 to 22 July 2021.

Due to the special circumstances caused by the Covid-19 pandemic, all interviews were conducted via electronic means of communications.

○ PREPARATION OF FIELDWORK, IDENTIFICATION AND RECRUITMENT OF PARTICIPANTS

Prior to the start of the interview, the profiles of the interviewees were determined, aiming to have a **balanced sample** in **experience** level, **gender** (male #9, female #13) and **regional distribution** (Antwerp #7, Ghent #8, Brussels #7).

All interview were conducted by an **experienced interviewer** and **expert** in the subject matter. Before starting the interview round, the formulation and phrasing of the questions were discussed with a legal expert working in youth law matters and then tested during an interview with a youth lawyer.

○ SAMPLE AND DESCRIPTION OF FIELDWORK

Table 1. OVERVIEW OF PROFESSIONALS INTERVIEWED

| Link with youth delinquency cases | Gender |
|--|------------------------------|
| Police inspector (youth section) | Female |
| Youth coordinator at local police | Male |
| Police inspector (youth section) (retired) | Male |
| Police inspector (youth section) | Male |
| (self-taught) Youth lawyer | Male |
| (self-taught) Youth lawyer | Male |
| (specifically trained) Youth lawyer | Female |
| (specifically trained) Youth lawyer | Female |
| (specifically trained) Youth lawyer | Female |
| Youth Judge | Female |
| Youth Judge | Male |
| Prosecutor at the court of first instance | Female |
| Prosecutor at the court of appeal | Male |
| Prosecutor at the court of appeal | Male /Female (duo interview) |
| Youth workers | Male /Female (duo interview) |
| Social worker | Female |
| Member of the supervisory body for closed facilities | Female |
| Policy advisor on children's rights | Female |
| Researcher on juvenile delinquency | Female |
| Consultant at the youth court's social service | Female |

Disregarding the introduction and preparatory stage, **on average** the actual interviews took **1 hour and 20 minutes**. All interview were conducted in a **friendly atmosphere**, with a **high level of trust** between interviewer and interviewee.

- **DATA ANALYSIS**

An **audio recording** was made of the twenty online interviews, allowing the interviews to be **transcribed verbatim**. The transcripts were then analysed and coded in the software programme **Nvivo**. The Nvivo file creates a structured overview of available data and provides the basis for compiling the research reports.

- **BRIEF OVERVIEW OF THE REPORT'S CONTENTS**

The report kicks off looking into the **applicability** of the directive in a Belgian context, taking due account of the fact that in Belgian youth law procedures are considered to be non-criminal in nature. Notwithstanding that applicability discussion, the Belgian legal framework intends to adhere to the directive's requirements.

Section C1 comprises an overview of the **training of practitioners** in general and goes into the specific training received by the interviewees. As anticipated when drawing up the profiles of the interviewees, some of the older and more experienced practitioners did not receive any training.

Section C2 details the legal framework and practice of **age assessments**, i.e. the medical examinations that are conducted if children are unable to produce official documents to attest their age.

Section C3 elaborates on the **right to be informed**, not only of the procedural rights (including the right to be assisted by a lawyer), but also of the general conduct of the criminal proceedings in their entirety. It discusses the importance of oral explanation to complement any written information provided and looks into the roles and responsibilities of the different actors involved.

Section C4 focusses on the **right to be assisted by a lawyer**. Starting from the baseline that legal aid is free of charge in Belgium, it explains how lawyers are assigned, the extent to which they are able to participate in the procedure and the differences in views regarding not only determining 'the best interest of the child' but also regarding the 'cooperation with the parents'.

Section C5 sheds light on **the individual assessment** that is conducted to gain insight into the specific individual characteristics of the child and the impact this should have on the way a reaction to the offence is shaped.

Section C6 deals with the right to have **deprivation of liberty** used as a measure of **last resort**. Whilst the principle is anchored into the legal framework, questions arise as to the interpretation thereof. Furthermore, this section will demonstrate that the legal framework is rather vague on the actual **rights of children whilst being deprived** of their liberty.

Section C7 concludes the analysis, reflecting on the **right to effective participation** of children, which is closely linked to the **right to be heard** throughout the procedures.

PART C. RESEARCH FINDINGS

C.1 Implementation of Directive (EU) 2016/800

a. Legal framework

The legal framework governing the juvenile justice landscape in **Belgium** is rather **complex**, given the relatively recent changes in the division of competences between the Federal State and the Communities.¹ Whereas before, *one single regime* applied to all children within the Belgian jurisdiction, *today, four different regimes* apply.² Following the transfer of federal competences to the Communities, the applicable regime will be determined, based on *the place of residence of the holders of parental responsibility* of the child involved. Most of the procedural matters relevant for the topics dealt with in this study, are however still subject to the **overarching Federal Law**.³

b. Scope of the Directive's application and relevant age categories

The formal application of the EU Directive is however rather limited, in that the Directive applies to children subject to a criminal procedure, and commonly, the **youth law procedures** in Belgium are **not considered to be criminal in nature**. Hence the official position reads that the Directive does not apply to children except for those children aged 16 or older, who are subject to a divestiture procedure. This divestiture mechanism (**uithandengeving**) results in the youth judges applying the sanction system in the adult criminal code, whilst still observing some principles stemming from the youth system. (See ANNEX 2 – Criminal responsibility in Belgium)

All interviewees agreed however that in practice, the overarching position amongst practitioners is that the rules of the EU Directive are to be adhered to. **From 2004 onwards**, in the legislative debate on the procedures that need to be followed, a particular focus was put on ensuring that children subject to youth law procedures were adequately protected and could benefit from a full-fledged procedural safeguards mechanism. The **rhetoric** of the policy makers, was translated in the **youth law of 2006** and followed through in subsequent legislative changes, including the most recent regional legislative initiatives. As a result thereof, the discussion on the 'formal' inapplicability of the Directive is considered to be a **mere theoretical discussion** with little added value in practice.

According to Article 2 Directive 2016/800 the directive should apply to all children who are suspects or accused persons in criminal proceedings. The question arises who 'children' should be interpreted against the background of the Belgian legal framework. In Belgium, a number of different age limits feature throughout the legislation. Applicable rules vary depending on the age at the time of the offence.

1 Special Act of 6 January 2015 (*Bijzondere wet*), Belgian Official Journal 31 January 2014

2 Flemish Juvenile Delinquency Decree 15 February 2019 – (*Decreet betreffende het jeugddelinquentierecht*) [Decree concerning juvenile delinquency law] – Belgian Official Journal 26 April 2019; Walloon Youth Protection Decree 18 January 2018 – (*Décret portant le code de la prévention, de l'Aide à la jeunesse et de la protection de la Jeunesse*) [Decree concerning the code on the prevention, the aid and protection of youth] – Belgian Official Journal 3 April 2018; Brussels Youth Protection Ordonnance 16 May 2019 – (*Ordonnance relative à l'aide et à la protection de la jeunesse*) [Ordonnance concerning the aid and protection of youth] – Belgian Official Journal 5 June 2019; Belgian Youth Law of 8 April 1965. – (*Wet betreffende de jeugdbescherming, het ten laste nemen van minderjarigen die een als misdrijf omschreven feit hebben gepleegd en het herstel van de door dit feit veroorzaakte schade*) [Act concerning youth protection, the follow up of children who have committed an act deemed to constitute an offence, reparation of the damage caused by this act] – Belgian Official Journal 15 April 1965.

3 Belgian Youth Law of 8 April 1965.

Firstly, the age of **12 years** features as the minimum age for the applicability of the youth law systems throughout Belgium. Children younger than 12 years old will not be subject to any of the youth delinquency systems. It is consistently argued that children below the age of 12 cannot be held criminally responsible in any way.⁴ This means, that 12 is the cut off age for the applicability of the directive.

Secondly, the age of **14 years** features as the minimum age for the applicability of certain sentences within the youth law systems throughout the country. In general, children younger than 14 years will not be subject to sentences involving deprivation of liberty. Even from 14 onwards, there are strict rules about the possibility of the youth judge to opt for such sentences. However – albeit in exceptional cases – children as young as 12 years old can be subject to a deprivation of liberty, either at a pre-trial or a trial stage.⁵

Thirdly, the age of **16 years** features as the minimum age for the divestiture procedures (*uithandengeving*). A child who is 16 years of age or older, suspected or accused of having committed an offence, can be referred to a specific chamber in the youth court where s/he is tried as an adult, under the common criminal law and the common law of criminal procedure.⁶ Such divestiture is possible if the youth court is of the opinion that the protective or educational measures available in a youth law context are not appropriate.⁷ Divestiture has remained possible in all regions after the changes in the legal landscape. However, in practice, given the increased stringency in the possibilities of youth judges to impose sanctions within the youth delinquency frameworks, divestiture procedures are becoming very rare.

Fourthly, the age of **18 years** features as the age of criminal maturity. Offences committed when having reached the age of 18, will be treated using the adult criminal codes as a legal basis.

c. Special training

i. Legal overview

Right to be treated by trained professionals

The Preliminary Title to the **Federal Youth Law** lists the main principles underlying the Youth Protection Landscape in Belgium. The first provision refers to the importance of prevention of delinquency in order to protect not only society, but also the children involved. It is a priority to identify, analyse and tackle the root causes of delinquency. Already **in the second provision** reference is made to the fact that children have the right to be treated by **professionals who have received a specific and permanent training on issues of youth law**. This provision in the Preliminary Title is applicable to the entirety of Belgium as no regional diversion (to this provision) was made.

⁴ It may be considered whether the child is in need of (mandatory) youth care, as a result of which a different legal system will apply. In any event, that legal system is not criminal in nature and will not result in the applicability of the directive.

⁵ Article 24 §3 of the Flemish Decree stipulates that the youth judge may consider this if the youth crime is sufficiently severe and there are exceptional, urgent and pressing circumstances that warrant such decision. Article 86 of the Brussels Ordonnance says the same. Article 124 §4 of the Walloon Decree says the same.

⁶ Article 57bis of the Federal Youth Act

⁷ In order for the youth court to take such a divestiture decision, one of two conditions should be met: either the child involved had already been subject to one or more protective or educational measures which did not have the desired effect, or the child involved is now suspected or accused of having committed one of the offences listed, being: sexual assault, rape, homicide, aggravated assault, torture or degrading treatment or aggravated theft.

Training of police officers

In the **standard** training of police officers, youth protection is amongst the topics studied, be it only **marginally**. Police officers are trained in how to **approach** and **communicate** with children, which specialised services exist, the **rights** of children when in contact with the police. In addition thereto, a number of **voluntary** additional training modules are offered. No data is available on the number of police officers who have attended such an additional training module.

The National Commission on the Rights of the Child (NCRK) recently did a study on the effectiveness of children's rights provisions. The NCRK-study concluded that in almost all police zones in Belgium either an expert in communication with children is present, or systematic use is made of an expert from a neighbouring police zone when children need to be heard or interrogated.⁸

Training of prosecutors and judges

In Belgium, a specific **mandatory** training is provided for **any youth magistrate** (prosecutor or judge) wanting to act within a family or youth court setting. This mandatory training consists of a **one day** training on the legal framework of **youth law** and a **two day** training on the **hearing** of children. The training is general in nature, meaning that it relates to both child victims and child suspects or accused, children confronted with divorce and children growing up in a problematic family situation.⁹

In addition, the official training institute for magistrates organises **voluntary training** modules. An analysis of the records of the Belgian official training institute indicate that between 2002 and 2015, 426 magistrates followed a specific, voluntary training on communication with children, rights of the child, child friendly justice and psychology of the child. In 2015 approximately 2455 magistrates and criminologists were employed at the level of the youth prosecutors and youth court judges. This means that about 17% of the staff members had received additional specific, voluntary training.

Training of lawyers

In Belgium, legal assistance to children is free of charge as it is government funded. Even though children are allowed to bring their own lawyer, most children will be appointed a lawyer upon their first contact with the police.¹⁰ In general, this lawyer will be appointed using a list of lawyers who happen to be '*on call*' at that moment in time. Although training is not mandatory, in practice children are mostly assisted by lawyers who have followed a special training on youth law offered by the bar associations, as most bars require such training before being put on the list of '*lawyers on call*'.¹¹

The annual training module has on average about 140 participants a year. The training consists of both legal and non-legal modules (including a two day training on communication with children, guest lectures of child psychologists, youth workers, visits to closed facilities), an internship and a written assignment using a mock case file as a basis.

⁸ See https://ncrk-cnde.be/IMG/pdf/publication_nl_def.pdf, page 184

⁹ See https://ncrk-cnde.be/IMG/pdf/publication_nl_def.pdf, page 183

¹⁰ Boydens, E. (2016), 'Jeugdadvocaten en specialisatie binnen de OVB' in: Van der Mussele, E. (Ed.), *Jeugdadvoocaat in Vlaanderen, België en Europa: verslagboek studiedag van de Unie van Jeugdadvocaten*, Larcier, pp. 73-77.

¹¹ Besides the bar of West-Flanders, all other bar associations have some sort of training requirement. Mostly the training requirement is limited to the one time year long training programme. Some bars require lawyers to submit annual proof of having followed training modules on matters relevant to their work as youth lawyers.

ii. Special training received by interviewees

All four interviewed police officers have a specific youth related position. **None of them** were **required** to have followed a **specific training** before starting in their current position. Except for one interviewee, all police officers had **voluntarily** followed training modules throughout their career. These training modules ranged from 'insights in child drug addiction' over 'child psychology' and 'communication with children' to 'child support mechanisms'. One of the interviewees is responsible to look into the needs to further develop police training.

Judges and prosecutors follow the same **mandatory training**, in theory before taking office as a youth magistrate. **Both interviewed youth judges** had had followed the **mandatory training** before taking office. **Two out of the four interviewed prosecutors** followed the training. The other two interviewed prosecutors indicate that they are both '**too old**'. One prosecutor stress that it is not uncommon for prosecutors to **already start working** in the youth section although they have **not yet received or finished the training**. She only had the training after she had been with the section for a little over a year.

Both judges however indicate that the training is **interesting**, but **not sufficient**.

"The training is **multidisciplinary** - for example, child psychiatrists come to talk to us. It's very interesting. But the problem is that it's all a bit **too theoretical**. It does not help you in your day-to-day work." (Judge, Antwerp)

"Het is wel multidisciplinair. Er komen bijvoorbeeld ook kinderpsychiaters spreken enzo. Het is zeer interessant. Maar het probleem is gewoon dat het allemaal wat te theoretisch is. Je kan er niet altijd veel mee in de praktijk." (Judge, Antwerp)

The female judge referred to the fact that talking to children was discussed in less than one hour of the training. The male judge added that it will not be realistic to expand the training, because of a lack of time and knowing that a lot of judges following the training are not interested as they have no intention of becoming a youth judge. This judge indicated that the 'gaps' in the training of youth judges are **mitigated** by 'the organisation of the system', i.e. the installation of a **social service**.

"We are fortunate to be able to work with a social service. Those people are pedagogues, **they have had training** for that, they are people with a psychological education as a background – I actually learn a lot from them." (Judge, Antwerp)

"Wij hebben het geluk dat we kunnen samenwerken met een sociale dienst. Die mensen, dat zijn orthopedagogen, die hebben daar opleiding voor gehad, dat zijn mensen met een psychologische opleiding als achtergrond – van die mensen daar leer ik eigenlijk heel veel." (Judge, Antwerp)

Today, a specific training is offered to defence lawyers wanting to specialise in youth law. **Two defence lawyers** started their career at a time when **no training existed yet**. All **three other youth lawyers** have followed the **specific training** offered by the bar association. All interviewed lawyers agree that the training **should be mandatory** and that it is unacceptable for children to be assisted by untrained lawyers.

Six out of the seven interviewed practitioners with a **more social profile** have received a basic training on youth work, social work, criminology, psychology and/or pedagogy which prepared them for their work with children. One interviewed practitioner in this category (also) had a legal background. **Four** of the interviewed practitioners indicated to **miss some fundamental competences or knowledge** to answer some of the questions they receive from children. Three of those interviewed practitioners indicate that they have too little insight in the legal framework governing youth law and consider it to be too complex for them to master.

“The legal things are not always clear to me. Frankly, sometimes I do not understand those rules either, I cannot explain it to children, and I feel like lawyers sometimes do not know things either. There really is a lot of uncertainty about the law. Why does it all have to be so complicated? If we do not understand it, how do we expect children to understand?” (youth worker)

“Voor mij is dat juridisch ook allemaal niet zo duidelijk. Eerlijk gezegd, ik begrijp die regels ook soms niet, ik kan het niet uitleggen aan de jongeren, en ik heb het gevoel dat de advocaten het soms ook niet weten. Er is echt veel onduidelijkheid. Waarom moet dat allemaal zo ingewikkeld zijn. Als wij het al niet snappen, wat zouden die jongeren het dan begrijpen?” (youth worker)

Two interviewees indicated to not be sufficiently trained to effectively communicate with children or understand the child developmental stages as a means to contextualise their behaviour.

“We are not really trained or anything to talk to children. Because we show a commitment to that target group, everyone expects that we also have the skills to talk to children, but that is actually not the case.” (Member of the supervisory body for closed facilities)

“Wij worden niet echt opgeleid ofzo om met jongeren te praten. Omdat we een engagement tonen naar die doelgroep verwacht iedereen precies dat we ook de skills hebben om met jongeren te praten, maar dat is eigenlijk niet zo.” (Member of the supervisory body for closed facilities)

d. Effectiveness of measures / Monitoring

The main concern in Belgium relates to the **training of youth lawyers**¹², as research clearly demonstrates that the impact of the youth lawyer is significant and being assisted by a poorly trained or malfunctioning youth lawyer can harm the case. The suggestion to make training of youth lawyers mandatory throughout the country, has been on the table for quite a while. Recently, the suggestion was voiced to complement that one of training with the requirement to follow annual training modules. The idea to introduce a monitoring mechanism to review the quality of the work of the lawyers is not (yet) widely supported in absence of concrete suggestions on how to implement it.

¹² De Bondt, W. (2021). Voor mij graag een speciaal opgeleide jeugdadvoocaat alstublieft, *Panopticon* 42 (5), 397-402; Defence for Children International – België. (2018). De rol van de advocaat van de minderjarige in de jeugdbeschermings- en strafrechtelijke procedures in België. *Nationaal Rapport september 2016-februari 2017*. Vanobbergen, B. (2018). Naar een (nog meer) kindvriendelijke justitie. *Tijdschrift voor Familierecht*, 146-147.

C.2 Age assessment and the presumption to be a child in case of remaining uncertainty

a. Legal overview

The **directive** requires in its Article 3 that the procedural safeguards are applicable to **any person below the age of 18**. Where there is **uncertainty** about the age of a person, that person should be **presumed to be a child**.

As a baseline prosecutors task police officers to use official documents or other official sources to identify the child and determine the age. Where no official documents are available, the person will be subject to a medical examination to determine whether a person is to be considered an adult or a child. There is however no legal basis for these medical examinations in the context of youth delinquency procedures.¹³ A practice has developed drawing on the legal framework known in the context of asylum and migration. (See ANNEX 3 – Age assessments in Belgium)

b. Age assessments in practice

Actors involved

All interviewees indicated that in Belgium, age assessments are dealt with at the level of the prosecutor.¹⁴ When the age of a person is uncertain and offences have been committed, the **public prosecutor's office** requests an age assessment. This clarifies why only interviewed prosecutors and police offices (who receive instructions to have a person medically examined from the prosecutors) had insight into how these age assessments are organised. Actors who come into play at a **later stage** have indicated to have **little or no experience** with age assessments.¹⁵ When a file reaches 'their stage in the procedure', the age related discussions have already been settled.

Medical examination

Two interviewed lawyers, three police officers, three prosecutors and the two judges clarified that age assessments are mostly done through a **single bone scan** of the wrist. This corroborates with the general guideline for prosecutors. One of the judges clarified that the **triple test** of the wrist, collarbone and teeth (known in migration law), is only rarely used, as it is more expensive and time-consuming. One of the prosecutors added that in practice it is not always possible to find a hospital that has the resources to do the triple test.

One of the police officers explains that even when the age of a person is unknown, it is not always considered relevant to get a reliable insight into a person's age. When the offences are not serious enough, and the case would be dismissed anyhow, no age assessment will be conducted.

¹³ Art 55 Walloon Decree indicates that its Book V (regarding children suspected or accused of having committed an offence) is applicable to children who have committed offences before they turned 18. The decree does not say anything about how this age should be established if the child cannot produce any official documents. Art 17 Brussels ordinance indicates that its title III (regarding protecting juveniles prosecuted for an offense described as a crime) is applicable to children who have committed offences after they turned 12 and before they turned 18. The ordinance does not say anything about how this age should be established if the child cannot produce any official documents.

¹⁴ or the investigative judges, but they were not included in the interview profiles.

¹⁵ Two lawyers and the consultant of the social service of the youth court indicated to have never had a case where an age assessment had to be conducted. They have some knowledge based on what they heard from colleagues. Both youth workers, the social worker, the member of the supervisory body for closed facilities and the researcher on juvenile delinquency had no knowledge on how these age assessments are conducted.

Results of the medical examination: reliability issues

All interviewees who had indicated to have some experience with age assessments confirmed that as long as the **results** of the medical examination are **unknown**, the person is **considered** to be a **child**. The results of the medical examination are always **interpreted to the advantage** of the person involved.

“As soon as there is a minimal chance that the person is underage, one gets the advantage of being underage. So if someone is presumed to be 18 years old, with a deviation of 6 months, it means that it is also possible that this person is 17 years and a half, then we still go for the minority. This is because we cannot allow a child to be mistaken for an adult. There, we always act in favour of the person concerned. We round off in their favour.” (Judge, Antwerp)

“Van zodra dat er een minimale kans is dat de persoon minderjarig zou zijn, krijgt men het voordeel van minderjarig te zijn. Dus als men zegt het is iemand die vermoedelijk 18 jaar is, met een afwijking van 6 maanden, en dat het dus ook kan dat het gaat om iemand die 17 jaar en half is, dan gaan we toch voor de minderjarigheid. Dat is omdat we het ons niet kunnen permitteren dat een kind ten onrechte als een volwassene zou beschouwd worden. Daar handelen we altijd in het voordeel van de betrokkene. Er wordt afgerond in hun voordeel.” (Judge, Antwerp)

One of the prosecutors voiced a concern regarding the reliability of the outcome of a medical examination based on a single bone scan of the wrist. That prosecutor argued however that the reason why the discussion on the reliability of the bone scans found in literature does not seem to find its way into the court proceedings, are the margins of error used. All interviewees discussing this topic referred to the **margin of error** used to accommodate the reliability concerns. Four prosecutors and a judge claimed that there are differences between doctors and hospitals about the width of the margin: the width varies from a few months to more than a year.

The margin of error used, can however not avoid that age assessments falsely label children as adults. A case was detailed where the age assessment was later on overruled by official documents the child was ultimately able to produce.

“It has already happened that based on a bone scan it was concluded that a person was an adult. There had been an entire procedure in front of the investigative judge before ultimately the child was able to prove that he/she was a child after all. It happens, but it's really quite exceptional.” (Judge, Antwerp)

“Het is al gebeurd dat uit een botscan bleek dat de betrokkene meerderjarig zou zijn, dat die al een heel parcours had afgelegd bij de onderzoeksrechter ook, en dat dan maar eerst in een latere fase het bewijs kon geleverd worden dat het om een minderjarige ging. Het gebeurt, maar dat is echt wel heel uitzonderlijk.” (Judge, Antwerp)

Two judges, a lawyer, three prosecutors and a police officer indicated that they have seen cases in which multiple age assessments lead to **contradictory results**. For that reason two prosecutors and the police officer argued that it would be better to avoid contradictory results by ruling out the

possibility that multiple examinations take place. They referred to the possibility to work in **closer cooperation** with the **immigration** office.

c. Discussion of findings

Age assessments are conducted when no official documents are available to attest the age of the child. Assessments are done via a **medical examination** that is usually limited to a **single bone scan** of the wrist and is only exceptionally extended to a **triple test** (of wrist, collar bone and teeth). Because of the large margin of error and the lack of reliability of these medical examinations, they are contested in literature. This controversy is however not found in youth law practice even though there have been several cases where different medical examinations resulted in **conflicting age assessment**. The lack of controversy in practice can be brought back to the **large margins** used and the fact that persons involved will be **presumed underaged** when there is the slightest possibility they are underaged. In the event of conflicting results in different assessments, the one that is most beneficial to the child will always take precedence.

C.3 The right to information, having the holder of parental responsibility informed and audio-visual recording of the questioning

- a. The right to information
 - i. Legal overview

The current legal framework holds very little references to the right to information, the right to have the holder of parental responsibility informed or the right to have a questioning audio-visually recorded. As the applicability of the Directive is not generally recognised, there are little references to the information rights included in the Directive, as visualised in the overview table in

ANNEX 4 – Right to information in Belgium.

When analysing the legal framework, it becomes apparent that significant attention was paid to the right to information at the occasion of being interrogated by the police.

The right to information about your rights in that specific context, is enshrined in article 47*bis* of the Belgian Criminal Procedural Code.¹⁶ Information is provided via a standardised letter of rights, which includes references to e.g. the right to remain silent, the right to a preparatory consultation with a lawyer, the right to be assisted by a lawyer throughout the interrogation, the right to interrupt the interrogation for an additional consultation with the lawyer and the right to use any documentation to support participation.¹⁷

The right to information about other stages in the criminal proceedings or about the role of other actors in the criminal proceedings is not coherently or comprehensively regulated. The right to information is not only scattered throughout different pieces of legislation, it also differs between the communities (i.e. it will be different for children, depending on the place of residence of their holders or parental responsibility).¹⁸

ii. Information about procedural rights and safeguards in practice

When children are questioned by the police at the start of a procedure, they receive the so-called **Salduz letter of rights**¹⁹ following the so-called Salduz-law.²⁰ Four interviewees²¹ state that **children do not read** this four-page document. In addition, ten respondents²² indicate that the document is **not understood** by children because of the difficult legal language. For that reason it is important that the rights are explained **orally** as well.

“No, those documents **not at all adapted** to a child. Actually, it is rather addressed to those parents. It is sent to the residence address of the child but we **assume that the parents will also read** that letter. It's hard enough for an adult to understand these rights, let alone a child. Children will not at all understand what it says. That's why I think it's important for a police

¹⁶ A distinction is made between children that are **free to go home** (article 47*bis* §§2-3 CCP) and children that are **deprived of their liberty** (also §4 CCP).

¹⁷ The rules will apply regardless of regional differences and the decision to either or not opt for a divestiture procedure. These rules also apply to children who will stay within the ‘protective’ juvenile justice systems shaped by any of the regional legal frameworks.

¹⁸ E.g. for children (whose parents are) residing in Brussels Capital region, Article 28 (1) of the Brussels ordonnance includes a specific reference to the right to be informed of the right to be assisted by a lawyer in the course of a mediation measure organised at the level of the public prosecutor. The same is true for children (whose parents are) residing in Wallonia and can rely on Article 97 §2 Walloon Decree. There are no rules or guidelines as to how this information should be provided. Different practices exist in different legal districts and even within districts. Some prosecutors are known to hand out a brochure, others give an oral explanation. For children (whose parents are) residing in Flanders, or in the German speaking region, no specific information provisions are included.

¹⁹ Some children will have received a copy of the Salduz letter of rights at an earlier point in time, e.g. at the time of the arrest, or at the occasion of receiving the invitation for the police interrogation. In any event, a new copy will be handed at the start of the police interrogation.

²⁰ Salduz-Law 13 August 2011 – (*Wet tot wijziging van het Wetboek van strafvordering en van de wet van 20 juli 1990 betreffende de voorlopige hechtenis, om aan elkeen die wordt verhoord en aan elkeen wiens vrijheid wordt benomen rechten te verlenen, waaronder het recht om een advocaat te raadplegen en door hem te worden bijgestaan*)– Belgian Official Journal 5 September 2011.

²¹ Three lawyers and one prosecutor

²² Two judges, two lawyers, two police officers, two prosecutors and two social experts

officer to actually call them, and explain it to them in normal language so that children can understand it.” (Police officer, Antwerp)

“Nee, die documenten zijn totaal niet aangepast aan een minderjarige. Eigenlijk is dat eerder gericht naar die ouders. Het wordt verzonden naar de minderjarige maar wij gaan ervan uit dat de ouders die brief ook gaan lezen. Het is al moeilijk voor een volwassene om die rechten te begrijpen, laat staan die minderjarige. Die gaat helemaal niet weten wat er staat. Daarom dat ik het ook belangrijk vind om eens te bellen en hen dat uit te leggen in mensentaal dat jongeren of kinderen dat begrijpen.” (Police officer, Antwerp)

Two actors stand out here. Firstly, according to eight interviewees,²³ the child's **lawyer** plays an important role in providing information on procedural safeguards. One of the judges stated that lawyers have ‘the daunting task of translating’ the Salduz letter of rights into a more child-friendly language’. Secondly, seven interviewees added that the **police** are also an important actor.²⁴ The three police officers working in a youth section indicated that in any event, prior to the interrogation, they will have contacted both the child and the parents to verify whether they have received and understood the letter of rights. In any event, all seven interviewees confirmed that at the start of the interrogation, it is common practice to ask whether the child has understood its rights. Where necessary the rights will be further explained.²⁵

“Of course, it is also the task and the responsibility of the youth lawyer to go through the rights and to explain all of them a bit, which rights there are, the right to remain silent, the right to a confidential consultation. So it is actually a bit of a **shared responsibility** between the police and the youth lawyers.” (Prosecutor, Brussels)

“Natuurlijk is dat ook een taak en een verantwoordelijkheid van de jeugadvocaat om die rechten te overlopen en het allemaal een beetje te duiden, welke rechten er zijn, het recht om te zwijgen, het recht op een vertrouwelijk overleg. Dus het is eigenlijk een beetje een gedeelde taak tussen de politie en de jeugadvocaten.” (Prosecutor, Brussels)

The extent to which these rights are clearly set out depends on the situation and the individual police officer, according to a juvenile court judge and police officer. For example, one of the judges and one of the police officers referred to how busy the police station is and how experienced the police officer is in dealing with juvenile law. The content of the information concerns the **Salduz rights**, including the **specific rights for children**, such as not being able to waive the right to be assisted by a lawyer.

iii. Information about the general conduct of the proceedings

Sixteen interviewees, including the youth lawyers themselves, state that providing information about the general conduct of the proceedings is **mainly the responsibility of youth lawyers**.²⁶ To a lesser extent, the conduct of the proceeding is also explained by the police, the prosecutor's office, counsellors and the juvenile judge. They provide information about the next steps in the procedure,

²³ One judge, five lawyers, one police officer and a prosecutor.

²⁴ One judge, two lawyers, three police officers and a prosecutor.

²⁵ One judge, two lawyers, three police officers and a prosecutor.

²⁶ One judge, four lawyers, two police officers, four prosecutors, five non-legal practitioners.

the role of the different actors, the possible outcomes, their rights during the proceedings and so on. **No standard forms** or templates are available for information on the further procedure. There children are completely **dependent on the actors** for further information, especially the youth lawyer.²⁷

Explaining what happens after the police interrogation, is the responsibility of the lawyer, I think that is also very clear. Given that there has to be a lawyer, that is also a bit of a task for a lawyer to explain all this. They have to be able to say this is how things are going to turn out. (Police officer, Ghent)

“Wat nadien komt, dat is de rol van de advocaat, ik denk dat dat ook heel duidelijk is. Gezien er een advocaat moet zijn, is dat ook wel een beetje de taak van een advocaat om dat allemaal te gaan toelichten. Die moeten in staat zijn om te zeggen zo en zo gaat het nu nog verder verlopen.” (Police officer, Ghent)

A police officer and a social expert indicate that children who have been in contact with the juvenile justice system before, know the system well. This in contrast to children who come into contact for the first time, who have many questions.

“I also simply think that there are two groups. There are children who commit one offence after another and know their rights very well, who even know half of the staff at the youth courts by name: they know which judges are sensitive to tears and which judges are more sensitive to other things. So they know the system better than we do. It's not like that with other young people.” (Social expert, Antwerp)

“Ik denk ook gewoon dat er twee groepen zijn. Je hebt jongeren die het ene feit achter het andere aan elkaar kleven en die heel goed, die zelfs de helft van de jeugdrechters bij naam kennen en weten: Bij die is het beter dat je wat tranen laat vloeien en die werkt meer zus of zo. Dus dat systeem beter kennen dan wij soms. Bij andere jongeren is dat veel minder zo.” (Social expert, Antwerp)

b. Right to have the holder of parental responsibility informed

i. Legal overview

In the Belgian legal framework there are no references to the right of the holders of parental responsibility to be informed about the rights of the child. There are however some references to the rights of parents to be informed of the procedure, which indirectly will inform them of the rights of their children.

Information provided by the police

At **police** level, the holder of parental responsibility is to be informed of the **arrest** of the child and the fact that they are held in police custody. Article 2bis §7 of the Pre-Trial Detention Act stipulates that children **deprived of their liberty** have the right to have another person informed of their arrest. This

²⁷ A youth lawyer and a non-legal practitioner.

could be the holder of parental responsibility, but this could also be another person of the child's own choosing. There are **no legal provisions** detailing reasons why parents should **not be informed**.

Information provided by the prosecutor

In the Belgian legal system, it is possible for the prosecutor's office to decide not to bring a case to court, but opt for a **prosecutorial measure**. The Federal Youth Act consequently stipulates that the holders of parental responsibility must be informed of all the steps of the procedure at the prosecutor's office. Reference can be made e.g. to Article 45quater Federal Youth Act, which requires the prosecutor to **equally inform the child and the persons holding parental responsibility** about the possibilities of mediation. **No reference** is made to reasons **why not** to inform the holders of parental responsibility of these possibilities. In addition to the Federal Youth Protection Act, the regional instruments provide for additional information rights for the parents. These provisions are phrased as rights for the parents rather than rights for the child.

Information provided by the youth court

Article 46 Federal Youth Protection Act stipulates that a subpoena should not only be addressed to the child involved, but also to the holders of parental responsibility. Article 50 Federal Youth Protection Act stipulates that the judge will inform the holders of parental responsibility of the fact that a case against their child is **pending to allow them to be present** at the hearing. No other provisions about the rights of parents to be informed about their own rights or the rights of their children are included.

Information about the execution of sentences

The overarching federal legislation does not refer to parents having the right to be informed about the fact that a sanction involving deprivation of liberty will be executed. The legislator acted upon the assumption that the parents would be present in court. Only in regional legislation of Wallonia, this caveat is tackled. The Art 60 §3 **Walloon Decree** indicates that when children are deprived of their liberty (in the context of a sentence execution and thus beyond pre-trial detention), the parents will be provided with a **copy of the house rules** that apply in the facility the child is brought to. In the other regions this is also common practice, but there is no enforceable legal basis.

ii. Informing the holders of parental responsibility in practice

All interviewees either acknowledged that there is no comprehensive legal framework informing the holders of parental responsibility of the rights of their children, or indicated not to be aware of such legal framework. The interviewees did however shed some light on the extent to which fragmented provisions exist and certain practices have developed.

Information about the arrest and subsequent procedures

All interviewees agree that the police should inform the parents **if their child is arrested**.²⁸ However, not all interviewees are on the same page about giving information about **the offences** allegedly

²⁸ There is a discussion in literature about the privacy of children towards their parents and whether or not it should be considered that children have the right not to have their parents informed of the arrest. However, none of the interviewees supported this idea.

committed by the child, and voiced their concern about the lack of clear rules about this.²⁹ In practice a lot depends on the individual police officer who contacts the parents. In general, when informing the parents about the arrest, there is **no obligation** to also explain to the parents what the **procedure** is like and which **procedural safeguards** the child (and parents) have. The amount of **other additional information** that is provided, **depends on the individual police officer**. A police officer and a prosecutor indicated that in practice, police officers who specialise in youth affairs, such as youth inspectors, usually provide more information, not only about the case, but also about the rights of the child.

“The only thing that is mandatory is that we have to say that the child is with us and that we will contact the parents when it has been decided what will have to happen with the child. I think that is what always happens by default. Anything else depends on the police officer involved. It is not discussed during training and it is not included in the rules either. I will let them know that there will be an interrogation, that there will be a lawyer present, that they can contact me if they have further questions. I tell them that it is possible that a preliminary hearing, that they will be invited for that, that they have to make sure to have their phone with them, because sometimes it can happen very quickly that the interrogation is finished and an hour later there is already a preliminary hearing at the juvenile court.” (Police officer, Ghent)

“Het enige wat verplicht is, is dat wij moeten zeggen dat de minderjarige bij ons is en dat we terug contact zullen opnemen als wij een beslissing hebben over wat er verder zal gebeuren. Ik denk dat dat standaard altijd gebeurt. En al de rest is opnieuw persoonsgebonden, bij ons dan, ik denk dat, het wordt niet in de opleiding vermeld, dat wordt ook niet ook niet in de procedure. Dat is persoonsgebonden, je kan daarbij zeggen van hoe, als je dan zegt van 'Je weet dat er een verhoor zal zijn, dat daar een advocaat zal bijzitten, weet van dat is onze contactgegevens voor als je nog verdere vragen hebt, bel ons maar. Het kan zijn dat er een voorleiding volgt, daarvan zullen jullie uitgenodigd worden, dus maak dat je zeker jouw telefoon bij hebt, want dat kan soms vlug gaan dat het verhoor afgesloten is en dat er een uur later al een voorleiding bij de jeugdrechter is.” (Police officer, Ghent)

Information about the police interrogation

Officially regulated **written information** provided to parents only relates to the **police interrogation**. In practice **this depends** on how and when the interrogation is organised. If the child is interrogated immediately upon the arrest, the parents will not receive any written information and are dependent on the information provided by the police officer. If the child is allowed home and **invited** to present him/herself for an interrogation at a later point in time, the parents will be able to either read in on the information annexed to the invitation for the interrogation, or receive their own copy. Sometimes lawyers also send letters with information. Two lawyers and a police officer testify that – in their

²⁹ The only ‘privacy’ argument that was supported by some of the interviewees related to the nature of the offences. Some interviewees argued that use of drugs can be considered problematic in some families and might result to physical violence towards the child. The same was argued in relation to sexual offences. Police officers argued that this appreciation can only be done by police officers who already know the child and the community and that this cannot be required to become common practice.

experience – even when information is only addressed to the child, in reality, parents very often open these letters and are informed in that way.

“Yes, in practice it is the parents who open the letters. I always send a letter to the child explaining everything. If someone calls, it's always the parents. So in practice, it is often the young people who pass on the letters to the parents, or the parents who open the letters. And if the parent is called for an interview, it is often a copy of the invitation letter that their child has received.” (Youth lawyer, Antwerp)

“Ja, in de praktijk zijn het de ouders die de brieven opendoen. Ik stuur altijd een brief naar de minderjarige met de uitleg wat alles inhoudt. Als er dan iemand belt, zijn het altijd de ouders. Dus in de praktijk zijn het vaak de jongeren die de brieven doorgeven aan de ouders, of de ouders die de brieven opendoen. En als de ouder opgeroepen wordt voor een verhoor, is dat vaak een kopie van de oproepingsbrief die hun kind gekregen heeft.” (Youth lawyer, Antwerp)

Information about court sessions

Two police officers and four prosecutors stress that parents should also be informed by the police **if their child is brought before the juvenile court**. However, in practice parents are not always informed. One of the interviewed prosecutors argues that because of his/her experience with parents not being informed (yet) by the police, he/she started actively monitoring it.

Information about the general conduct of the proceedings

In general, it is argued that parents should consult their own lawyer if they have questions regarding the proceedings. In theory the parents should consult their own lawyer, i.e. a different lawyer than the lawyer assisting their child. The Belgian youth **lawyers** in this study **differ** greatly in their approach on informing the parents. One youth lawyer insists that he/she does not inform the parents, another one only informs the parents about the continuation of the procedure and yet another one discusses the file with the parents. One youth lawyer stresses that it is not allowed to discuss any substantive issues without the child's consent, referring to his/her professional secrecy.

“The parents want to know everything there is to know. They sometimes try to hire lawyers for the children whom they then pay in the hope of knowing everything. It is not my job to inform the parents. It is only my job to inform the children as best I can. Because there are many other services, the social service, the judge can tell the parents everything, the public prosecutor is there. It is not up to us to inform the parents. I don't do that and I can't do that. The child often does not want things to be said. If I did that, I would be violating professional secrecy.” (Youth lawyer, Antwerp)

“De ouders willen alles weten wat er te weten valt. Ze proberen soms advocaten in te schakelen voor de minderjarigen die zij dan betalen in de hoop alles te weten te komen. Het is niet mijn taak om de ouders in te lichten. Het is enkel mijn taak om de minderjarige zo goed mogelijk te informeren. Want er zijn veel andere diensten, de sociale dienst, de rechter kan vanalles vertellen aan de ouders, parket is er. Men moet ons de informatie van de ouders niet in de schoenen schuiven. Dat doe ik niet en dat kan niet. De minderjarige wilt vaak niet dat er dingen

gezegd worden. Als ik dat zou doen bega ik een fout tegen het beroepsgeheim. Dat kan niet en dat mag niet.” (Youth lawyer, Antwerp)

Specialists working in **social work**, such as the consultants of the social service of the juvenile court, often **involve the parents** immediately. The importance of involving the network (including but not limited to the parents) is strongly emphasised. The consultant of the social service of the court stresses that in practice, the parents receive **the same information as the child**. The social worker, a judge and the consultant refer to **brochures** that are available. The judges questioned however, whether handing out the brochures is a standard practice.

“So I go over the facts that have been established, I tell them that their son or daughter has to appear in court for fact A, B, C and what is going to happen, what they can expect from the juvenile court. So basically all the information that is given to the child is also given to the parents.” (Consultant)

“Dus ik overloop met hen de feiten die gepleegd zijn, ik zeg dan dat zoon of dochter voor feit A, B, C voor de rechter moet verschijnen en wat er gaan gebeuren, wat ze mogen verwachten van de jeugdrechter. Dus eigenlijk alle informatie die aan de jongere gegeven wordt, wordt ook aan de ouders gegeven.” (Consultant)

iii. Having a nominated/designated person informed

Eight interviewees indicate that very **little use is made of a support person**.³⁰ Two of the interviewees stated that the right to a trust person is **not yet clearly legally embedded** in Belgium.³¹ One of the juvenile judges and a police officer state that this little use may be because children are **not informed about this** by their lawyer.

“What really strikes me is that very few support persons come to the courts. Perhaps that is because it is not emphasized enough by the lawyers that that is also possible, a support person.” (Judge, Antwerp)

“Wat me echt opvalt is dus dat er heel weinig vertrouwenspersonen meekomen naar de rechtbanken. Misschien komt dat omdat het nog onvoldoende wordt benadrukt door de advocaten dat dat ook kan he, een vertrouwenspersoon.” (Judge, Antwerp)

Another reason cited by a juvenile judge is the fact that the children have **no social network** where they can seek a trust person.

“The drama is: one of the reasons why there are not so many support persons is because our children have little network.” (Judge, Antwerp)

“Het drama is: één van de redenen waarom er niet zo veel vertrouwenspersonen zijn, is omdat onze jongeren weinig netwerk hebben.” (Judge, Antwerp)

In light thereof, one of the interviewed consultants of the social service of the courts states that upon request they actively look for a suitable support person. The consultant indicates to **prefer a person within the close social network of the child** (e.g. neighbours, friends, family, teachers and trainers) because official counsellors and care providers are only temporarily in the child's life. A support person can be anyone. Examples given are a football coach, an older sibling, teachers, aunts, neighbours, individuals from religious communities to volunteer organizations and so on. It is important that this person knows the child, is aware of the situation and has something to offer the child in the form of support. The social worker stressed that their colleagues always seek to **actively involve this person**.

One of the social experts points to the danger that persons within the network can be influenced by the parents. **The public prosecutor's office** has the **decision-making power** to approve a support person. Moreover, one of the prosecutors indicates to have noticed that among some police officers a practice has developed of running the person through the **General National Database** to check whether they appear in any investigations. One of the police officers acknowledges that indeed databases are checked and inquiries are made to get some more insight into the relationship between trust person and child.

³⁰ Two judges a lawyer, three prosecutors and two non-legal experts.

³¹ A prosecutor and a non-legal expert.

iv. Involvement of parents or designated persons in the criminal proceedings

Police views on parental involvement

To begin with, it seems that **the police officers** prefer that the **parents are not present during an interrogation** because children can then **speak more freely**. Another police officer stated that children sometimes indicate that they do not want their parents present. For that reason, one of the police officer states that parents can be a **disturbing factor** both for the police officer as well as the child, because parents at times try to answer the questions or hinder the child in talking freely .

The interviewed police officers agree that it is mainly the parents who want to be there. They agree that it can be a valid option to have the parents present, but indicate that nine out of ten interrogations are without the parents. If the parents are present during a questioning, the police officers will make clear that they may **not intervene**.

"We prefer not to do that and we usually say so. We ask that we do the interview without the mum or the dad, because then they can speak more freely. That usually works out well. We ask that we do the interview without the mother or father, because that gives them more freedom to speak, and it's usually successful. [...] If we ask them to do it without their mother, it is usually the mother or father who insists on being there, and not actually the child, we have already noticed. 9 out of 10 of the video hearings are without the assistance of a counsellor. We do always say that if, during the interview, you find that you would rather have mum or dad present, you can ask and we will bring them in for the interview. And that is actually never done." (Police officer, Antwerp)

"Wij hebben dat liever niet en we zeggen dat ook meestal. We vragen dat we zonder de mama of de papa het verhoor doen, omdat ze dan vrijer kunnen spreken. Meestal lukt dat ook wel. Nog een persoon in dat verhoorlokaal en dan moeder of vader gaat sowieso invloed hebben op de minderjarige, ook al zegt ie niks. Voor ons onderzoek is het altijd beter dat die er niet bij zit. [...] Als we vragen of ze het willen doen zonder mama, is het meestal de moeder of vader die er per se bij wilt zijn, en eigenlijk niet het kind hebben we al gemerkt. 9 op 10 van de videoverhoren zijn zonder bijstand van een vertrouwenspersoon. We zeggen wel altijd dat als je tijdens het gesprek merkt dat je liever hebt dat mama of papa er bij is, dan mag je het vragen en dan halen we ze er nog bij het gesprek. En dat wordt eigenlijk nooit gedaan." (Police officer, Antwerp)

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

(Police officer, Ghent)

"Ik zeg dan : Meneer, mevrouw jullie mogen aanwezig zijn, maar ik wil jullie niet horen. Ik ga mij naar uw zoon of naar uw dochter richten. [...] Het is ook leuk en makkelijker voor mij en zeker ook voor uw kind dat u niet tussenkomt, want de ouders durven soms wel, die denken ook al veel verder na, die kleine zegt van: "Ja, ik heb dat gedaan", dan gaan die ouders zeggen

van: "Ja maar, hij heeft u eerst geslagen". Dus dat is echt wel een storend element, waardoor dat jongeren soms het noorden kwijt zijn. Dus ik leg dat ook heel duidelijk uit: 'Je mag aanwezig zijn. Ik ga mij niet naar u richten, ik richt mij naar uw zoon of uw dochter en ik wil u ook niet horen'." (Police officer, Ghent)

Youth lawyer views on parental involvement

Subsequently, **Youth lawyers** indicate **not to be in favour of the parents being present** during the confidential consultation or interrogation. One of the youth lawyers states that children often do not dare to indicate that they do not want their parents involved. Another youth lawyer is of the same opinion. Moreover, this interviewee is not in favour of parents as confidants because it is **difficult to determine whether it is at the child's request**. Sometimes the **parents impose themselves** as a trust person but the child does not dare to speak up. During a confidential consultation, things are often entrusted of which the parents are not aware. In addition thereto, one of the youth lawyers states that some judges **blame the parents** for their child's behaviour.

"Yes, you do see what the judge thinks of the role of the parents. Sometimes the tone towards the parents is somewhat accusatory. But I find that a bit difficult sometimes. Often they can't really do anything about it. They are then confronted with the facts that their children have committed, but they have not committed them." (Youth lawyer, Ghent)

"Ja, je ziet dat inderdaad wel dan wat de rechter vindt van de rol van de ouders. Soms is de toon naar de ouders toe wel wat verwijtend. Maar ik vind dat soms toch een beetje moeilijk. Vaak kunnen die er ook niet echt aan doen he. Die worden dan geconfronteerd met de feiten die hun kinderen hebben gepleegd, maar ze hebben ze zelf niet gepleegd he." (Youth lawyer, Ghent)

That youth lawyer considers this unjustified and believes that this can only be done in a case of disturbing parenting situations.

Prosecutors' and judges' views on parental involvement

In addition, one of the juvenile judges indicates that it is **important that the parents are involved and present** at the court hearing. The social service of the juvenile court should therefore make all efforts to involve the parents. Judges and prosecutors acknowledge that if the parents are present at the court hearing, they are always **allowed to speak**. Both juvenile judges clarify that this is **important to take the context** into account. In addition, also a prosecutor acknowledges that the role and position of the **parents plays a role** when a decision is taken on how to react to the offence committed. Moreover, the judges argue that they consider it to be an added value if trust persons are involved. The idea behind this, is that the involvement of trust persons is an indication of the width of the network the child can rely on.

"For me, an important criterion for placing a child under the supervision of the juvenile court is: 'the lack of an adequate parental environment'. I take into consideration whether the problem is to be found in the why the parents take on the upbringing of the child, or whether the problem is to be found in the juvenile delinquent him/herself. That is still decisive for me.

Let me put it another way: parents who react adequately themselves, capable parents, are capable enough to sanction their child. You don't need a court for that.” (Prosecutor, Antwerp)

“Voor mij is een belangrijke maatstaf om een jongere onder toezicht van de jeugdrechter te plaatsen: ‘het gebrek aan een adequaat ouderlijk milieu’. Of dat het nu een verontrustende opvoedingssituatie is of een jeugddelinquent. Dat is voor mij nog altijd bepalend. Ik zal het anders zeggen: ouders die zelf adequaat reageren, bekwame ouders, die zijn zelf in staat genoeg om hun kind te sanctioneren. Daarvoor heb je geen rechtbank nodig.” (Prosecutor, Antwerp)

The **consultant** of the social service of the juvenile court, states that ideally the **parents are involved** throughout the process, but unfortunately some parents do not want to be involved. Mirroring the importance that is attributed to the role of the parents and possibly trust persons, one of the non-legal experts cites that it is her experience that it is disadvantageous for the child if parents are not present at the hearing.

c. Audio-visual recording of questioning and due verification of written records

i. Legal overview

Today, **no legal basis** is available **granting** children (suspected or accused of having committed a crime) **the right** to have their interrogation audio-visually recorded. This does not mean however that in practice child offenders are never audio visually recorded. Firstly, pursuant to Article 112ter CCP a **prosecutor or an investigative judge can order** that an interrogation be audio-visually recorded. The reason for that decision should be included in the meeting minutes. The prosecutor and investigative judge are free to develop whatever argumentation they see fit. Secondly, in some judicial districts, the police have developed a practice of audio-visually recording their interrogations of children suspected or accused of having committed an offence.

When being subject to an interrogation however, the interrogated person has the right to ask that the questions and answers are **noted in verbatim on the meeting minutes**.³² The meeting minutes will be reviewed and signed by both the lawyer and the child. Two interviewed lawyers spontaneously referred to the fact that they are allowed to add any comments he/she sees fit about the way the interrogation was conducted and/or the way the meeting minutes were drawn up. One of the judges acknowledged that the minutes of the interrogation will not be admissible as evidence if these rules are not followed. When being subject to an audio-visually recorded interrogation, the interrogated person additionally has the right to indicate afterwards, which parts of the recording he/she wants to see **transcribed in verbatim**. This transcript should be provided as soon as possible.

In Belgium a **discussion is ongoing as to the desirability of introducing a right** to have interrogations of children (suspected or accused of having committed on offence) audio-visually recorded, at least introduce a more general and widespread practice thereof.³³ The introduction thereof could

³² Article 47bis of the Belgian Criminal Procedural Code.

³³ One of the political parties has voiced its ambition to introduce a more general obligation to audio-visually record interrogations of children. HLN (2021), ‘Open Vld wil verplichte audiovisuele opname bij verhoor van gevoelige feiten’, 3 March 2021. www.hln.be/binnenland/open-vld-wil-verplichte-audiovisuele-opname-bij-verhoor-van-gevoelige-feiten~ad09b9ed/

constitute the extension of the legal basis for the audio-visual recording of children who have fallen a victim of crime. For this category of children, a specific chapter was introduced in the Belgian criminal procedural code, Chapter VIIbis Hearing of children and vulnerable adults victim of or witness to certain offences.³⁴ The audio visual recording of children has a significant influence on the interrogation, as the rules and requirements go beyond merely installing a camera. Specialised teams have been set up, called TAM – Team Audiovisual recording of Minors, who conduct the interrogations using a specific technique: no questions are asked, but the child is encouraged to talk about their experience, no eye contact is allowed between the child and any other adult (including the youth lawyer). Because of its link with this specific technique, the introduction of the use thereof in youth delinquency cases is said to be inefficient which is why it has not yet been introduced. Two police officers and a non-legal expert have argued that this type of interrogation is **not suitable for a suspect**, as they would not be allowed to ask direct questions. Two lawyers have argued that the prohibition to seek (eye) contact with their clients would effectively undermine their ability to assist the child. More fundamentally, two lawyers have argued that it is **dangerous** to draw conclusions about someone's behaviour during an interrogation. This concern was echoed by a non-legal expert. One police officer also questioned the impact on the willingness of the child to talk.

ii. Implementation in practice

Ten interviewees confirm that audio-visual recording of interrogations is rather **rare** in Belgium.³⁵ One of the rather experienced youth lawyers indicates to have **never seen** an audio-visual recording of an interrogation in cases of juvenile delinquency. When it does happen it is in case of **very serious offences** such as rape. A police officer and a prosecutor explain that it is the public prosecutor who requests the audio-visual recording of the questioning.

Capacity³⁶ issues (the interrogations take much longer), **infrastructure**³⁷ (not all police stations are sufficiently equipped) and lack of **trained staff members**³⁸ (the technique as implemented in Belgium comes with a completely different way of interrogation) are commonly raised as explanations.

“It [the issue about the rare use of audio-visual recording of the questioning] is indeed purely a capacity issue. The infrastructure is not available in all police stations, and it's really a separate and specific interrogation technique. You have to be trained for it, and that is a really tough training. You have to be careful with suggestive questions and actually you are not even allowed to ask questions. That's quite tough, you know. And the police don't always have time for that either.” (Judge, Antwerp)

“Het [de kwestie over het weinige gebruik van audiovisuele opname van het verhoor] is inderdaad puur een capaciteitsvraagstuk. De infrastructuur is niet overal aanwezig en het is ook echt een afzonderlijke en specifieke verhoortechniek. Je moet daar een opleiding voor gevolgd hebben en dat is toch echt wel een zware opleiding. Je moet dan opletten met

³⁴ Article 91bis CCP holds a list of offences for which such an audio visual recorded hearing is available. Reference is made to hostage taking, voyeurism, sexual assault and rape, grooming, prostitution, pornography, assault, homicide, poisoning, genital mutilation, criminal negligence, neglect, deprivation of food and shelter, abduction, trafficking in human beings and people smuggling.

³⁵ Two judges, three prosecutors, two police officers and three lawyers.

³⁶ Mentioned by a judge, a police officer, a prosecutor and a non-legal expert.

³⁷ Mentioned by a judge, a lawyer, a police officer a prosecutor and a non-legal expert.

³⁸ Mentioned by a judge, a lawyer, a police officer and a prosecutor.

suggestieve vragen en eigenlijk mag je niet eens vragen stellen. Dat is toch wel pittig hoor. En de politie heeft daar ook niet altijd tijd voor ook hé.” (Judge, Antwerp)

“I think a combination of both It [the issue about the rare use of audio-visual recording of the questioning]. Infrastructure, and the fact that the people who do the audiovisual interrogation also have to have had specific training. Plus the guidelines for an audiovisual interrogation are a lot stricter. First you have to spend half an hour explaining to the child why we are doing this, where the cameras are, what will happen. So there's a lot more administrative work involved.” (Police officer, Ghent)

“Ik denk een combinatie van beide. Én infrastructuur, én het feit dat de mensen die een audiovisueel verhoor doen, dat die ook een specifieke opleiding moeten gevolgd hebben. Plus de richtlijnen voor een audiovisueel verhoor zijn dan nogmaals een pak strenger. Dan moet je eerst een half uur aan de minderjarige uitleggen waarom we dat doen, waar de camera's hangen, wat er zal gebeuren. Dus administratief komt er nog een pak meer werk bij kijken.” (Police officer, Ghent)

The interviewees are **not on the same page** as regards the **desirability** to consider introducing a **right** to audio-visual recording of interrogations. A judge, a lawyer, a police officer and a non-legal expert indicate to see an added value for the correct assessment of e.g. the **veracity** of the child's testimony (e.g. by showing the recording to a psychiatrist)³⁹.

“Audio-visual interrogation really does have an added value. And that we as public prosecutors could then watch it. It is completely different to be able to see an interrogation, than when you only read it on paper. When you have seen it on DVD, it's different than when you read it. I also notice that when I watch an interrogation, I get a totally different picture.” (Prosecutor, Brussels)

“Audiovisueel verhoren heeft echt wel een meerwaarde. En dat wij als parketmagistraat dat dan zouden kunnen bekijken. Het is helemaal anders om een verhoor te kunnen zien ook, dan wanneer je het alleen leest op papier. Als je het hebt gezien op DVD is dat toch anders dan dat je het leest. Ik merk ook wel dat wanneer ik een verhoor bekijk, dat ik dan een totaal ander beeld zal krijgen.” (Prosecutor, Brussels)

“It is true that you can judge the child much better if you also see it, of course. Then you can better judge what kind of person they are, what attitude they have. I often feel that way when I read official reports for a cabinet meeting, for example. Then I see during the interrogation that there are certain passages about which I wonder, or where I wonder what the attitude of the young person would have been. And then it's a pity that I wasn't there, and that I can't see it.” (Judge, Antwerp)

“Het is inderdaad zo dat je de minderjarige veel beter kan inschatten als je die ook ziet natuurlijk. Dan kan je beter beoordelen wat voor iemand het is, welke houding die aanneemt. Ik heb dat toch vaak als ik PV's lees voor een kabinetbespreking bijvoorbeeld he. Dan zie ik al in het verhoor dat er toch bepaalde passages zijn waar ik me vragen over stel, of waar ik me

³⁹ Mentioned by a police officer.

dan afvraag wat de houding van de jongere zou zijn geweest. En dan is het jammer dat ik er niet bij was, en dat ik het niet kan zien.” (Judge, Antwerp)

d. Discussion of findings

Right to information

The right to receiving information about the context of the police **interrogation** is well embedded in a solid legal framework and written information is usually provided to children. However, it is clear that the added value of this **written (but overly complicated) information** is undermined in absence of an oral explanation. The efforts of the police seem to vary significantly. At the level of the prosecutor or the youth judges, no standardised information **brochures** are available. There too, the **efforts vary significantly** between individual actors.

The most important actor to provide information to the child, is the **youth lawyer**. This finding supports the argument that training of youth lawyers is of utmost importance.

Right to have the holder of parental responsibility informed

The rights in relation to the holders of parental responsibility are not well elaborated on. In general it is clear that parents should be informed **when the child is deprived of its liberty**, be it in case of an arrest, a pre-trial detention or following the execution of a youth law reaction involving deprivation of liberty. There are very little legal provisions detailing what parents should be informed of.

The interviewees often shifted between the **right of the child** to have his/her parents informed and the **right of the parents** to be informed about what is happening with that child. This shift is caused by the dual position parents have in youth justice procedures. On the one hand, they are the parents of the child and in that capacity best placed to support the child throughout the procedure. On the other hand they are civilly responsible for that child and in that capacity a party to some parts of the procedure.

Right to an audio-visual recording

In general, audio-visual recording of the interrogation of child suspects is very rare in Belgium. When audio-visual recordings of the interrogations are made, these concern serious offences such as sexual offences. For other offences, it is rarely or never used. It is certainly **not a standard practice**. According to the interviewees, this is due to practical matters. The causes of the low usage mentioned in the interviews are therefore **a lack of infrastructure, trained police officers, time and budget**. Opinions on its usefulness are divided among the interviewees. The advantages mentioned by a juvenile judge and a prosecutor are that you can see the child's body language and attitude. It gives a different image of the child. This allows for a better assessment of the child. Disadvantages mentioned are that there is a lot of administration involved. It is more expensive and takes more time which slows down the process. It is also indicated that children feel less comfortable with an audio-visual recording. Next to that some interviewees state that the technique is not suitable for offenders.

C.4 The right to be assisted by a lawyer and legal aid

a. Legal overview

The legal assistance provided to children is free of charge. Lawyers will be appointed by the bar association and the legal aid office of a specific bar. The lawyers are remunerated by the Ministry of Justice based on an intricate coding system of performances that need to be attested. The legal bases governing the right to be assisted by a lawyer can be summarized as follows:

- **Police interrogations** – Since the entry into force of the *Salduz-bis* Law on 27 November 2016⁴⁰, which provides for the first time that children interrogated have to be assisted by a lawyer, the lawyer is given an active and participative role during the interrogation of their client. For children deprived of their liberty in a pre-trial context a specific provision applies. Article 2bis §5 Pre-Trial Detention Act stipulates that the person who is to be interrogated, has the right to be assisted by his/her lawyer during interrogations.
- **Investigative judge or Prosecutor** – Mirroring the rights enshrined for legal assistance during interrogation, a complementing circular extends this right to ‘hearings’ at the level of the public prosecutor⁴¹ or the investigative judge.⁴²
- **Youth judge** – Article 52bis and Article 54bis Federal Youth Law stipulate that children are to be accompanied by a youth lawyer whenever they appear in front of them. The Federal Youth Act clearly states that where a person who is less than 18 years of age is a party in the procedure and has no lawyer, they will be assigned one.

b. Assistance by a lawyer and legal aid

i. Being informed about the right

No issues were raised with regard to **informing the child of their right to be assisted by a lawyer**. The interviewees confirmed that – notwithstanding some individual exceptions acknowledged by two lawyers and one police officer – children are properly informed about this right. When discussing the importance of this right, three police officers, all youth inspectors, indicate to visit or call the child and their parents and to explain this right orally.

“I am speaking specifically for the youth inspector – How I did it, is that I always went to see them in person, to hand over the invitation to the child and I had a separate copy for the parents [...] And I also took the time to explain the procedure. Because, in the fact, many parents are shocked when they hear: 'Look, a lawyer has to be present'. Those parents are immediately quite defensive, saying: 'Look, this is my son, I decide about it, there's no need for a lawyer'. And it is difficult to explain that this is the procedure, that it is required by law, even for minor offences, that a lawyer needs to be present.” (Police officer, Ghent)

“Ik spreek dan specifiek voor de jeugdinspecteur – in mijn geval was het zo, ik ging altijd persoonlijk de uitnodiging afgeven aan de minderjarige en apart aan de ouders [...] En ik nam dan ook de tijd om de procedure uit te leggen. Want het blijft toch een feit dat vele ouders

⁴⁰ Salduz-bis Law

⁴¹ Article 47bis §6 (6) Belgian Criminal Procedural Code

⁴² Article 49 and 54 Federal Youth Law

enorm schrikken als ze horen van: 'Kijk, er moet een advocaat bij zijn.' Die ouders die staan dan meteen op hun achterste poten, van: 'Kijk, het is hier mijn zoon, ik beslis daar over, daar moet helemaal geen advocaat bij zijn'. En het wordt moeilijk uitgelegd dat het de procedure is, dat het wettelijk verplicht is, ook voor kleine feiten, dat er een advocaat bij is." (Police officer, Ghent)

ii. Mandatory involvement of lawyers from the very beginning

Assistance by a lawyer is **mandatory for children** in Belgium. Children cannot waive their right to legal assistance. In particular, no hearing shall take place without the assistance of a lawyer. This also means that a lawyer is **present at the first questioning** by the police.

"From the beginning they have the right to a lawyer, they are there from the first minute onwards." (Judge, Antwerp)

"Van in het begin hebben ze recht op een advocaat, die zijn er ook echt wel van de eerste minuut bij." (Judge, Antwerp)

One of the police officers indicates that this right is not always to the child's advantage. It can lead to a deprivation of liberty that lasts longer than necessary because of the need to wait for the lawyer.

"Problems arise when we have had to detain too many children [...], In those situations you run into the problem that you actually have to deprive children of their freedom for much longer because of their higher legal guarantees, that lawyer, then that is actually something quite absurd. They are detained longer, which goes against their rights, but actually the reason for that is those higher legal guarantees, that obligatory assistance of a lawyer, so on a Friday evening you don't find many lawyers, so then you have to go somewhere, and if you don't have enough information you can't filter who you can let go and you can't ask those guys any questions, so you can't really do much." (Police officer, Gent)

"Wanneer doet er zich een probleem voor, dat is als we teveel minderjarigen hebben moeten weerhouden, [...] dan bots je op het probleem dat je eigenlijk minderjarigen veel langer moesten van hun vrijheid beroven omwille van hun hogere rechtswaarborgen, die advocaat, dan is eigenlijk iets heel absurd iets. Ze worden langer vastgehouden, wat ingaat tegen hun rechten, maar eigenlijk de reden daarvan is die hogere rechtswaarborgen, die verplichte bijstand van een advocaat, dus op een vrijdagavond vind je weinig advocaten, dus dan moet je ergens, en als je niet genoeg informatie hebt kan je ook niet filteren wie dat je mag laten vertrekken en je mag ook geen vragen stellen aan die gasten, dus je kan eigenlijk niet veel doen." (Police officer, Gent)

When no youth lawyers are available, non-specialist lawyers are called in. A lawyer, a police officer and a prosecutor, all come to the conclusion that this mainly occurs at weekends or at night in judicial districts where fewer youth lawyers are available. Two police officers state to never or rarely experience problems in finding a youth lawyer, not even in the weekend. Analysis reveals that there are important regional differences.

"We work with a list of lawyers that are on call, so I am on call for a week. You are called by a number that you cannot call back. So if I'm in the shower and haven't been able to answer the

call, I can't call back five minutes later. They then continue to search until they find a lawyer on call. Normally, the first rule is to stay within the district. If that doesn't work, it is also possible that they go outside the judicial district, and in the worst case scenario, it is an ordinary lawyer and not a youth lawyer who assists the young person during the first interrogation, but that is only for the interrogation, you won't have that at a court hearing.” (Youth lawyer, Antwerp)

“Wij werken met een permanentielijst, dus ik ben dan een week van wacht. Je wordt gebeld door een nummer waar je niet naar kan terugbellen. Dus als ik onder de douche sta en de oproep niet heb kunnen beantwoorden kan ik niet vijf minuten later terugbellen. Men zoekt dan voort en men blijft zoeken naar een advocaat van wacht, en dus tot er een advocaat gevonden wordt. Normaal is het eerst de regel om binnen het arrondissement te blijven. Als dat niet lukt, kan het ook zijn dan men buiten het gerechtelijke arrondissement gaat, en in het slechtste geval is het dus een gewone advocaat en is het dus geen jeugadvocaat die de jongere bijstaat tijdens dat eerste verhoor, maar dat is dus alleen maar bij dat verhoor dan, je gaat dat niet hebben bij een zitting ten gronde.” (Youth Lawyer, Antwerp)

A **distinction** should be made between children who **are arrested and immediately questioned** and those who are **invited for questioning at a later date**. In the first case, it will be the police who call upon a youth lawyer. In the second case of an interrogation at a later stage, differences can be observed between different police districts. In certain districts, the police themselves arrange for a youth lawyer through permanence. In other zones, children and their parents are expected to arrange for a youth lawyer themselves, as was explained by one lawyer and two police officers. When children arrive at the police station without a lawyer, according to two of the interviewed police officers, the questioning is either postponed or a lawyer is called in to come as quickly as possible.

“It often happened that the parents arrived anyway and then said: 'Yes, we tried, but we couldn't find anyone' and then they are standing in front of you without a lawyer. And then you have to say either: 'Look, I'm going to send you back home' or 'I'll try to get you a lawyer, but then you're going to be waiting here for at least three hours'. That was actually not practical. So I changed the way I approached this and I would contact the Bar Association at my own initiative and say 'look, I have an interview with a child at that time that day, please provide a lawyer'. And that always worked out.” (Police officer, Ghent)

“Veelal gebeurde het dat de ouders dan toch toekwamen en dat de ouders dan zegden van: ‘Ja we hebben het geprobeerd, maar we hebben niemand gevonden’ en dan stonden ze daar toch zonder advocaat. En dan moet je zeggen ofwel van: ‘Kijk, ik ga u terug naar huis sturen’ of ‘ik ga proberen nog een advocaat voor u te pakken te krijgen, maar dan zit je hier zeker drie uur te wachten’. Dat was eigenlijk niet werkbaar. Dus ik nam dan contact op met de balie om te zeggen ‘kijk, die dag om dat uur heb ik een verhoor met een minderjarige, gelieve een advocaat te voorzien’. En dat liep altijd vrij vlot.” (Police officer, Gent)

Essentially, it is the intention that it is **always the same youth lawyer who assists the child**, as one of the lawyers put it. Nevertheless, it happens that the youth lawyer is not available or that the police services do not check whether there is already a lawyer in the picture. In those cases another lawyer is appointed. This leads to discussions about which lawyer should follow up the case, brought up by a

judge, two lawyers and two no legal experts. Apart from the problems mentioned, those five respondents said that the permanence system works quite well.

“The idea is that it should always be the same lawyer, but in practice this is not always possible to make that happen, especially when it is a matter of an urgent court session. When it comes to these kinds of referrals, yes, sometimes it will be a lawyer who is less familiar with the child and the previous case. And then you may hear a child say, 'yes, but I don't really want you as a lawyer'. But if the regular youth lawyer is not available at that time, then of course we have no choice. It sometimes happens that the youth lawyer is substituted by another youth lawyer the child does not know.” (Judge, Antwerp)

“Het idee is wel dat het altijd dezelfde advocaat is, maar in de praktijk is het zo dat dat niet altijd te organiseren valt, zeker niet wanneer het om een dringende voorleiding gaat. Als het om dat soort voorleidingen gaat, ja dan zal het al eens een advocaat zijn, die de jongere en het voorafgaande dossier minder goed kent. En dan hoor je wel eens een jongere zeggen, ‘ja maar ik wil u eigenlijk niet als advocaat’. Maar als de vaste jeugadvocaat niet beschikbaar is op dat moment dan kunnen we natuurlijk niet anders. Dat gebeurt het wel eens dat er een vervanger is.” (Judge, Antwerp)

iii. Legal assistance free of charge

Moreover, in Belgium, **legal aid from a lawyer is free for children** under eighteen in order to **avoid conflict of interest**. The interests of the parents are not necessarily equal to those of the child. One of the lawyers explicitly linked this to the importance that youth lawyers can maintain their **neutrality** and **independence**. When parents pay for their children's lawyer this would, according to a youth lawyer, open the door to **abuse**. Moreover, a youth lawyer states it is unthinkable that parents could choose their child's lawyer. In addition, another youth lawyer argues that free legal aid is important to gain the child's **trust**. This way, children know that it is their lawyer and not their parents'.

“Look, I only have a short time to gain the trust of the child and with children it is really important to make them feel comfortable, saying “Look, I am your lawyer. Not mum's, not dad's, I'm just your lawyer. I'm not paid by mummy or daddy either”. (Youth lawyer, Antwerp)

“Kijk, ik heb maar een korte tijd om het vertrouwen van de minderjarige te winnen en bij minderjarigen is het echt wel belangrijk om hen te laten voelen, van kijk, "ik ben uw advocaat. Niet die van mama , niet die van papa, ik ben alleen uw advocaat. Ik word ook niet betaald door mama of papa".” (Youth lawyer, Antwerp)

iv. Proceedings without the assistance of a lawyer

One of the juvenile judges indicates that they **never let children appear at court hearings without their youth lawyer**. What does sometimes happen is that, due to time constraints, the juvenile court judge starts the hearing while the juvenile lawyer is still on his/her way. The youth lawyer is then kept informed. One of the social experts confirmed that a lawyer is always present at a court hearing, with the exception of some unusual circumstances.

"I will never, ever, ever... let a child appear before me if they have not first spoken to their lawyer. The only tragedy is that we have a high case load and there are always a lot of children and parents and lawyers we need to see. We do not always have the time to wait until everyone is in the room. So if I know that the lawyer has already seen the child at the occasion of the police interrogation, then I might consider and decide to already start the meeting while the lawyer is yet to come in. But this is exceptional and I will only do it when I talked to the lawyer, know that they are coming and we have agreed that it is OK to start. We will have agreed: 'I'm going to start a bit with my explanation and so on, and come in when you arrive, come in at once'." (Judge, Antwerp)

"Ik zal nooit, nooit, nooit ... een minderjarige bij mij laten verschijnen als hij niet eerst zijn advocaat heeft gesproken. Het enige drama is dat het zo is – omwille van de tijdsdruk van ouders die zitten te wachten en andere zaken die nog moeten verschijnen... - als ik weet dat de advocaat de minderjarige al gezien heeft bij Salduz, dan durf ik al beginnen terwijl de advocaat nog moet binnenkomen. Maar dan is dat altijd wel afgesproken. Dan hebben we afgesproken van 'Meester, ik ga al een beetje beginnen met mijn uitleg enzo, en kom maar binnen als je toekomt, kom maar ineens binnen'." (Judge, Antwerp)

- c. Effective participation of a lawyer
 - i. Different views on 'the best interest of the child'

When it comes to the determining what is the best interest of the child and how to best safeguard it, **three ways** of fulfilling the role of a youth lawyer can be identified.

"You can actually make 3 categories. You have juvenile lawyers who will fight for their client's opinion, without questioning it. They really do have as their philosophy: my client wants this, I will do everything I can to get that point of view across. The second category of lawyers are those who try to clearly get the view of the child across, but still take the opinion of the public prosecutor into account. They then adopt an intermediate position. And then third category of lawyers are those who really play the role of juvenile judge. Who actually do all the work of a juvenile judge. Well, I think some children are rightly disappointed to have such a lawyer. I don't think the role of the youth lawyer is to try to guess what the youth judge is going to do. I prefer the mixed form of the second category." (Prosecutor, Antwerp)

"Je kan eigenlijk 3 categorieën maken. Je hebt jeugdadvocaten die zo onomwonden voor de mening van hun cliënt gaan. [...] Maar echt wel zelf als filosofie hebben, mijn minderjarige wil dit, ik zal er alles aan doen dat dat standpunt in de verf komt. Dan heb je er die zo tussen de twee schipperen, die proberen maximaal de belangen van die minderjarige aan bod te brengen, maar toch ook nog ergens rekening houden bijvoorbeeld met de mening van het parket. En die daar dan een tussenhouding aannemen. En dan heb je er die echt wel jeugdrechter spelen. Die eigenlijk al het werk van de jeugdrechter doen, awel, waarvan ik denk dat sommige minderjarige wel echt ontgoocheld zijn dat ze met zo een advocaat zitten. Ik denk niet dat de rol van de jeugdadvoaat is te proberen te raden wat dat de jeugdrechter gaat doen. Ik heb het eerder voor die mengvorm." (Prosecutor, Antwerp)

A juvenile judge and a youth lawyer indicate that the difference observed by this prosecutor can be brought back to the distinction between the **objective and the subjective interest of the child**. The subjective interest is what the child wants to be defended or the opinion of the child. The objective interest is what is objectively best for the child. **First**, there are interviewees who state that children's lawyers must **defend the child's point of view** or the subjective interest. In that respect, the assistance does not differ greatly from that of adults. Three youth lawyers and a social expert state explicitly that a lawyer cannot say anything in court that the child does not agree with.

"With me it is about the subjective interest of the child. I always tell the children that I have professional secrecy, and that I am the only one in the whole procedure with such professional secrecy. The child indicates what I am allowed to say." (Youth lawyer, Antwerp)

"Bij mij gaat het over het subjectieve belang van de minderjarige. Maar ik zeg hen altijd dat ik beroepsgeheim heb, de enige in heel de procedure. De minderjarige geeft zelf aan wat ik mag vertellen." (Youth lawyer, Antwerp)

Secondly, one of the juvenile judges, a police officer and a prosecutor tend more towards the opinion that the child's lawyer must **defend the objective interest** or the best interest of the child. In fact, lawyers who defend the subjective interest are seen by these interviewees as lawyers without affinity with juvenile law, lawyers who do not have the child's best interests at heart or lawyers who do not play it right. One of the youth lawyers even indicates that other youth lawyers are afraid that they will be criticized for defending the child's point of view. Nevertheless, one of the judges, a lawyer, a prosecutor and a social expert indicate that defending the objective interest against the will of the child, entails the risk that no trust relationship can be established between lawyer and child. Thirdly and finally, there are also two public prosecutors and a social expert who rather choose **the middle ground**.

"You also notice that those lawyers mean it very well with juvenile delinquents.[...] And who also dare to address their underage clients, even during the hearing, who dare to say: "Come on, you must realise that it is not OK, or you must realise that this is serious. Who also play a really good role. A youth lawyer is not the lawyer who has to dispute everything at all costs, as you sometimes see in criminal cases involving adults. Or who wants to plead guilty or innocence. There, you often see lawyers disputing everything or arguing about the procedural elements; that's something you won't see with children. With juvenile lawyers, I think it's important that they don't do that." (Prosecutor, Brussels)

"Je merkt ook dat die advocaten het super goed menen met die jeugddelinquenten. [...] En die ook hun minderjarige cliënten durven aanspreken, ook op zitting zelfs, die durven zeggen van: "komaan, dat moet je toch beseffen dat het niet OK is, of je moet toch beseffen dat het hier menens is". Die er ook echt een goeie rol in spelen. Een jeugadvocaat is niet de advocaat die kei hard koste wat het kost alles moet betwisten, zoals je soms ook ziet in correctionele zaken met meerderjarigen. Of die dan over de schuld of onschuld wil pleiten. Daar zie je vaak advocaten die alles betwisten of die over de procedurele elementen pleiten; dat is iets wat je bij minderjarigen niet zal zien. Bij jeugadvocaten vind ik het belangrijk dat ze dat niet doen." (Prosecutor, Brussels)

ii. Participation in all stages of the procedure

In addition, the results of the study show that youth lawyers feel they **cannot adequately participate in all stages** of the procedure.

To start with, one of the judges and a police officer stressed that youth lawyers are **not supposed to intervene in a questioning** and only monitor the proceedings. This means that lawyers are to keep quiet and only observe what is happening. This is in contrast to the position taken by other interviewees. Three youth lawyers and two police officers expressly indicated that lawyers are given the possibility to have an **active role** during the interrogation. They feel that lawyers should participate – not in asking or answering questions, but in e.g. pointing to unclarities, asking things to be rephrased, verifying whether the child and police officer understood each other. Some police officers clearly prefer an active lawyer, as it will facilitate and speed up the process.

“Lawyers know that in principle they cannot intervene during the interrogation. I do offer them that possibility. I do ask them not to interrupt the hearing immediately by starting to talk, but if necessary, in the meantime when I'm taking notes, I will ask the question: Sir, are there things you want to discuss with your client in the meantime? This happens rarely or not at all.” (Police officer, Ghent)

“Advocaten weten dat zij in principe niet kunnen tussenkomen bij het verhoor. Ik bied hen die mogelijkheid wel. Ik vraag wel van het verhoor niet te onderbreken onmiddellijk door te beginnen praten, maar eventueel tussentijds als ik aan het noteren ben, durf ik wel de vraag stellen van: Meester, zijn er ondertussen zaken die u eventjes met uw minderjarige wil bespreken. Dat gebeurt weinig of niet.” (Police officer, Ghent)

“I know from all my colleagues who work with this target group of young people that we prefer an active lawyer who thinks along with us, because that is also much easier for us.” (Police officer, Ghent)

“Ik weet van al mijn collega's dat met die doelgroep jongeren werken, dat wij liever een actieve advocaat hebben die mee nadenkt omdat dat voor ons ook veel makkelijker is.” (Police officer, Ghent)

One of the juvenile lawyers indicates **not to be involved in any investigative acts** other than interrogations. It is worth to note however that in juvenile cases, other investigative acts such as reconstructions or confrontations, do not take place very often. The problem with effective participation is to be found elsewhere. On a more fundamental level, lawyers indicate that their effective participation is undermined because children are not necessarily assisted by the same lawyer throughout the procedure. Even though children have to be assisted by a lawyer, there is no obligation to contact the lawyer that was previously assigned to the child. In practice, lawyers indicate, it happens all too often that a ‘new lawyer from the list’ will be appointed to assist the child as opposed to putting in the effort to contact the lawyer that has assisted the child in a previous proceeding.

“The lawyers are never informed of such acts of investigation. This is actually not done very often with children.” (Youth lawyer, Antwerp)

“De advocaten worden nooit verwittigd van dergelijke onderzoeksdaten. Dat wordt eigenlijk ook niet zo frequent gedaan bij minderjarigen.” (Youth lawyer, Antwerp)

“The juvenile court itself sometimes does not consider it necessary to call us [juvenile lawyers] even though we are known. They quickly confirm decisions that have been announced without knowing us. [...] There are a lot of decisions where they try to get the child to sign a note saying that you are not coming to the hearing because it is not necessary.” (Youth lawyer, Antwerp)

“De jeugdrechtbank zelf daar vindt men het soms niet nodig om ons [jeugdadvocaten] op te roepen ook al zijn we gekend. Men bevestigt snel beslissingen die ooit zijn aangekondigd zonder ons te daarin te kennen. [...] Er zijn heel wat beslissingen waar men de minderjarige probeert een briefje te laten tekenen dat jij niet naar de zitting komt omdat het niet nodig is.” (Youth lawyer, Antwerp)

At a later stage, one of the juvenile lawyers states **not to be informed about measures imposed by the public prosecutor's office**. Another finding is that a social expert indicates that research has shown that juvenile judges do not attach much importance to the opinion and interventions of the lawyer. More specifically, **little account is taken of their opinions in court**.

“And I also think - and this was also one of the things when I questioned the judges about how hard they took the opinion of the lawyer into account - that this is rather limited, because the lawyer is not the person they give much weight to. If they can provide additional information about the young people and their context, that's a good thing, but no more than that.” (Member of the supervisory body for closed facilities)

“En ik denk ook – en dat was ook een van de dingen als ik dan de rechters bevroeg over hoe hard ze rekening hielden met de mening van de advocaat – dat dat toch wel redelijk beperkt is, want dat de advocaat niet de persoon is waar ze veel waarde aan geven. Als die bijkomende informatie kunnen geven over de jongeren en over hun context dan is dat mooi meegenomen, maar ook niet meer dan dat.” (Member of the supervisory body for closed facilities)

Finally, a youth lawyer and a social expert explicitly refer to a problematic **practice of prolonging stays** in closed facilities. When children are first sent to a closed facility a review meeting is to be scheduled after about a week to review the necessity of the stay in a closed facility. However, some practitioners feel this is a waste of time and will ask the child to agree not to have such a review meeting and give their **written consent** for the prolongation. These two interviewees feel it is problematic that this consent is given **without prior consultation with their lawyer**. Moreover, lawyers are only informed when the permission has already been given, which also means that children do not have to appear before the juvenile court.

One of the non-legal experts summarizes the involvement of the lawyer as overly regulated at the beginning of the procedure (at the police interrogation) and completely underregulated in later stages.

- d. Communicating with the child and getting to know each other
 - i. Lawyers are trained to communicate with children

Belgian lawyers who have followed the training course for youth lawyers are **trained to communicate** with children. In this sense, youth lawyers have an advantage over other non-trained lawyers. Nonetheless, one youth lawyer stated that the training is **not a guarantee** for good communication skills. In general, the aim is to use language that is appropriate for the individual child. Two youth lawyers state that it is not always easy to use simple and clear language.

“A youth lawyer is at least trained to communicate with children. But do they always succeed? Yes, that is the question. Sometimes I hear things like: “The way they talk to children, it is not always appropriate to do it that way”, but everyone is trained, so everyone should be able to do it. And I assume that most of those who do it, do it with conviction and try to explain everything as good as possible to the young people, taking into account the possibilities of the child, the age, the capacity.” (Youth lawyer, Ghent)

“Wie jeugdadvoocaat is, is minstens opgeleid om te kunnen communiceren met jongeren. Maar lukt dat dan altijd? Ja, dat is de vraag he. Ik hoor soms wel dingen van: “hoe die met jongeren praat, dat is toch niet altijd aangewezen om het zo te doen”, maar iedereen is opgeleid, dus iedereen zou het moeten kunnen doen. En ik neem aan dat de meesten die het doen, dat toch wel met overtuiging doen en die alles zo goed mogelijk proberen te brengen aan de jongeren, rekening houdend met de mogelijkheden van de jongere, de leeftijd, de capaciteit.” (Youth lawyer, Ghent)

“There are lawyers - and this also applies to adult lawyers - who do not always succeed in using simple language. And this is also the case with youth lawyers. And by simple language, I mean - something that people understand.” (Youth lawyer, Ghent)

“Er zijn advocaten – en je hebt dat ook bij advocaten voor volwassenen he – die er niet altijd in slagen om een eenvoudig taalgebruik te hanteren. En dat zie je bij jeugdadvocaten ook. En een eenvoudig taalgebruik, daarmee bedoel ik – iets dat de mensen verstaan he.” (Youth lawyer, Ghent)

“You try to translate that Salduz documentation to the child sitting in front of you, and it's very different. Sometimes we have girls or boys of 12 or younger who have to come to the police for an interrogation. You have to explain that in a child friendly way and it is sometimes very difficult.” (Youth lawyer, Antwerp)

“Je probeert die salduz-documentatie te vertalen naar de minderjarige die voor je zit, en dat is heel verschillend. Soms hebben we meisjes of jongens van 12 jaar of jonger, die bij de politie moeten komen voor een verhoor. Je moet dat op hun maat te vertellen en het is soms heel moeilijk.” (Youth lawyer, Antwerp)

ii. Effective communication presupposes a level of trust

To achieve a level of effective communication, it is necessary to establish a level of trust between the child and the lawyer. Therefore the **commitment** of the lawyer to get to know the child is also important. One of the juvenile judges indicates that it is very important for juvenile lawyers to try to **get to know the context** of the child. The various interviewees showed that the degree of commitment differs greatly between youth lawyers. On the one hand, there are children who have a trusting relationship with their youth lawyer. On the other hand, there are children who do not even know their youth lawyer. One of the youth judges and one of the public prosecutors claim to usually see a lot of commitment. This is in contrast to five non-legal experts who state that children often do not know their youth lawyer very well.

“You also feel that sometimes those children really don't know who their lawyer is. But then again, the vast majority know very well, and they are also happy when they see their lawyer.”
(Judge, Antwerp)

“Je voelt ook dat soms die minderjarigen echt niet weten wie hun advocaat is. Maar evengoed, de overgrote meerderheid weet het heel goed, en die zijn ook blij als ze hun advocaat zien.”
(Judge, Antwerp)

“I see a lot of commitment from these lawyers as well. They also have regular contact with their client throughout the year. In juvenile cases, for example, there is always an annual gathering when the file is reviewed, and you notice at the hearing that the lawyers really have a connection with the children, that they know them too, that they have kept in touch with them; and I think that is really important. That is really very positive. It is a completely different approach to that of adults. They are always lawyers who have the background of the children.”
(Prosecutor, Brussels)

“Ik zie toch veel betrokkenheid ook bij die advocaten. Die hebben ook regelmatig contact met hun cliënt doorheen het jaar. Er is bijvoorbeeld in jeugdzaken altijd een jaarlijks moment waar het dossier opnieuw bekeken wordt, en je merkt dan op zitting dat die advocaten echt een band hebben met de minderjarigen, dat ze die ook kennen, dat ze er contact mee gehouden hebben; en dat vind ik echt een belangrijke toch wel. Dat is echt iets heel positief. Dat is een heel andere benadering dan bij volwassenen. Het zijn altijd advocaten die de achtergrond mee hebben van de minderjarigen.” (Prosecutor, Brussels)

“The children often do not know their lawyer. They don't know who it is. And that's really often what happens. They don't even know what the name is, and don't recognise it when I look it up. So I still often do that for the children, look up who the lawyer is and then give them the phone number and so on. And I also tell them that they can call and that they are willing to answer questions and such, and that they don't have to pay for it. Look, on paper it's all fine, but children often don't know.” (Member of the supervisory body for closed facilities)

“De jongeren kennen hun advocaat vaak niet. Ze weten niet wie het is. En dat is echt vaak dat dat gebeurt. Dat ze zelfs niet weten hoe de naam is, de naam ook niet herkennen als ik het dan opzoek. Dus ik doe dat nog vaak voor de jongeren eigenlijk, opzoeken wie de advocaat is en dan het telefoonnummer enzo meegeven. En ik zeg hen dan ook dat er naar mogen bellen en

dat die bereid is om te antwoorden op vragen enzo, en dat ze daar niet voor moeten betalen. Kijk, op papier is dat allemaal in orde he, maar de jongeren weten het vaak niet.” (Member of the supervisory body for closed facilities)

e. Confidential and private consultations and meetings

Before being interviewed by the police, children are entitled to a **30-minute confidential consultation** with their lawyer. When children are not deprived of their liberty, they may have already spoken to their lawyer before arriving at the police station. This is in the minority of cases. Therefore, these children are also entitled to prior confidential consultations. Child and lawyer decide for themselves whether they want to make use of this. Four police officers and a prosecutor indicate that in their experience it happens that the lawyer indicates that a(n additional) confidential consultation is not necessary. Children deprived of their liberty, the Salduz-IV category, have often not been able to speak to their lawyer yet. One of the police officers indicates that in these cases, a confidential consultation takes place at the police station anyway.

“The investigator leaves the room and says: "Look, you have the right to confidential consultation of a certain duration, when you're done, come outside". I used to do that anyway - even if there had been a confidential consultation beforehand, I still gave the lawyer and the child the chance to consult again at the police station, before the interrogation, and to tune the violins again, as it were. Unless the lawyer said that it was not useful to speak to the child separately.” (Police officer, Ghent)

“De vaststeller die gaat dan buiten en die heeft dan gezegd: "kijk je hebt recht op het vertrouwelijk overleg, gedurende een bepaalde periode, als je gedaan hebt, kom je maar naar buiten". Ik deed dat sowieso ook standaard – ook al was er al vooraf een vertrouwelijk overleg geweest, dan nog gaf ik de advocaat en de minderjarige de kans om bij ons op het bureau, voor het verhoor dan, nog eens te overleggen en als het ware nog eens de violen gelijk te stemmen. Tenzij de advocaat zei dat het niet nuttig was om de minderjarige nog eens afzonderlijk te spreken.” (Police officer, Ghent)

“Yes, I ask the question when they both arrive: "Has there been a confidential consultation?". It happens, but that is the minority who have already visited the lawyer in his/her office beforehand. Most of the preliminary discussions take place at the police station itself, in fact 85-90 % are conducted that way.” (Police officer, Ghent)

“Ja, ik stel de vraag als zijn allebei toekomen: "Is er al een vertrouwelijk overleg geweest?". Het gebeurt, maar dat is de minderheid die al op voorhand bij de advocaat is langs geweest op zijn kantoor. De meeste voorafgaande gesprekken vinden bij ons plaats op het commissariaat zelf, eigenlijk wel 85-90 % gaat dat op die manier.” (Police officer, Ghent)

When asked if **30 minutes is enough**, the answer is mainly in the affirmative. One of the youth lawyers states that 15 minutes is sufficient. Moreover, one police officer also states to have never experienced consultations lasting thirty minutes. However, another police officer states that it can sometimes take up to thirty minutes.

"That may take 30 minutes, sometimes it really does take 30 minutes, but I think that is also a difference between adults and children: with children it can really take 30 minutes while with adults it is often not that long at all. I think they (the lawyers) have to further explain how things will go from there." (Police officer, Antwerp)

"Dat mag 30 minuten duren, soms duurt dat ook echt 30 minuten, maar dat vind ik ook wel een verschil tussen meerder- en minderjarigen: bij minderjarigen kan het echt 30 minuten duren terwijl het bij meerderjarigen vaak helemaal niet zo lang is. Ik denk dat die meer moeten uitleggen dan over hoe het zal verlopen of zo." (Police officer, Antwerp)

"That does happen, we have the time for it, but I have never seen them actually spend half an hour on it, never." (Police officer, Ghent)

"Dat gebeurt ook wel, hebben we ook de tijd voor, maar ik heb nog nooit meegemaakt dat ze effectief een halfuur bezig zijn, nog nooit." (Police officer, Ghent)

The confidential consultation takes place in private. Some police stations have **separate rooms** for this purpose.

"In our region, if there is a deprivation of liberty, and they have not spoken to each other yet, this is done in a special room, with glass in between, where the lawyer can sit on one side and the child on the other. But this is never actually done. They almost always sit in the same room. Next to it is the interrogation room, actually." (Police officer, Antwerp)

"Bij ons gebeurt dat als het een Salduz IV is, en ze hebben elkaar nog niet gesproken, gebeurt dat in een speciaal voorzien lokaaltje, met glas tussen waar de advocaat aan de ene kant kan zitten, en de minderjarige aan de andere kant. Maar dit wordt eigenlijk nooit zo gedaan. Ze gaan bijna altijd in dezelfde ruimte zitten. Daarnaast is het verhoorlokaal eigenlijk." (Police officer, Antwerp)

In other police stations, confidential consultations take place in **the interrogation room** while the police officers wait outside, as was confirmed by three police officers interviewed. One of the police officers explained that this is only used when there is a fear for safety.

"Sometimes it is in the interrogation room because there is no separate room. Then we go outside and we wait until the meeting is over." (Police officer, Antwerp)

"Soms is het in het verhoorlokaal omdat er geen aparte ruimte voorzien is. Dan begeven wij ons naar buiten en dan wachten wij totdat het overleg afgelopen is." (Police officer, Antwerp)

One of the youth lawyers raised a concern about the rooms used for the confidential consultation, referring to possibilities to listen in on the consultation.

"Sometimes it is an old building where you see that there are no cameras. But in Beveren, for example, there is a brand new police station, which is fully equipped with cameras everywhere. There are those little balls hanging there, of which you don't actually know what it is, and I ask that once: "Hey, the camera isn't on, is it", laughing, but actually, in all honesty

in that kind of modern buildings you don't know. But in general, you do get the time and space to do that confidential consultation. It all depends from police station to police station. Sometimes there is also a police officer that I feel is going to hang around in the hallway close to that door, and then I sometimes say to the child: "Not too loud, let's go whisper", because I can't guarantee that something will be picked up from the other side. This is not possible in Beveren, for example, because the doors are so heavy there, but that is certainly not the case everywhere. But in general it is OK. I have never been refused to sit in a separate room." (Youth lawyer, Antwerp)

"Soms is het een oud gebouw waarbij je ziet dat er geen camera's hangen. Maar in Beveren bijvoorbeeld, daar is een gloednieuw politiekantoor, en dat is volledig uitgerust met camera's overal. Daar hangen dan zo'n bolletjes, waarvan je eigenlijk niet weet wat het is, en ik vraag dat dan wel een keer: "Zeg, de camera staat toch niet op hé", al lachend, maar eigenlijk, in alle eerlijkheid in dat soort moderne gebouwen weet je het niet. Maar algemeen genomen, krijg je wel de tijd en ruimte om dat vertrouwelijk overleg te doen. Dat is allemaal afhankelijk van politiekantoor tot politiekantoor. Soms is er ook wel eens een agent waarvan ik voel, die gaat hier in de gang blijven plakken tegen die deur, en dan durf ik wel eens tegen de minderjarige zeggen: "Niet te luid, kom we gaan fluisteren", omdat ik niet kan garanderen dat er langs de andere zijde iets zal worden opgepikt. In Beveren bijvoorbeeld kan dat niet, omdat die deuren daar zodanig zwaar zijn, maar dat is zeker niet overal het geval hoor. Maar dus in principe is het wel OK. Het is me nog nooit geweigerd om in een aparte ruimte te gaan zitten." (Youth lawyer, Antwerp)

In addition, a police officer and a prosecutor spontaneously added that the child is also entitled to a **15-minute break during the interrogation** to consult with the lawyer. I regularly read in an interview that the questioning was paused because of a consultation with the lawyer. This is a possibility that exists and that is actually used.

While confidential consultations with the police are relatively well organized, **more problems are encountered in court**. Most youth lawyers have a confidential consultation with the child before a court hearing or cabinet meeting, as was confirmed by two youth judges, two lawyers and non-legal expert. Nevertheless, one of the judges and the two lawyers raised that there is often **no private space** for the consultation to take place.

"Yes [confidential consultation takes place], but with us it is sometimes in dire circumstances. For example, we don't always have the space for it. Sometimes the glass room is available and it can be done there, but usually not. So usually it is downstairs in the cells, but then there are also adult arrestees; that's not ideal either. But then the consultation takes place in one of the cells there. The police are also there - they are further down the corridor, but you can see the lawyer and the child who have to cuddle up together and have a consultation in a whisper. That's not really how it should be done. So the opportunity is there, but the infrastructure is not ideal." (Judge, Antwerp)

"Ja [vertrouwelijk overleg vindt plaats], maar bij ons soms in erbarmelijke omstandigheden. Bij ons bijvoorbeeld is er gewoon niet altijd de ruimte voor. Soms is het glazen lokaal wel beschikbaar en kan het daar, maar meestal niet eigenlijk. Meestal is het dus beneden in het cellencomplex, maar ook meerderjarigen zijn dan; dat is ook al niet ideaal. Maar dan vindt dat

overleg dus plaats in een van de cellen daar. Ja dat is niet afgesloten, de politie staat daar dan ook – ze staan wel verder in de gang he, daar niet van, maar je ziet dan die advocaat en de minderjarige die moeten dan bijna op elkaar kruipen en op fluistertoon een overleg hebben. Ja dat is het toch niet eigenlijk. Dus het mogelijkheid wordt wel geboden maar de infrastructuur is niet ideaal.” (Judge, Antwerp)

Moreover, they indicate that confidential consultations are often **made difficult by police officers**.

“I had to speak once in the hall way with the child at the waiting room with a lift. I said to the police: “No, I don't do that, this is not going to happen. I want a space where we can speak in a normal way”. Then I closed the door of the waiting room and they (the police) came back and opened it. So I said to those police officers: “You can leave it open, but then you will still be here at midnight. I can't speak to the child now. I will explain that to the juvenile court.” The juvenile court judge intervened saying, “What is going on? The lawyer should be able to speak to the child”.” (Youth lawyer, Antwerp)

“Ik heb zo moeten spreken in de doorgang met de minderjarige aan het wachtlokaal met een lift. Ik zei: “Nee, dat doe ik niet, niets van. Ik wil een ruimte waar we kunnen spreken op een normale manier”. Dan deed ik de deur toe van het wachtlokaal en die kwamen ze terug openzetten, ik zei: “Je kan die open laten staan, maar dan sta je hier vannacht om 12 uur nog. Ik kan nu niet spreken met de minderjarige. Dat zal ik eens uitleggen aan de jeugdrechter.” De jeugdrechter is tussengekomen om te zeggen: “Wat is dat hier? De advocaat moet de minderjarige toch kunnen spreken”.” (Youth lawyer, Antwerp)

“I don't think we can always consult properly. If the child has been arrested, in the best case, we have to do it standing at the elevator, but that's not always allowed these days. Then the police officer is almost listening in. In practice, that is what happens, even though we say it is not allowed to deny us a proper consultation.” (Youth lawyer, Antwerp)

“Ik vind niet dat we altijd goed kunnen overleggen. Als de minderjarige aangehouden is, moeten wij in het beste geval het rechtstaand aan de lift doen, maar dat mag tegenwoordig ook niet meer altijd. Dan zit de politieagent bijna mee te luisteren. De praktijk is dat dat wel zo gebeurt, ook al zeggen wij dat dat niet mag.” (Youth lawyer, Antwerp)

One of the youth lawyers stated that consultations often have to take place **very quickly**. At court, half an hour is not guaranteed. Nevertheless, the judge stated that they often read on the case files that interrogations are sometimes interrupted for confidential consultations.

A final topic that can be discussed is the contact between lawyers and children residing in closed institutions. **Contact over the phone** is possible, but according to one of the social experts, telephone time with their youth lawyer is deducted from their general telephone time. As a result, children would not be able to call their lawyer without limitation. When asked, two other non-legal interviewees do not think this is the case. In addition thereto, some lawyers visit their clients in the facilities, but not every lawyer is willing or able to do so. This diversity in the practice of lawyers was pointed to by two judges, two lawyers, three prosecutors and four non-legal experts. Three of those interviewees indicate that, in general, there is **little communication** between children in facilities and their youth lawyer.

“Going to see them (children in a detention facility) ourselves, we hardly ever do that, unless there is an interrogation to be conducted there in the facility. In those cases, usually, the police will go to the facility and we (the lawyers) will go there as well. But mostly they try to postpone it so the interrogation can take place at the police station or at the court house.” (Youth lawyer, Ghent)

“Zelf op bezoek gaan en zo, dat doen wij eigenlijk bijna niet, tenzij dat daar nog een verhoor moet doorgaan, dus dan, meestal gaat de politie zich dan verplaatsen naar daar en moeten wij ons ook verplaatsen naar daar. Of men probeert dat uit te stellen.” (Youth lawyer, Ghent)

“But I think the biggest problem is that the extent to which the child is allowed to contact and communicate with its lawyer depends very much on the individual supervisor of the child in the facility. If the lawyer is physically present, then a consultation will take place, and then little can be said about that. If the lawyer wants to call, then it is already more difficult, because many children tell us that calling their lawyer will be taken from ‘telephone budget’. So, if a child has questions and would like to consult with his/her lawyer, it is a little awkward that they have to use their phone time for something they should be entitled to anyway. I’m not saying that children should be able to chitchat with their lawyers indefinitely, but I don’t think it would come to that. There is still a lot of work to be done in terms of communication with the lawyer, both from the perspective of the lawyer who does not always make the effort, and from the perspective of the Federal Public Service for Justice when it comes to remuneration, and from the facilities when it comes to the policy on being allowed to contact the lawyer.” (Member of the supervisory body for closed facilities)

“Maar ik denk dat het grootste probleem is dat de communicatiemogelijkheden met de advocaat heel afhankelijk zijn van de individuele opvoeder. Als de advocaat fysiek aanwezig is, dan zal er een consultatie doorgaan, en dan kan daar weinig op gezegd worden. Als de advocaat wil bellen, dan is het al moeilijker, want vele jongeren geven ons aan dat de telefoontijd met hun advocaat van hun telefoontijd tout court gaat. Dus ja, als je als jongere met vragen zit en graag even wil overleggen met je advocaat is het wel wat lastig dat je dan je telefoontijd moet inzetten voor iets waar je eigenlijk hoe dan ook recht op zou moeten hebben. Ik zeg ook niet dat een jongere onbeperkt met zijn advocaat moet kunnen leuteren, maar ik denk niet dat het daar toe zou komen. Er is daar wat communicatie met de advocaat betreft, nog veel werk aan de winkel, zowel vanuit het perspectief van de advocaat de niet altijd moeite doen, als vanuit het perspectief van de Federale Overheidsdienst Justitie wat de verloning betreft, als vanuit de voorzieningen wat het beleid rond het mogen contacteren van de advocaat betreft.” (Member of the supervisory body for closed facilities)

f. Cooperation with the child’s holder of parental responsibility

First of all, as already mentioned, the assistance of a lawyer is free for children precisely to avoid conflicts of interest with the parents. Secondly, the Belgian youth **lawyers** in this study **differ in their cooperation** with the child’s holder of parental responsibility. One youth lawyer deliberately does not want to cooperate with the parents to avoid mistakes against the professional secrecy. Two other youth lawyers do not find it a problem to inform the parents about the course of the procedure. Nevertheless, both indicate that they are exclusively the child’s lawyer. Moreover, they are also both selective in what information is passed on to the parents. One of them also involves the parents in the

proceedings, provided the child agrees. Only one of the youth lawyers in this study states that sometimes **cooperation with the parents is necessary to avoid placement** as a judicial measure. The youth lawyer discusses the situation, the file and the rights with the parents. Moreover, this youth lawyer also asks whether the parents can offer help.

“If I want to achieve something for the children that is not in the direction of a detention, then I do need the parents. And for that reason, I do talk to the parents and inform them. And so I go over things with them: this is the situation, this is what is in the case file, these are the rights of your child, this is what is going to happen if we have to go to court, and then I also ask them if they have anything to offer me.” (Youth lawyer, Antwerp)

“Als ik nog iets wil bereiken voor de minderjarigen dat niet in de richting van een plaatsing gaat, dan heb ik die ouders wel nodig. En dan ga ik wel in gesprek met de ouders en licht ik hen in. En dus overloop ik met hen, van kijk dit is de situatie, dit is het dossier, dit zijn de rechten, dit is wat er gaat gebeuren als er naar een voorleiding gegaan wordt, en dan vraag ik ook wel of ze me iets te bieden hebben.” (Youth lawyer, Antwerp)

g. Discussion of findings

Being assisted by a lawyer throughout the procedure is embedded in the existing legal framework. Children do not have ‘the **right**’ to be assisted, but ‘the **obligation**’ to be assisted as **they cannot waive** their right. Assistance is state funded and therefore free of charge for the children involved.

Youth lawyers are usually appointed when a child has its first contact with the police. The idea is that **the appointed lawyer will continue** to be the lawyer of this child not only throughout the pending procedure but also in **any future procedure**. The fact that in practice often lawyers ‘on call’ are contacted to assist children arrested by the police undermines this idea and is flagged by the lawyers as undermining the effectiveness of their assistance to children. This **effectiveness** is said to be influenced not only by the legal possibilities of the lawyer to **act**, but also by the **relationship** of trust established between lawyer and child. Although most children will be assisted by trained youth lawyers, who are therefore also trained in communicating with children, this does not guarantee effective **communication** between lawyer and child.

From the interviews it becomes clear that there are various views on the way in which a youth lawyer should assist the child; what effective participation should mean. Whereas some lawyers try to construe ‘**the best interest of the child**’ based on their assessment of the case file, other lawyers will consider the opinion of the child what is in their best interest. This divides lawyers in either **objective** or **subjective** advocates of the best interest of the child. Most lawyers seem to **combine elements** of these two approaches. This diversity in opinions can also be found in the cooperation between the youth lawyer and **the holders of parental responsibility**. Whereas some lawyers will try and involve the parents as much as possible and consider themselves to be ‘working with the **child and his/her family**’, other lawyers are very strict in differentiating between either assisting the child or assisting the parents. They **will not interact with the parents** altogether. Most lawyers seem to **combine elements** of these two approaches.

C.5 The right to an individual assessment

a. Legal overview

There are **no legal rules on how police officers** should conduct individual assessments to inform the prosecutors' decision to either or not follow up on a case.

The individual assessments used by the youth judge to support his/her decisions, are drawn up by **consultants of the social service of the youth court**. These assignments are drawn up in execution of **Article 50 Federal Youth Act**,⁴³ which stipulates that the court will do all that is necessary to ensure that proper investigation is conducted into the **personality** of the child involved, and the **environment** in which he/she is brought up, and to understand what the **interest** of the child in a particular case is, and which means for its **upbringing** are available and appropriate.

However, as these provisions are **not drafted** in a way that they would provide a **formal right** to an individual assessment via a report drawn up by the social service of the youth court, there are **no legal remedies** available should the child feel his/her background was not sufficiently assessed and taken into account.

b. Individual assessment and exceptions in practice

Assessments conducted by the police

First of all, in some cases an individual assessment is carried out by the police on behalf of the public prosecutor. One of the police officers explained that within the police there is a **social department** with social workers of the youth investigation department. During an investigation police officers focus on the offences, while social workers focus on the social aspect. One of the other police officers indicated that the idea is to form the **broadest possible picture** of the child's life. To do this, the police try to gather as much information as possible. They talk to the child, the parents, the school and the social network. One of the police officers states that the whole background of the family is explored in every domain of life. Moreover all police officers and one of the prosecutors confirmed that the type of information that is gathered, relates to the child's family, friends, free time, school, social services, behaviour, living conditions, etc. In addition, one of the police officers stated that they tried to find out **why the offences were committed**. One of the prosecutors indicated that the image formed by the police is a **snapshot of the child's life**. However, it seems that not every police force in Belgium has a social department to help them do an individual assessment.

One of the police officers and one of the prosecutors indicated to deplore that the individual assessment by the police is **not a standardised practice**. The public prosecutor's office can ask the police services to do an inquiry. Moreover, one of the public prosecutors clarifies that each public prosecutor's office has its own prosecution policy, and if there is any doubt about an appropriate measure, the police are asked to conduct a social inquiry. Despite, two police officers indicate to also carry out social inquiry of their own initiative.

"I think, typically for working with children is not only investigating the facts, but also the living situation and upbringing. Those things are also looked into. About the home situation, school,

⁴³ Still applicable to the German Speaking Community, Brussels Capital and Flanders

free time, the friends they hang out with, those are the things which we ask the young person himself/herself. A bit of a general framework.” (Police officer, Ghent)

“Ik denk dat dat typisch is aan gerechtelijk werk op minderjarigen, onderzoek doen naar de feiten, maar ook naar de leef- en opvoedingsomstandigheden, die worden bevraagd bij de jongere zelf, dat gaat over thuissituatie, school, vrije tijd, de vrienden met wie ze optrekken, dat wordt bevraagd aan de jongere zelf. Een beetje een algemeen kader.” (Police officer, Ghent)

Assessments conducted by the consultant of the social service of the youth court

Secondly, an individual assessment is scheduled by social service consultants at the juvenile court, as soon as a case is brought before the judge. Two situations must be distinguished here. In the first situation, the child is immediately brought before the juvenile court after their arrest. This means that there is no individual assessment yet. The individual assessment is then drawn up later with a view to providing information and advice at later decision moments. In the second case, a measure is not imposed immediately and the social service has time to conduct a social inquiry before the child actually appears before the juvenile court, as was pointed to by a non-legal expert. This individual assessment seems similar but more profound than the assessment of the police. Again, **the living environment and background of the child is mapped out**. One of the social experts who works as a consultant for the social service states that information is collected in the **various areas of the child's life**. This includes behaviour, school, leisure time, family situation, social network and support figures. One of the social experts states that this assessment does not focus on the offences. The consultants work with the **Signs of Safety methodology**. Two youth judges and one of the consultants elaborated on this, explaining that this involves identifying (1) past and present concerns, (2) strengths or protective factors and (3) possible solutions or necessary assistance to address the problem. Moreover, to carry out an individual assessment, interviews are held with the child, the parents and the wider social context. Reports drawn up by the facilities where the children stay and other social services, are also included in the assessment. The results of the individual assessment are written down in **reports and recommendations**.

“They [Consultants of the social service of the juvenile court] work according to the Signs of Safety model. They look for the elements that they can work with. They work with a triptych: 1. what are the major concerns in the file, 2. what are the strengths within that family - going on network figures who can mean something. 3. and then they look at how we can come to a solution. They look very much at the strengths.” (Judge, Antwerp)

“Zij [consulenten van de sociale dienst van de jeugdrechtbank] werken volgens het model van de Signs of Safety. Ze zoeken naar de elementen waar er wél mee aan de slag gegaan kan worden. Ze werken met een drieluik: 1. wat zijn de grote zorgen in het dossier, 2. wat zijn de krachten binnen dat gezin – gaande van netwerkfiguren die iets kunnen betekenen. 3. en dan wordt er gekeken hoe we tot een oplossing kunnen komen. Tot welk doel we ons kunnen richten; Ze kijken heel erg naar de krachten.” (Judge, Antwerp)

“We [Consultants of the social services of the juvenile court] always talk to the child, to his/her network, which can be parents, grandparents, friends, cousins. This can actually be anyone you see who says 'OK, they are very important in that family or who are also worried for the child'. Then you always look at where he/she is taking school, what subject he/she is studying, whether it is going well at school, what is the opinion of the CLB (Centra voor Leerlingen

Begeleiding, a Service supervising and guiding students throughout their school path), is there any previous social work that has been involved, so you map all of that. So, yes, actually you are going to look at the various domains in the life of the child, so yes, school, the home situation, hobbies or leisure time. Yes, get to know the child.” (Consultant, Ghent)

“Wij [consulenten van de sociale dienst van de jeugdrechtbank] gaan eigenlijk altijd in gesprek met de minderjarige, met het netwerk daarrond, dus dat kunnen ouders zijn, grootouders, vrienden, neven, nichten. Dat kan eigenlijk iedereen zijn die je ziet van 'oké, die zijn heel belangrijk in dat gezin of die maken zich ook zorgen'. Dan ga je ook altijd gaan kijken van waar zit hij op school, welke richting doet hij, loopt dat goed op school, is er een CLB betrokken, is er voorgaande hulpverlening die al betrokken is geweest, dus dat breng je ook wel een stuk in kaart. Dus, ja, eigenlijk ga je op de verschillende domeinen in het leven van de minderjarige gaan kijken van dus ja, dus school, de thuissituatie, hobby's of vrije tijd. Ja, de jongere gaan leren kennen of het kind.” (Consultant, Ghent)

Nevertheless, a number of comments have been made about the individual assessment by the social service of the juvenile court. First, according to a juvenile judge, **not every assessment is sufficiently updated**. Only for serious cases, e.g. deprivation of liberty, the assessment is periodically renewed. One of the reasons is the **excessive workload** because of the time and staff shortages of the social service. This was echoed by two judges, three lawyers, one prosecutor and all non-legal experts interviewed. However there were also two prosecutors who stated that the reports they see in their practice do provide an accurate and up-to-date picture of the child. A second remark is the **large difference in quality** between the consultants and their reports. This was pointed to by five lawyers, two prosecutors and a social expert. When elaborating on this issue, two lawyers, a prosecutor and four non-legal experts indicated that one of the reasons for this may be the **high staff turnover**, as a result of which certain consultants are not experienced enough.

“It is very diverse. You can't say much in general terms. You have good consultants and you also have bad consultants. There are people with a lot of experience, but unfortunately there is also a lot of turnover. And those people are also drowning in work, they say. So yes, there is a lot of difference in quality.” (Policy advisor on children's rights)

“Het is zeer divers. Je kan er weinig in algemene zin over zeggen. Je hebt goeie consulenten en je hebt ook waardeloze consulenten. Je hebt mensen met heel veel ervaring, maar helaas is er ook heel veel verloop. En die mensen verzuipen ook in het werk zeggen ze. Dus ja, er is super veel verschil in kwaliteit.” (Policy advisor on children's rights)

No typical cases have been identified where an individual assessment is not conducted. However, it was noted that due to time constraints, **priority** is given to the **most serious cases**. One of the social experts points out that no social inquiry is carried out on children who commit lighter offences, such as shoplifting. Another social expert working at the social services confirmed that their work consists of crisis cases, where stable cases receive less attention.

“I think that especially in cases where things are very difficult, you actually go from crisis to crisis in a case. Because there are too many of them, you have to set priorities. So the more stable cases, for example long-term foster placements or children who have been placed for a long time, you can let go of a bit more because you have the social workers there, but I do think that the social workers will look for you and say, 'Oh dear, this is going badly', and they

will signal to us, 'We have to look for something for this', and then you jump on it again." (Consultant, Ghent)

"Ik denk dat je vooral in dossiers waarin dat het heel moeilijk loopt, dat je daarin eigenlijk van crisis naar een andere crisis gaat in een dossier. Omdat je er te veel hebt hé dat je prioriteiten moet stellen. Dus de stabielere dossiers, bijvoorbeeld langdurige pleegplaatsingen of kinderen die al heel lang geplaatst zijn, kun je wat meer loslaten omdat je daar hulpverlening rond hebt, maar ik denk wel dat je dan door de hulpverlening wel wordt errond gezocht van 'Oei, dit loopt slecht' en die dan signaleren aan ons van 'We moeten voor dit iets zoeken' en dat je dan wel ook weer mee op de kar springt." (Consultant, Ghent)

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

The purpose of an individual assessment by the police is to **inform the public prosecutor** of the current situation. In turn, the public prosecutor informs the juvenile court. In this way, the public prosecutor tries to **assess** the situation correctly and to **demand an appropriate measure**, as was put forward by two prosecutors and two police officers.

"I think that you really must try as much as possible to paint as broad a picture as possible, to look at the situation, what happened, what the context is, and what could have caused it to come to this. It has to form a picture so that the public prosecutor can decide whether or not to react." (Police officer, Ghent)

"Ik denk dat je echt toch zo veel mogelijk moet proberen om een zo ruim mogelijk beeld te schetsen, van kijk dat is de situatie, dat is er gebeurt, dat is de context, dat is een achterliggende mogelijkheid van waarom het zover is kunnen komen. Het moet een beeld vormen zodat het parket kan beslissen we gaan zo of zo reageren." (Police officer, Ghent)

"This information is only used to understand the context of the child and to be able to assess more clearly why the acts were committed and what the most appropriate reaction should be. We especially want to know if something went wrong at home, if it is an isolated incident, because that is also possible. This information about the living context is important for further assessment." (Prosecutor, Brussels)

"Die informatie wordt enkel gebruikt om de context van de jongere te begrijpen en meer kunnen inschatten waarom de feiten gepleegd zijn en welke dan de reactie is die het meest gepast is. We willen vooral weten of er thuis iets misgelopen is, of het een alleen staand feit is, dat kan natuurlijk ook. Die informatie van de leefcontext is belangrijk om alles verder in te schatten." (Prosecutor, Brussels)

Similar to the previous, the purpose of an individual assessment by the social service of the juvenile court is to **inform the youth judge**. The aim is for the judge to have an **accurate picture** of the child. In addition, advice is given in function of the possible reactions with regard to the child. The overall purpose is for the juvenile judge to take this information into account in its decision making process for **imposing the appropriate measure**. This rationale was pointed to by two of the interviewed judges, one lawyer, four prosecutors and three non-legal experts. One of the lawyers and one of the

prosecutors added that another purpose is to **investigate** whether the juvenile delinquency is **not due to an underlying troubling upbringing situation**.

“Especially to get to know the context and to see how best to deal with the child. We especially want to know what the situation is like with those protective factors. Does this young person have a chance to get out of it and get his/her life back on track, or do we have to help him? What about the parents, what about the school? Look, when I said earlier that we are contacting the schools, also via the social services, it is partly to see if we can't intervene, if we can't help to straighten out an problematic situation.” (Judge, Antwerp)

“Vooraf om de context te leren kennen en te zien hoe we best met de jongere omgaan he. We willen toch vooral ook weten hoe het daar zit met die protectieve factoren he. Heeft die jongere kans om eruit te raken en zijn leven terug op de rails te krijgen of moeten we daar bij helpen. Hoe zit het eigenlijk met die ouders, hoe zit het met de school. Kijk, als ik daarstraks zei dat we contact opnemen met de scholen, via de sociale dienst ook, dan is dat ook voor een stuk om te bekijken of we daar niet in kunnen tussenkomen, of we niet kunnen helpen om een scheef gegroeide situatie terug recht te trekken.” (Judge, Antwerp)

“That is certainly the social service. That is a very important partner. They also say that, those juvenile judges, as soon as there is a file, a social inquiry is almost automatically requested. And a juvenile court judge bases his/her decision on that. They say that too, they say: 'For me, that is one of the most important sources of information, that social inquiry'.” (Researcher on juvenile delinquency)

“Dat is zeker de sociale dienst he. Dat is een hele belangrijke partner. Die zeggen dat ook he, die jeugdrechters, van zodra er een dossier is wordt er bijna automatisch een maatschappelijk onderzoek gevraagd. En een jeugdrechter baseert zich daar op. Die zeggen dat ook he, die zeggen: 'voor mij is dat een van de belangrijkste bronnen van informatie, dat maatschappelijk onderzoek'.” (Researcher on juvenile delinquency)

“So then it's kind of our job [consultant of the social service of the court] to give advice to the juvenile court of 'Look, we think those conditions are important to make sure he/she doesn't commit new offences'.” (Consultant, Ghent)

“Dus dan is het een stukje onze taak [consulenten van de sociale dienst van de jeugdrechtbank] om advies te geven aan de jeugdrechter van ‘Kijk, wij denken dat die voorwaarden belangrijk zijn om ervoor te zorgen dat hij niet opnieuw feiten pleegt’.” (Consultant, Ghent)

d. Challenges

During the interviews, the interviewees were asked about certain hurdles or vulnerabilities. Some interviewees also mentioned them spontaneously. The most frequently cited barrier is **not speaking the language of the proceedings**. This can apply to both the child and their parents. Not speaking the language makes it difficult to participate. In most cases, officially recognised **interpreters** are used. However, family members are sometimes asked to interpret as well, even though this is preferred to be avoided. In any event, one of the judges, a prosecutor and four non-legal experts stressed that communicating through an interpreter does create a **barrier**. Other vulnerabilities that were

sporadically mentioned were culture, religion, lower language level, intellectual disabilities, behavioral disorders, personality disorders and socio-economic status.

“Often, I have indeed noticed that the children speak our language better than the parents, who often do not speak our language at all, but if there are certain emotional things you want to say as a child, you see that the barrier is in the language, that they can do better in Slovak than in our language, for example. So it's good to have an interpreter there, if they don't know how to say it in Dutch, so that they can say it in their mother tongue, for example.” (Consultant, Ghent)

“Vaak, ik heb inderdaad wel vaak dat de kinderen wat meer Nederlands praten en de ouders bijvoorbeeld helemaal niet, maar als er bepaalde, als er bepaalde emotionele zaken zijn die je dan als kind wil vertellen, zie je dan wel dat de barrière daar zit in de taal, dat ze dat dan beter kunnen in bijvoorbeeld Slovaaks dan in het Nederlands. Dus dan is het wel goed om daar een tolk bij te hebben, als ze dan niet goed weten hoe ze het in het Nederlands moeten zeggen dat het dan wel kan in hun moedertaal bijvoorbeeld.” (Consultant, Ghent)

e. Discussion of findings

In conclusion, there are two types of individual assessments in Belgium. Firstly, there is the individual assessment carried out by the police. This assessment is not standard practice and is carried out in order of the public prosecutor. However, in certain cases the police decide to carry out a social inquiry out of own initiative. In general, the aim of this investigation is to inform the public prosecutor of the current situation of the child in all aspects of life. This allows the prosecutor to order the appropriate measures for the child in the specific situation.

Secondly, there is the individual assessment carried out by the social service on behalf of the juvenile court. Again, the aim is to form a broad picture of the child's life. The Signs of Safety methodology is used for this purpose, with solutions ultimately being formulated. The aim of this investigation is to inform the juvenile judge about the current situation in which the child finds itself and to advise about possibly appropriate measures. Moreover, a second goal of the individual assessment is to see if there is no underlying problematic parenting situation. Problems with this assessment are that it is not always updated and that it is not always of high quality. Both problems may be due to the enormous workload of the social service consultants and the high staff turnover.

In terms of challenges to individual assessment, the main barrier mentioned was not speaking the language of the procedure. Subsequently, the use of interpreters is common, but this still appears to create a certain distance between actor and child, which does away with the advantage of being able to better communicate about facts and feelings.

C.6 Deprivation of liberty as a last resort and safeguards when deprived of their liberty

a. Deprivation of liberty as a last resort measure

i. Legal overview

The Federal Youth Law explicitly anchored this idea. Article 37 §2 section three clarifies that a hierarchy amongst the reactions should be taken into account when deciding how to react to an offence. Firstly, **restorative justice measures** should always get precedence over any other measure. Secondly, it should be assessed to what extent the child involved is willing to design his/her **own**

project in response to the offence.⁴⁴ Only if this is not possible or not deemed appropriate any of the other measures can be considered. Thirdly, any measure involving a **change in the context** of the child and involving that the child is placed in a different context **should be the last resort**. Amongst these detention measures, a further distinction is made between open and closed settings, the latter being the ultimate last resort. Similar provisions can be found in the regional systems further shaping the reactions to juvenile delinquency. (See ANNEX 7 – Deprivation of liberty in a Belgian context)

ii. Deprivation of liberty and alternative measures in practice

Police custody and pre-trial detention

Firstly, it is important to look at police custody and pre-trial detention of children. One of the youth lawyers states that the procedure from arrest to interrogation to court hearing for children is done so **quickly** in order to keep **police custody and pre-trial detention as short as possible**. In other words, the system is set in motion more quickly to prevent them from having to spend a night in detention. In addition, a police officer stated that children are **not held back any longer than necessary**. Strictly speaking, it is the time needed for the interrogation to take place. One of the public prosecutors confirmed that in general police custody is not used unnecessarily.

The main factor leading to a decision by the public prosecutor for police custody and pre-trial detention is **the seriousness of the offences**. Examples, raised by two police officers and a prosecutor, of offences for which an arrest is requested are theft with violence, sex offences, fights with injuries, attempted manslaughter, gay bashing and drug offences.

The seriousness of the offences, whichever way you look at it, that is a very important element. I am talking about violent offences, drug offences, sexual offences. We are talking about a situation where risks are created for third parties, let alone third parties who are also very serious victims, and then you have to put a stop to it. These are situations that cannot simply be allowed to continue; these are situations that must be neutralised immediately, by, for example, depriving the suspect of his/her liberty, I am convinced. (Prosecutor, Antwerp)

De ernst van de feiten, hoe je dat ook draait of keert, dat is een heel belangrijk element. Dan heb ik het over gewelddelicten, drugsdelicten, zedendelicten. We spreken over een situatie waar er risico's worden gecreëerd voor derden, laat staan dat er derden zijn die ook heel zwaar slachtoffer zijn, ja en dan moet je ergens 'halt' roepen. Dat zijn situaties die je niet zomaar verder kan laten bestaan; dat zijn situaties die onmiddellijk moeten geneutraliseerd worden, door onder meer de vrijheidsberoving van de verdachte, daar ben ik van overtuigd. (Prosecutor, Antwerp)

One of the police officers stated that the decision to deprive a child of their liberty **depends much on the prosecutor** and way the police officers explain it to the prosecutor.

“Sometimes you can guess when a colleague from the police calls the prosecutor: it is Salduz IV – they are deprived from their liberty - anyway. If another colleague calls the same prosecutor, then it's nothing. So it really depends on how we explain it to the public

⁴⁴ This means that the child itself takes the initiative to indicate what would be an appropriate way to restore the damage done and improve his/her behaviour towards society.

prosecutor, but it also really depends on which public prosecutor you have sitting on the other side. It is not the case that similar children [who committed the same crimes] are getting the same reaction, for example. One may be deprived from his/her liberty, and the other one can go home.” (Police officer, Antwerp)

“Je kan soms al inschatten als die collega van de politie naar die procureur gaat bellen: dan is het sowieso Salduz IV. Als die andere collega naar diezelfde procureur gaat bellen: dan is het sowieso niets. Het hangt er dus ook echt van af hoe dat wij het uitleggen aan het parket, maar het hangt er ook echt van af welke procureur je aan de andere kant hebt zitten. Dat is niet dat twee dezelfde minderjarigen, dezelfde opdracht gaan krijgen bv. De ene kan een Salduz IV krijgen, en de andere misschien een Salduz III.” (Police officer, Antwerp)

The time or moment of the arrest is also important. First of all, it is necessary to wait for a lawyer to conduct an interrogation. The interviews show that waiting for a lawyer takes more time at night and on weekends. Secondly, if a juvenile judge is requested in the middle of the night, one of the lawyers, a police officer and a prosecutor considered that it was only logical that the arrest will take longer.

In Belgium, a number of cases have caught media attention because of police custody and pre-trial detention of children who have **violated the Covid-restrictions**. The two interviewees (a lawyer and a prosecutor) state that in recent months, in this particular context, deprivation of liberty was not used as a last resort.

“When it comes to those Covid-restrictions children had to obey: Mind blowing scenes! Six children sitting together in the garden, who are picked up after someone called it in and were put in the cell; three children in a cell for one person, for the whole night. They are then brought before the juvenile court the next morning.

That is a clear example of abuse in that context. I am not saying that it always happens like that, but it happened a lot. Because of the corona measures, children sometimes spend 30 hours in a cell before coming before the juvenile court.” (Youth lawyer, Antwerp)

“Voor die coronamaatregelen: hallucinante taferelen! Jongeren die met zes in den hof overdag zitten, na geklik opgepakt worden en in de cel gezet, per drie in een cel voor 1 persoon, voor heel de nacht. Die worden dan voorgeleid voor de jeugdrechter de volgende ochtend.

Dat is een duidelijk voorbeeld van misbruiken in dat kader. Ik zeg niet dat dat altijd gebeurt, maar toch veel. Door de coronamaatregelen zitten er jongeren soms 30 uur in een cel voordat ze voor de jeugdrechter komen.” (Youth lawyer, Antwerp)

Secondly, it is important to consider whether **deprivation of liberty or placement in an institution imposed by a juvenile judge** is used as a last resort. The opinion on the meaning of last resort differ among the interviewees. One juvenile court judge, for example, stated that everything possible should be done to avoid placement. It was added that not every judge thinks this way. Other judges are more like crime fighters and are more likely to decide on placement. One of the likeminded police officers indicates that when the judge decides to deprive children of their liberty, **a number of steps are forgotten**.

In contrast thereto, a number of interviewees indicated that in their views the concept of it being ‘the last resort’ does not mean that all other measures must be exhausted. They state that a placement measure should be used with caution, but that it is sometimes immediately necessary. One of the

social experts states that it is **not necessary to try alternative measures first**. It is stated that sometimes a placement is simply necessary. The opinion of another social expert and a public prosecutor concur. In addition, one police officer indicates that action is often taken too late. One of the social experts agrees with this and states that when intervention is too late, situations escalate to the extent that a placement becomes necessary where it could have been avoided in the first place.

“Do not get me wrong, I don't think you necessarily have to try everything else first before you can decide to deprive a child of its liberty. But it is something that should not be taken lightly. Look, sometimes a deprivation is just necessary. If you are a doctor and someone is having a heart attack, you don't first try to have a conversation with the patient about healthy eating habits, but you immediately start resuscitating. And then during the hospital stay, before the patient goes home, you can pick up those dietary habits. Actually, it's the same with the response to juvenile delinquency. Sometimes it's necessary to go for a detention and there's no point in resorting to alternatives at that point.” (Member of the supervisory body for closed facilities)

“Pas op, ik vind ook weer niet dat je per se alles anders eerst moet geprobeerd hebben alvorens je tot een plaatsing kan overgaan he. Maar het is iets waar je niet licht mag over gaan. Kijk soms is een plaatsing gewoon nodig. Als iemand neervalt met een hartstilstand ga je ook niet eerst proberen om een gesprek te hebben met de patiënt over gezonde voedingsgewoontes, maar dan ga je meteen reanimeren. En dan kan je tijdens het verblijf in het ziekenhuis, voor de patiënt naar huis gaat die voedingsgewoontes oppikken. Eigenlijk is dat bij de reactie op jeugd delinquentie net hetzelfde. Soms is het nodig om voor een plaatsing te gaan en heeft het op dat moment geen zin om naar alternatieven te grijpen.” (Member of the supervisory body for closed facilities)

A number of interviewees also indicated the importance of exercising caution when depriving children of their liberty. Two judges and four non-legal experts pointed to the fact that a detention measure means **a break in many areas** such as school, context and friends. Nevertheless, one of the social experts indicates that it can also offer the necessary peace of mind for the child and the family.

Whether the deprivation of liberty in Belgium is really used as a last resort is a question on which **opinions are divided** among the interviewees. Two interviewees, a youth lawyer and a social expert, believe that the deprivation of liberty is **effectively used as a last resort**. This is in contrast to five other interviewees (a lawyer, a prosecutor and three non-legal experts) who stated that they did not have this feeling. Four of them stated that a placement measure is used to give a **signal** to the child that the behavior will not be tolerated. The words **wake-up call** and **shock** are also used.

“And then, of course, with a deprivation of liberty you have a double effect. Firstly, you neutralise a risk situation, and secondly, you send a signal to the child that they have gone way over the top. And very often this is used as a wake-up call.” (Prosecutor, Antwerp)

“En dan heb je natuurlijk met een vrijheidsberoving een effect dat dubbel is. Ten eerste: je neutraliseert een risicotoestand, en ten tweede, je geeft ook een signaal aan de minderjarige dat men er ver over gegaan is. En heel vaak wordt dat als een wake up call gebruikt.” (Prosecutor, Antwerp)

Two social experts, explicitly refer to “the short stay” type of (pre-trial) detention. This is a project in Belgium where children are locked up for a period of two weeks just to impose a quick reaction which argued to be contrary to the principle to use any type of detention as a last resort.

“That is certainly not always used as an ultima remedy. We now have the short stay, which has not yet been legally anchored, but that is a kind of pilot project where young people are placed briefly and contextual guidance is then linked to it. And in my experience, this is often used to give a good shock, even though researchers have said 1,000 times that it doesn't work. But in my experience it does happen often.” (Policy advisor on children's rights)

“Dat wordt zeker niet altijd als ultima remedia gebruikt. We hebben nu het kort verblijf, dat heeft nog geen wettelijke verankering, maar dat is een soort van proefproject waarbij men jongeren kort plaatst en er dan een contextbegeleiding aan koppelt. En in mijn beleving wordt dat heel vaak ingezet om ne keer een goeie shock te geven, ook al hebben onderzoekers al 1000 keer gezegd dat dat niet werkt. Maar in mijn beleving gebeurt dat wel vaak.” (Policy advisor on children's rights)

Moreover, one of the youth lawyers indicates to have the feeling a placement was **not always necessary or was too far-reaching**. In addition, one of the police officers stated to **not see any straightforwardness**. It is rather an “all or nothing”-decision. Finally, three interviewees (a judge and two lawyers) indicated that detention measures are very rarely used because of the lack of space and therefore not because of the underlying vision of last resort.

“It could be that at one point you are locked up for minor offences, whereas at another point in time you are allowed to go home even though you have committed very serious offences, because there is simply no room available for you. So it really is an injustice, that is felt.” (Police officer, Ghent)

“Je kan voor lichte feiten opgesloten worden, daar waar je voor heel zware feiten perfect naar huis kunnen gaan omdat er geen plaats is. Dus het is echt onrecht dat gevoeld wordt.” (Police officer, Ghent)

Following this, the interviewees were asked about the criteria that lead to the decision to opt for a deprivation of liberty. The results show that many respondents cite the same elements and that many issues play a role in the decision-making process. The main factor mentioned is the **seriousness of the offence**. This was acknowledged by three judges, two lawyers, one police officer, three prosecutors and four non-legal experts. Two judges and two non-legal experts refer to **buffer-worthy offences**⁴⁵ in which adults receive a number of years' imprisonment for the offences. The types of offences named include manslaughter, aggravated drug offences, armed robbery, robbery with violence, arson, serious blows and injuries, sexual offences and so on.

“What is also important to mention is that we already have an important limitation in the law there, too. Because we can only deprive children of their freedom if it concerns acts that are described as crimes for adults, so it really should already concern acts that are punishable with a penalty of 5 years or more.” (Judge, Antwerp)

⁴⁵ Closed facilities are tasked to ensure that a number of beds are reserved for children who have committed very serious offences. These beds are the buffer capacity.

“Wat ook niet onbelangrijk is om te vermelden, is dat we daar natuurlijk ook al een belangrijke beperking hebben in de wet he. Want we kunnen minderjarigen enkel van hun vrijheid beroven als het gaat om feiten die voor volwassenen omschreven worden als misdaden, dus het moet echt al gaan om feiten die strafbaar zijn met een straf van 5 jaar of meer he.” (Judge, Antwerp)

The **other elements** that are listed are the following: offences **victimising** other people, the risk of **recidivism**, **collusion** and **withdrawal**, guilt and the child's **attitude**. The **context** of the child also plays a role. For example, the extent to which the parents provide for a good upbringing was raised by 11 interviewees (two judges, one lawyer, four prosecutors and four non-legal experts). Finally, four interviewees (two lawyers and two non-legal experts) indicated that, unintentionally, **capacity** in the facilities also plays a major role.

“This can be based on various arguments. In the first instance, the seriousness of the facts will play an important role. If it is about a theft with violence or other aggravating circumstances or about moral offences, then there is little discussion about why we should not do it. On the other hand, recidivism will also play an important role. On the other hand, I recently had a file from a child, and that was actually about a child who was busy distributing child pornographic material, very serious material that was, but the file showed that there was also a difficult life situation, so that we still thought that a placement was not appropriate. It was someone who was not yet known to us. It was someone who was very cooperative in his/her interrogation, also had a lot of guilt, and of course a lot of shame. There are so many elements that will lead us to decide whether or not to ask for a deprivation of liberty.” (Prosecutor, Brussels)

“Dat kan op grond van verschillende argumenten zijn. In eerste instantie zal de ernst van de feiten een belangrijke rol spelen. Als het gaat over een diefstal met geweld of nog andere verzwarende omstandigheden of over zedenfeiten, dan is er weinig discussie over waarom we dat dan niet zouden doen. Anderzijds zal ook recidive een belangrijke rol spelen. Aan de andere kant had ik onlangs een dossier van een minderjarige, en dat ging eigenlijk over een minderjarige die bezig was met kinderpornografisch materiaal te verspreiden, erg ernstig materiaal was dat, maar daar bleek echter uit het dossier wat er ook een moeilijke levenssituatie was, waardoor we toch vonden dat een plaatsing niet aangewezen was. [...] Het was iemand die nog niet gekend was bij ons. Het was iemand die in zijn verhoor heel medewerkend was, ook heel veel schuldinzicht had, en heel veel schaamte ook natuurlijk. Er zijn zoveel elementen die ons er toe gaan brengen om al of niet een plaatsing te vragen.” (Prosecutor, Brussels)

When there is no deprivation of liberty, an **alternative measure** can be imposed. The main alternatives are the educative project and the community service. In addition, the imposition of conditions, context-guidance⁴⁶, house arrest (curfew), mediation and the ‘positive project’⁴⁷ are also mentioned, by 8 interviewees (being one judge, one lawyer, one prosecutor and five non-legal experts). Nevertheless, one of the public prosecutors states that these are not worthy alternatives to a

⁴⁶ This is a specific type of supervision and guidance that seeks to strengthen the context of the child in order to establish a support system that is able to prevent future offences.

⁴⁷ This is an alternative that allows the child to draw his/her own project with different alternative measures, conditions that will be met. It is called ‘positive project’ because it encourages the child to have a positive outlook on the future and design his/her own positive contribution to create a better version of themselves.

detention measure, in that when detention is needed but not possible due to capacity issues, these alternatives are not really what you need.

“Actually, you see that with children, judges predominantly use the learning project and the community service. I think those are the two most important ones today. Of course, it is also possible that conditions which have to be fulfilled are used, both at the level of the public prosecutor and at the level of the juvenile court. But the learning project and the community service are the most common alternatives and they are actually used. The new decree also introduced the positive project; what I hear about this is that the positive project is used with varying degrees of success.” (Member of the supervisory body for closed facilities)

“Eigenlijk zie je dat bij minderjarigen dominant gebruik gemaakt wordt van het leerproject en de gemeenschapsdienst. Dat zijn op vandaag de twee belangrijkste denk ik. Natuurlijk kan het ook zijn dat er volstaan wordt met voorwaarden die nageleefd moeten worden he, dat kan zowel op het niveau van het parket als op het niveau van de jeugdrechtsbank. Maar het leerproject en de gemeenschapsdienst zijn de meest voorkomende alternatieven en die worden ook daadwerkelijk gebruikt. Met het nieuwe decreet is er ook het positief project bijgekomen he; Wat ik daar over hoor is dat er toch met wisselend succes naar dat positief project wordt teruggegrepen.” (Member of the supervisory body for closed facilities)

“Alternatives in the sense of other possible measures that a juvenile court can take is, for example, house arrest, but again, for very serious offences, that is not really a worthy alternative. It is not in proportion. It's just not a worthy alternative. With some children, depending on the severity of the offences, their recidivism, sometimes also just their attitude too, sometimes I really think that the only appropriate reaction is to go to a placement. Then I think that if conditions are imposed - well, these young people just laugh about it too.” (Prosecutor, Antwerp)

“Alternatieven in de zin van andere mogelijke maatregelen die een jeugdrechter kan nemen, is bijvoorbeeld het huisarrest, maar opnieuw, voor zeer zware feiten, is dat eigenlijk geen volwaardig alternatief. Het is niet in proportie. Het is gewoon geen waardig alternatief. Bij sommige minderjarigen, afhankelijk van de ernst van de feiten, hun recidive, soms ook gewoon hun houding ook he, soms vind ik echt dat de enige gepaste reactie is om naar een plaatsing te gaan. Dan vind ik dat als er voorwaarden opgelegd worden – tja, die jongeren die lachen daar ook gewoon mee he.” (Prosecutor, Antwerp)

b. Medical examination

i. Legal overview

Medical examination is **not a standardised practice** in Belgium. Children are not routinely subjected to an examination when they are deprived from their liberty.

ii. The medical examination in practice

The interviewees were **not knowledgeable enough** on this topic

- iii. How and for what purposes are the results of the medical examination used by national authorities in practice?

There is **no standardised medical examination** so **the results cannot be used** by national authorities.

C. Special treatment in detention

- i. Legal overview

No overarching legal framework

There is no elaborate legal framework specifically governing the rights of children in detention. These children can benefit from the general rights of children subject to youth protection measures in when detained in Flanders, or draw from the rights included in the decree on the detention of children who have been subject to a divestiture measures.⁴⁸ Additionally, the rules and rights of children are included in the 'house rules' of the closed facilities and the regulations holding the conditions for financing of facilities.⁴⁹

- Children receive an **education or training** that is intended to facilitate a return to the general educational environment. Where possible, children are allowed to attend classes in a regular school. Where needed, the closed facilities will support children who wish to participate in the regional exams, similar to state exams known in other countries.
- Children should have access to **physical training** and outdoor **exercises**; children should have access to a **library** and should have the possibility to engage in **cultural, artistic and intellectual** activities.

A comprehensive study was published in March 2021 on the need for a more elaborate legal framework governing the rights of children in closed facilities.⁵⁰

⁴⁸ Flemish Decree on the Legal Position of Minors 7 May 2004 - Decreet 7 May 2004 betreffende de rechtspositie van de minderjarige in de integrale jeugdhulp en binnen het kader van het decreet betreffende het jeugddelinquentierecht [Decree on the legal position of minors in youth protection and in the context of the youth delinquency decree] – Belgian Official Journal 4 October 2004; Decree on the Legal Position of Minors 14 March 2019 - Décret relatif à la prise en charge en Centre communautaire des jeunes ayant fait l'objet d'un dessaisissement [Decree on the reception and supervision in a community center], Belgian Official Journal 23 April 2019.

⁴⁹ French Community Financial Regulation 5 December 2018 - Besluit van de Franse Regering van 5 december 2018 betreffende de algemene voorwaarden voor de erkenning en de subsidiëring van de diensten bedoeld in artikel 139 van het decreet van 18 januari 2018 houdende het wetboek van preventie, hulpverlening aan de jeugd en jeugdbescherming, [Decision of the French Government of December 5, 2018 on the general conditions for the recognition and financing of the services referred to in Article 139 of the Decree of January 18, 2018 on the Code of Prevention, Youth Assistance and Youth Protection] Belgian Official Journal 11 January 2019. A similar decision was taken by the Flemish Government for the facilities in the Flemish Region.

⁵⁰ Carlé J. (2021). Gesloten opvang van minderjarigen in Vlaanderen: een rechtspositieregeling, Available at (<https://steunpuntwvg.be/images/swvg-3-rapporten/ef59-rechtspositie-gesloten-opvang-rapport>)

ii. The special treatment in practice

Separate from adults

In Belgium children will always be **detained separate** from adults. A youth lawyer adds to this, that **in the courts separate waiting rooms** have been created for children. These rooms do not look like a cell, but rather like an office room. The **problem** with being separated from adults is mainly in **the police custody** of children. Not every police station is equally well equipped to achieve separation. One of the prosecutors and three police officers clarify that in some police stations there are **special youth cells or youth rooms**, but other areas do not have these. In addition one of those police officers indicates that some child suspects are accommodated in **the victims' room instead** of a cell. Despite the effort, there is often **auditory contact possible with adults** as the youth rooms are in the same corridor as the cells for adults. Moreover, children have to pass the adult cells to get to the youth cell. Subsequently, the **shouting or knocking on the walls** of adults can be heard by children, which was considered to be a problem by three police officers and two prosecutors. Another police officer also refers to the infrastructure of the **interrogation rooms**. In a certain police station, it is possible to follow the interrogation in the other room because the walls are too thin and the sound carries.

“Of course, I do not know the situation in each individual police station. There are, of course, police forces that are well equipped and that really have their separate cells for children, but there are plenty that don't have that, and in those police forces there are indeed many possibilities for children to come into contact with adults. Not that they would be locked up in the same cells, of course, but there is contact in the sense that they can hear each other and we know that sometimes there is real communication. There can indeed be contact in that way.” (Prosecutor, Brussels)

“Ik ken natuurlijk niet de situatie in elk individueel politiekantoor. Er zijn natuurlijk politiediensten die goed geëquipeerd zijn, en die echt hun afzonderlijke cellen hebben voor minderjarigen, maar er zijn er genoeg die daar niet over beschikken en bij die politiediensten zijn er toch inderdaad heel wat mogelijkheden dat minderjarigen in contact komen met meerderjarigen. Niet dat ze in dezelfde cellen zouden worden opgesloten, dat natuurlijk niet, maar er is wel contact mogelijk in die zin dat ze elkaar kunnen horen en dat we weten dat er soms toch ook echt gecommuniceerd wordt. Er kan op die manier inderdaad contact zijn.” (Prosecutor, Brussels)

Access to health care services

When children are deprived of their liberty in a **police cell** and **ask for medical assistance**, this is of course possible. Nevertheless, a police officer and a prosecutor indicate that **it does not often happen** that children seek medical assistance. Even one police officer states to never had experienced it with children. Examples given by two police officers and a prosecutor of situations when medical assistance is requested are when a child needs medication, when they are having a crisis, when they are injured during interventions or when they have difficulty breathing during an interrogation.

The police themselves may not administer any medication. All medication must be on **prescription**.

“This means that we are not even allowed to offer anything for headaches. I have not yet had a case of headache, but if it is something serious, e.g. difficulty breathing, then we interrupt the interrogation and an ambulance is called.” (Police officer, Antwerp)

“Nee, wij mogen die zelf niets geven van medicatie. Alle medicatie moet dan echt op voorschrift zijn. Je mag dus zelfs niets aanbieden tegen hoofdpijn. Ik heb het nu zelf nog niet gehad dat dat voor hoofdpijn is, maar als het echt iets serieus is – bv moeilijk ademen – dan onderbreken wij het verhoor en wordt er een ziekenwagen ter plaatse gevraagd.” (Police officer, Antwerp)

One police officer indicates that the **public prosecutor should be** informed when medical assistance is needed. The **standard procedure** is for an **ambulance** to arrive at the scene. Another police officer indicates that it is also an option to have a **general practitioner** come to the scene. Two of the police officers indicated that they would not take the **risk not to call in medical assistance** when asked.

“In any case: for the sake of safety, if this question comes up for a medical examination, the public prosecutor's office will be informed of 'this child is complaining about this or that, may we take him/her to the hospital'. And if they say it's OK, then we'll take it to the hospital before we continue with the investigation. Because they really don't want to take any risks in that; in case there is something wrong. I do think that this is strictly adhered to. Even if they say they need medication, they will always immediately inform the public prosecutor's office and then the necessary steps will be taken.” (Police officer, Ghent)

“Sowieso: veiligheidshalve, als die vraag komt voor een medisch onderzoek, dan zal het parket ingelicht worden van ‘die minderjarige klaagt over dit of dat, mogen we daar mee naar het ziekenhuis gaan’. En als zij dan zeggen dat het mag, dan gaan we er mee naar het ziekenhuis alvorens we het onderzoek verder zetten. Want daar willen ze toch echt geen risico in nemen; mocht er al eens iets aan de hand zijn. Ik denk wel dat dat strikt nageleefd wordt. Ook als ze zeggen dat ze medicatie nodig hebben dan zal men altijd meteen het parket inlichten en dan zal het nodige gedaan worden.” (Police officer, Ghent)

When children are deprived of their freedom in an **institution or facility**, there is **no standard medical examination**.

“I know that they are washed thoroughly and they have to hand over all their clothes - that is to rule out the problem of lice and fungus and so on. I don't know if they get a medical check-up. They will do a corona test now, but I don't know if they also get a medical check-up. In an open facility I can't imagine that. In a community institution: I think they have a nurse there, but I don't know if they always do a check.” (Judge, Antwerp)

“Van de gesloten voorzieningen weet ik dat ze grondige gewassen worden en ze moeten al hun kleren afgeven – dat is om een problematiek van luizen en schimmels enzo uit te sluiten. Of ze een medische check-up krijgen dat weet ik eigenlijk niet. Ze zullen nu wel een corona-test doen he, maar of ze ook een medisch onderzoek krijgen, dat weet ik eigenlijk niet. In een open voorziening kan ik me dat niet voorstellen. In een gemeenschapsinstelling: ik denk dat ze daar wel een verpleegster hebben rondlopen, maar ik weet niet of die altijd een check doet.” (Judge, Antwerp)

One of the social experts clarified that they are mainly **checked for conditions that require medication**, such as diabetes. Other medical examinations that take place sporadically, which was

mentioned by one of the judges and three non-legal experts, are Covid tests, drug tests, gynecological examinations. A **nurse** is present in the closed institutions. Two of the non-legal experts assume that facilities work with **local practices and hospitals**.

Education and training

For many children, a placement in a juvenile institution means an **interruption in their school career**. Seven interviewees (two judges and five social experts) indicate that the school pathway is often already very disrupted before the placement. Often there is already a truancy problem or no school in the picture. For these children, education is organised in the facility. Despite, the problem here is that the facility can only offer a **limited number of courses** to a **very diverse group**. Children have to choose between the limited courses that often do not match their own school level.

“The more high level programs we have in our schooling system will not be available in an institution, I'm pretty sure. There are two or three options of programmes linking in with more lower and practically-oriented programmes. If you were in a different (more high level) programme that is just tuff luck. They will have missed so many months of school that they often can't successfully finish that year, so this means that very quickly a year is lost, which is of course demotivating. I think the schooling programmes in the community institutions try their best, but they can't have twenty different programmes on offer and one person in each programme.” (Social worker, Antwerp)

“Ja, bijvoorbeeld ASO of TSO [twee onderwijsgraden in België] dat moeten ze daar al niet gaan zoeken denk ik, ben ik vrij zeker van. Dat zijn zo twee, drie BSO-richtingen [lagere en praktijkgerichte onderwijsgraad] dat die aanbieden, doe je een andere richting dan heb je pech, dan heb je zoveel maand les gemist dat ervoor kan zorgen dat die dat jaar er niet door zijn, want meestal hebben die voor die in de gemeenschapsinstelling gingen het ook wel al wat uitgehangen dus, ja, dan is dat schooljaar ook al snel verloren, wat dat ook demotiverend is. Ik denk dat de gemeenschapsinstelling daarin probeert, maar die kunnen ook geen twintig opleidingen en in elke opleiding een persoon hebben.” (Social worker, Antwerp)

The children **cannot obtain a diploma or certificate** through the institution's education as it is not a recognised form of education, which was raised by five interviewees (one judge, two lawyers and two social experts) as very problematic.

“That's the big tragedy: the whole school career of a child threatens to come to a halt if children have to stay in a closed institution. And sometimes there are children who commit serious offences, but who actually went to school quite well, which jeopardises the whole school career, and sometimes they lose a whole year.

Now we do see that for some children distance learning is organised. What's more, there are children who come from Mol to Antwerp every day to attend their normal school and then return to the facility in the evening. They have to get up at half past five and they are on the train at half past six to attend their normal school and then return to the institution at seven or so. They are very motivated people, but those are the exceptions.” (Judge, Antwerp)

“Dat is het grote drama: heel dat schoolse parcours dreigt stil te vallen als jongeren binnen zitten he. En soms zijn er jongere die zware feiten plegen, maar die eigenlijk best OK naar school gingen, waardoor dat heel dat schools traject in gevaar komt, en die soms een compleet jaar verliezen.

Nu van sommige jongeren zien we dat ze er afstandsonderwijs georganiseerd wordt. Meer nog, er zijn jongeren die vanuit Mol elke dag naar Antwerpen komen om hun dagonderwijs te volgen en 's avonds dan terug. Die mannekes die moeten om half zes uit hun bed en die zitten om half zeven op de trein om hun dagonderwijs te volgen om dan maar eerst om zeven uur ofzo in de instelling terug te komen. Dat zijn heel gemotiveerde gasten, maar dat zijn toch eigenlijk wel de uitzonderingen.” (Judge, Antwerp)

The main purpose of education programmes in the facilities, is to bring the school **rhythm and structure** back into the child's life and to **gain knowledge**. The children where school was going well, a cooperation may be set up with the original school for **distance learning** or in some cases **external schooling**. These initiatives were referred to by 7 interviewees (one lawyer and six social experts). Moreover, one of the social experts who often has contact with children in closed facilities states that the children themselves are also worried about their school career.

Personal development and reintegration

One of the social experts states that reintegration is the **main theme** of the stay in the facility. Another social expert indicate that the facilities are very aware of the fact that working on reintegration is **necessary**. Children in closed facilities receive crime-focused **contextual counselling** which **prepares** them for **their return to society**. The counsellor tries to make the transition as smooth as possible. The counselling contains individual guidance for the child with a strong **focus on the context**. Examples are context counsellors who search for new hobbies, go on home visits together with the children, go for a walk in the neighbourhood or go out for half a day on their own. These elements were confirmed by all social experts interviewed. There are also **semi-open facilities** for children who are leaving a closed facility because the transition to free society is still too big. One of the social experts elaborated on the intensive guidance in entails as well as a strong **focus on structure**. Despite, such an intermediate step is not always possible due to capacity problems.

“There is actually a very strong focus on that [i.e. getting in touch with the context (meaning parents, family, friends) of the child from the very beginning of their stay in a closed facility]. That is actually the main theme throughout the stay there. As far as possible, the children are also given more and more freedom in terms of structure. The school is an example of this. But that does not alter the fact that the transition to a home environment can be a very abrupt one, which is exactly why it is important to be vigilant about this preparation and the possible installation of an intermediate step.” (Member of the supervisory body for closed facilities)

“Daar wordt eigenlijk heel sterk op ingezet. Dat is eigenlijk de rode draad doorheen het verblijf daar. In de mate van het mogelijke wordt ook naar structuur toe de jongeren steeds meer vrijheid gelaten. Die school is daar een voorbeeld van. Maar dat neemt niet weg dat de overgang naar een thuisomgeving wel een heel bruuske overgang kan zijn, en precies daarom is het belangrijk om goed te waken over die voorbereiding en het eventueel installeren van een tussenstap.” (Member of the supervisory body for closed facilities)

d. Contact with family members during deprivation of liberty

Contact with the parents when children are **arrested by the police** seems rather **limited**. The results of the interviews are ambiguous. A police officer stated that when a child is deprived of its freedom, there is **no contact** between parent and child. Only when the child is **released or brought before the**

juvenile court contact is possible. The reason given by the interviewee is the **secrecy of the investigation**. Another police officer also stated that when children are deprived of their liberty in the context of an interrogation, **permission** must be sought for contact with the parents. Moreover, the parents will be contacted by the police after which the child has the chance to have **one phone call** with their parents. One of the police officers deplored that other contact depend on the **goodwill of the individual police officer**. One police officer indicates that some police officers always allow a mother to see her child, even when they are at the police station. Other police officers stick to a telephone call. Moreover, according to a police officer, when parents do not answer the phone, they do not always try again. When children are not deprived of their freedom, they are free to contact their parents. A juvenile judge states that there has usually been contact between parent and child before the child comes to court.

“We are talking about children, so we have to inform the parents of where their son or daughter is at the moment. But the children should always have the right to have a chat with their parents as well. And my experience has taught me, again on a personal basis, which of my colleagues I can persuade and say: Let mommy come in for a minute, let mommy be mommy for a minute to those little ones who did something stupid. But I also know that with other colleagues that will not be possible. They will feel: No, a phone call is more than enough. Yes, and then they call the parents, it's voicemail, they don't even leave a message and he/she has had the chance, but he/she can't take it. So, again, it depends very much on the person who does the things.” (Police officer, Ghent)

“Het gaat om minderjarigen, dus wij moeten die ouders in kennis stellen van waar is uw zoon of uw dochter momenteel, maar de minderjarigen hebben altijd recht om nog een gesprekje te hebben en mijn ervaring leert, ook weer op de persoon zelf, ik weet bij welke collega's dat ik kan bekomen van: Laat mama eventjes binnen komen, laat mama eventjes mama zijn voor die kleinen die onnozel heeft gedaan, maar bij de anderen weet ik ook van: Neen, telefoontje is meer dan voldoende. Ja, en dan wordt er gebeld, is het voicemail, wordt er zelfs geen boodschap ingesproken en heeft hij de kans gekregen, maar niet kunnen invullen. Dus het hangt ook hier weer heel sterk af van de persoon die de dingen doet.” (Police officer, Ghent)

Contact with parents is consistently thought of when looking into the functioning of the closed facilities. Two social experts indicate the importance that children attach to contact with their parents. The possibilities to have contact is **built up gradually**.

“What we conclude is that family visit are limited. [...] children are allowed to call home x number of times and they really make use of that. From week five onwards, I think, children will be allowed to go on a day visit starts, which means that either they go home or their family come to pick them up and do something near the facility.” (Researcher on juvenile delinquency)

“Wat dat wij vaststellen is dat dat bezoek, dat dat toch dikwijls beperkt is. [...] Jongeren mogen dan x-aantal keer naar huis bellen en daar maken ze echt wel gebruik van en dan vanaf, denk ik, vijf weken begint al zo het dagbezoek thuis of dan mag het bezoek komen en dan mogen ze eventjes naar buiten.” (Researcher on juvenile delinquency)

Three non-legal experts point to the strictness of the rules within the facility regarding the duration of contact with family members. Two social experts indicate that facilities are difficult to reach for families without a car. During the lockdowns due to the **Covid pandemic**, **video calling** was used, visits

were not possible then. Subsequently, the right to contact with family was under enormous pressure during the pandemic, which one of the social experts felt was not recognised enough.

“During corona, many steps have also been taken towards video calling. But I still think that this group has been punished too harshly by the [corona] measures. It's really unfortunate that we've cut them off so much from their families and their parents. Children have a right to their parents. They have a right to contact with their parents and I also believe in physical contact. And there have been many young people who have stayed in a facility for a long time without contact with their parents. It really has been a forgotten group. It is also not to be underestimated how important this is for children. They have a real right to the feeling that they are loved, that they can turn to their parents and that their parents are there for them. That's been a real problem.” (Member of the supervisory body for closed facilities)

“Tijdens corona zijn er heel veel stappen gezet ook richting videobellen. Maar toch vind ik dat deze groep te hard gestraft is door de maatregelen. Het is onheus eigenlijk dat we ze zo sterk van hun familie en hun ouders hebben afgesneden. Kinderen hebben recht op hun ouders he. Ze hebben recht op contact met hun ouders en ik vind ook op fysiek contact. En er zijn heel veel jongeren geweest die heel lang zonder contact met de ouders in een voorziening verbleven hebben. Het is echt een vergeten groep geweest. Het is ook niet te onderschatten hoe belangrijk dat is voor kinderen. Die hebben echt recht op het gevoel dat ze geliefd zijn, dat ze bij hun ouders terecht kunnen en dat hun ouders er voor hen zijn. Dat is echt een probleem geweest.” (Member of the supervisory body for closed facilities)

Visits from **other family members or friends**, outside the household, are more **difficult**. One of the social experts indicates that contact with people other than the parents is rather rare. **Permission** for those contacts must be requested from the **juvenile court**. The social service of the juvenile court examines the profile of the person and then formulates an advice. Two youth judges and three social experts stressed that if there are no indications that this would be bad for the child, the visit is and should be allowed. When the interviewer asks about this, one of the judges and two social experts agreed that the current system might be too **cumbersome**. One of the social experts indicates that asking for permission can be a **threshold** for a child.

“The system as we know it today consists of asking for permission from the juvenile judge. If the judge thinks it's OK, then the child can also keep in touch and receive visits from friends and acquaintances [and other family members] from the network. But then explicit permission must be requested, the juvenile judge must then consider this, which is of course a very big barrier.” (Member of the supervisory body for closed facilities)

“Het systeem zoals we dat vandaag kennen bestaat erin dat er toestemming moet gevraagd worden aan de jeugdrechter. Als die het OK vindt, dan kan het kind ook contact houden en bezoek ontvangen van vrienden en kennissen [en andere familieleden] uit het netwerk. Maar dan moet er expliciet toestemming gevraagd worden, de jeugdrechter moet zich daar dan over buigen, wat uiteraard een hele grote drempel is.” (Member of the supervisory body for closed facilities)

e. Discussion of findings

Deprivation of liberty of children is legally **anchored as a measure of last resort**. In practice there are some **difference in opinion** as to what 'last resort' should entail. In general the interviewees feel that deprivation of liberty is something that is **not considered lightly**. Some interviewees indicate however that deprivation of liberty is **sometimes used too easily**. References are made to violations of Covid-restrictions.

The **legal framework** governing children deprived of their liberty is not elaborate nor included into one specific legal instrument. **Rights and rules are scattered** over different legal instruments. Discussions are ongoing as to the need to adopt a more comprehensive and self-standing legal framework.

Due to the lack of an overarching legal framework, **a lot of uncertainty** exists among practitioners who are not working inside closed facilities. Questions on medical examination upon entry and access to health care whilst residing in a close facility received vague answers.

The **education and training** inside facilities is better known as it is something that is particularly relevant to most practitioners, be it police officers, prosecutors, lawyers, judges, social workers, .. As the school career of children is considered to be of utmost importance this is reflected upon by all interviewees. Whereas there are **some concerns** with the ability of the facilities to organise a meaningful alternative to a normal school career, there are **numerous good practices** of children being allowed to attend classes in a regular school, outside the facility.

Similarly important is the possibility to stay in close **contact with family members and friends**. The rules are considered to be rather strict, but the strictness is deemed **necessary to monitor** the contacts of the child and ensure that children are not approached by people considered to be of bad influence.

C.7 The rights to effectively participate in and be accompanied during the trial

a. Legal overview

The right to effective participation is enshrined in the right to be heard and express one's views during the proceedings. In addition to the general principles regarding the right to be heard as included in article 12 UNCRC, and **echoed by provision 5 of the Preliminary Title** to the Federal Youth Law, specific provisions on the right to be heard are included in the Youth Justice system in Belgium.

Right to be heard by the Prosecutor

The right to be heard by the prosecutor is **not as explicitly** mentioned as is the case for the right to be heard by the youth court judges. However, several decisions made by the prosecutor entail a **discussion** with the child involved.

E.g. the prosecutors' office will explore the possibility of pursuing a restorative initiative.⁵¹ This exploration requires hearing the child as any such initiative cannot be taken without the consent of the child. The same is true for the possibility of offering a positive project as a way to react to the offence.⁵² The prosecutor will explain the possibility to the child, and it is up to the child to decide to whether or not take an initiative to draft such a project.

⁵¹ Article 20 Flemish Delinquency Decree stipulates that restorative initiatives should be explored before considering any other reaction to the offence.

⁵² Article 23 Flemish Delinquency Decree

Right to be heard by the Youth Court Judge

The Federal Youth Law stipulates in its Article 52^{ter} that **no decision can be taken unless the child involved is heard** by the youth court judge. The only exception allowed is when the child cannot be found, when the medical condition of the child does not allow the hearing to take place or when the child refuses to be heard. This rule does not only apply when an initial decision is taken, but also when the judge as to review an earlier decision (e.g. due to problems with the execution thereof). In those situations too, Article 60 Federal Youth Protection Act stipulates that the child should be heard. These rules apply to the entirety of the Belgian Territory as no regional rules have diverted from it.

This right is **reiterated in the regional rules**. Article 15 and 16 Flemish Delinquency Decree holds a mirroring general provision. Article 22 Flemish Delinquency Decree repeats the principle in the context of the possibility to opt for a restorative initiative, Article 25 Flemish Delinquency Decree in the context of conditions imposed on the child, Article 26 in relation to detention in an orientation centre

b. Right to effective participation in practice

i. Enabling the child's effective participations - Modifications of settings and conduct

Modification of the setting

When it comes to enabling participation, one of the juvenile judges indicates that the setting of the hearing can be **intimidating**. This is because the clerk, their lawyer, social services and police officers are present. This makes it **difficult to get children to talk**. Moreover, the other juvenile judge indicates that the **courtrooms are not always suitable** for children to participate. The halls are furnished after **traditional courtrooms** for adults where the **judge is sitting on a platform**. The juvenile judge in question does not understand the usefulness of this practice.

"The courtroom for our annual hearings are really very traditional courtrooms, with a raised platform where the judges take a seat. And then a section for the suspect and a section for the civil party. [...] Of course, in the context of the assessment of offences, where there is also a civil party, I understand that it must be a bit like an adult courtroom, but I do not understand that we really need to sit on such a platform; I don't like that." (Judge, Antwerp)

"De zittingszaal voor onze jaarlijkse zittingen zijn echt heel traditionele zittingszalen, met een verhoog waar de rechters zitten. En dan een deel voor de verdachte en een deel voor de burgerlijke partij. [...] Natuurlijk, in het kader van het beoordelen van feiten, waar er ook een burgerlijke partij is, dan begrijp ik wel dat het toch een beetje moet zijn zoals een zittingszaal bij volwassenen, maar ik begrijp niet dat we daar dan echt op zo een verhoog moeten zitten; Ik vind dat maar niets." (Judge, Antwerp)

In addition, one of the youth lawyers states that there is an **office of a juvenile judge** in which there is a **doll in an old police uniform, old courtroom benches and religious posters**.

"There is one office, where there is a doll with an old Gendarmerie uniform, where there are benches of the old courthouse, on which people have to sit. There were religious posters on the wall a while ago, I can't remember what it was. I already explicitly asked the judge why that happens there and if he/she doesn't find it intimidating. He/she answers no, but I find that intimidating myself. (Youth lawyer, Antwerp)

“Er is één kabinet, waar een oud Rijkswacht-uniform op een pop staat, waar er banken van het oude justitiepaleis staan, waar mensen op moeten zitten. Daar hingen een tijd geleden religieuze posters tegen de muur, ik weet al niet meer wat het juist was. Daar heb ik aan de rechter al expliciet gevraagd waarom dat daar zo gebeurt en of hij dat niet intimiderend vindt. Hij antwoordt dan van niet, maar ik vind dat zelf al intimiderend.” (Youth lawyer, Antwerp)

In addition, the same lawyer indicates that in the juvenile court there is a waiting room 'the glass room' where there is a **plush toy of a Dalton⁵³ with a prison ball at its foot.**

“Something that also bothers me is that in the glass room where young people sometimes have to wait a long time, there is a Dalton figure with a prison ball at its foot. Then I wonder why it should be there. Someone put it there for some reason. It wouldn't occur to me to put it there with young people who are locked up there at that moment and can't leave by definition.” (Youth lawyer, Antwerp)

“Iets dat mij ook stoort is dat in het glazen lokaal waar jongeren soms heel lang moeten wachten, daar staat een Dalton-figuur met een gevangenisbal aan zijn voet en een knuffel. Dan vraag ik mij af waarom dat daar moet liggen. Iemand legt dat daar toch met een bepaalde bedoeling. Bij mij zou dat niet opkomen om dat daar te leggen bij jongeren die daar op die moment opgesloten zitten en niet weg kunnen per definitie.” (Youth lawyer, Antwerp)

Nevertheless, three of the social experts state that setting is **not the most important**. It will leave an **impression** on the child's experience, but it is **no guarantee to a successful participation**. According to them, the **attitude of the actors** is of greater importance. Obviously however, if **the judge is on a platform** it creates **a distance or barrier** for the child to participate.

“If you have a good juvenile judge who explains everything well, you can sit in a dusty basement, then that is still a good interrogation that gives those children a very good feeling about their participation. And a clean room with a clean seat is no guarantee of success if the child doesn't feel that there is really genuine interest in what he/she has to say.” (Member of the supervisory body for closed facilities)

“Als je een goede jeugdrechter hebt die alles goed uitlegt, mag je in een stoffige kelder zitten, dan is dat toch een goed verhoor dat die jongeren een heel goed gevoel geeft over zijn deelname. En een schone kamer met een schone stoel is geen garantie voor succes als de jongere niet het gevoel heeft dat er echt oprechte interesse is in wat hij te zeggen heeft.” (Member of the supervisory body for closed facilities)

Modification of conduct of the proceedings

During the interviews, only one element emerged concerning this theme. A juvenile lawyer states that children **are given the floor first** by the juvenile judge, while for adults it is the other way round. Another juvenile lawyer indicates that the juvenile judge **indeed often focuses on the child first**. Then it is the child's intention to speak and the juvenile lawyer only adds to it. Another juvenile lawyer also

⁵³ The Daltons are the four criminals from the children's series Lucky Luke. In the series, they often stay in prison. They can be recognised by their black and yellow prison uniform and a prison ball on their foot.

states that the child is given the floor first. In contrast, a social expert stated that some youth court judges let the lawyer speak first and hardly ever let the child speak.

“In practice, it is often the case that the child is heard first, before the lawyer. Or that the hearing starts with a do-over of the interrogation of the child. This is the opposite of the situation with adults, because if a lawyer is present, it is actually the lawyer who does the talking, and then at the end he/she is asked, almost *pro forma*, if the person concerned has anything to add. In the case of children, it is actually the other way round.” (Youth lawyer, Antwerp)

“Eigenlijk is het in de praktijk vaak zo dat de minderjarige eerst het woord krijgt op zitting, nog voor de advocaat. Of dat hij eerst verhoord wordt, nog ne keer bij wijze van spreken. Dat is dan het tegenovergestelde van bij de meerderjarigen; want als er daar een advocaat bij is, is dan is het eigenlijk de advocaat die het woord voert, en dan wordt er op het einde gevraagd, bijna pro forma, of de betrokkene er nog iets aan toe te voegen heeft. Dat is bij minderjarigen eigenlijk omgekeerd.” (Youth lawyer, Antwerp)

ii. How are children heard and their views taken into account?

One of the social experts states that the right to participation is a **shared responsibility**. To begin with, youth lawyers can **represent the voice of the child** and involve them in the procedure. Then, the social service of the juvenile court also drafts reports in which the voice of the child is included. Those reports cannot be drafted without seeing and hearing children. This position was echoed by two lawyers.

It is stated by two of the social experts that the right to participation is **well regulated on paper**. Effective participation, however, depends on how it is organised in practice.

“If you have a judge who takes the time to explain everything to the young people and is interested in asking a number of questions in order to get the child to talk, then that is fine. But usually there is just no time. And I also know juvenile judges who first let the lawyer speak and then snarl at him/her 'and you, do you have anything else to add' - that's not really the way to put a child at ease. Then there is no real, genuine opportunity to participate.” (Member of the supervisory body for closed facilities)

“Als je een rechter hebt die de tijd neemt om de jongeren van alles uit te leggen en geïnteresseerd een aantal vragen stelt om de jongere aan de praat te krijgen, dan gaat dat. Maar doorgaans is er toch gewoon geen tijd hoor. En ik ken ook wel jeugdrechters die dan eerst de advocaat aan het woord laten en dan langs hun neus weg snauwen ‘en gij, hebbe gij daar nog iets aan toe te voegen’ – ja dat is nu niet echt de manier om een jongere op zijn gemak te stellen. Dan is er geen sprake van een echte, oprechte mogelijkheid om te participeren.” (Member of the supervisory body for closed facilities)

A distinction needs to be made between ‘pro forma’ being allowed to participate by having your say, and ‘actually’ being allowed to ‘effectively’ participate by having that say taken into account. From that perspective, it seems that **not every child can effectively participate**. A juvenile judge states that many decisions are still made over the heads of children. One of the youth lawyers states that children can always tell their story at the court, but that does not necessarily mean that they will be listened to.

“They [the children] can always tell their story, but whether all the judges listen to it is another matter. You can let someone tell their story, but if your opinion has already been determined beforehand, it is of little use. I have never experienced that they are not allowed to say anything, actually.” (Youth lawyer, Antwerp)

“Ze [de kinderen] mogen altijd wel hun verhaal doen, of alle rechters er even goed naar luisteren, dat is iets anders. Je kan iemand laten vertellen, maar als op voorhand je mening al vaststaat, heeft het weinig zin. Ik heb nog nooit meegemaakt dat ze niks mogen zeggen eigenlijk.” (Youth lawyer, Antwerp)

Some judges also indicate that they cannot be convinced. In addition, one of the social experts states that children are not always taken seriously. Another social expert indicates that in social work, people often talked about the child instead of with the child. The right to participation is not part of the culture of social work. Often, communication takes place through an intermediary, the child's individual supervisor.

Even though **investments are made**, there is still a lot of **progress** to be made, according to three social experts and a lawyer. It is important that children are given a **forum to speak without being obliged** to do so. One of the social experts states that most **children do not know that they can participate** in their rehabilitation process. As a result, children just endure it. Furthermore, not every child wants to participate. In the experience of four lawyers, two prosecutors, a judge and a social expert, some children are eager to speak their minds, while others leave everything to their lawyer. One of the juvenile court judges **stimulates** children to tell their story by **reassuring** and **encouraging** them. The juvenile judge also states that the child is **asked if their lawyer should speak**. They can then intervene at any time if they wish. The other juvenile judge indicated that judges are unfairly portrayed as a threat. This makes children afraid to participate. This juvenile court judge also tries to reassure the children first. One of the social experts, a social worker, asks the children, after talking to them, what they thought of the conversation and how it could be improved. Also, **Low-threshold communication tools** are used in the social services. For example, children can reach social workers through WhatsApp.

During the Covid pandemic, online court hearings via video conferencing, called WebEx, were utilised. In such a hearing there is no way of knowing who can listen in to the conversation. Furthermore, it creates a greater distance between the child and the judge. These issues could affect the child's participation in the proceedings. The two youth lawyers and two prosecutors with whom this practice was discussed are not in favour of online court hearings.

c. The right to be accompanied by the holder of parental responsibility

Not all interviewees are on the same page as regards the involvement and participation of parents. One of the juvenile judges and a prosecutor indicate that **most parents are present** at the court hearing to accompany their child.

“Most parents are really very much involved with their children; most parents are actually present at the hearing. And that's very important, they play an important role in the story. There are always exceptions, of course, but that's a minority.” (Judge, Antwerp)

“De meeste ouders zijn echt wel zeer betrokken bij hun kinderen; de meeste ouders zijn ook echt wel aanwezig op de zitting. En dat is heel belangrijk, ze spelen een belangrijke rol in het verhaal. Er zijn natuurlijk altijd wel uitzonderingen, maar dat is echt wel een minderheid.” (Judge, Antwerp)

In contrast, one of the youth lawyers and another prosecutor state that parents are often not present at the court, except for the **very involved parents**.

“I notice in practice that those parents are often not present when a young person is brought before them; that one has to make do with the youth lawyer - unless they are very involved parents, and that is left to the initiative of the parents - some parents immediately provide themselves with their own lawyer.” (Prosecutor, Antwerp)

“Ik stel in de praktijk vast, dat die ouders daar vaak niet aanwezig zijn, wanneer een jongere wordt voorgeleid; dat men het moet doen met de jeugdadvoocaat – tenzij het heel betrokken ouders zijn, en men laat dat dan wel aan het initiatief van de ouders over – sommige ouders voorzien zich al onmiddellijk van hun eigen advocaat.” (Prosecutor, Antwerp)

Nine interviewees (two judges, a lawyer, three prosecutors and three social experts) indicate that **very little use is made of a support person**. From time to time a trust person is present at court. The following examples are cited: a teacher, the guardian, someone from the centre for pupil guidance, a supervisor from the facility and a general practitioner. It is unclear why they are not used more often.

“What really strikes me is that very few support persons come to the courts. Perhaps that is because it is not emphasized enough by the lawyers that that is also possible, a support person.” (Judge, Antwerp)

“Wat me echt opvalt is dus dat er heel weinig vertrouwenspersonen meekomen naar de rechtbanken. Misschien komt dat omdat het nog onvoldoende wordt benadrukt door de advocaten dat dat ook kan he, een vertrouwenspersoon.” (Judge, Antwerp)

Three prosecutors state that it can happen that a **court hearing is interrupted** for a **consultation with their lawyer**. Also online court hearings can be suspended so that the lawyer can call the child for consultation. It is the experience of three of the lawyers, that before the start of the hearing, in most cases there is a consultation between the youth lawyer and the child.

d. Discussion of findings

It can be concluded that the right to participation still has **room for improvement**. Legally speaking, the right to effectively participate for children is well regulated. However, in practice, it appears that ideal conditions for participation are often not created. To begin with, the setting is often not very child-friendly or even intimidating. However, it is stated that the setting is not the most important and does not guarantee good participation. The attitude of the actors towards the child is more important. In addition, it seems as if very little has been changed in the conduct of the proceedings to allow children to participate. The main difference is that the focus is on the child and not on the lawyer's plea as is the case in criminal cases. In particular, children are often given the floor first. Whether the voice of children is taken into account is the responsibility of each actor. Based on the results, it seems

that the right to participation cannot be fully exercised. Children are still too little involved in every step of the procedure and things are still decided over their heads.

When it comes to the right to be accompanied, it is noted that involved parents are present at the hearing. In addition, it is noticeable that children make little use of trust persons during hearings, but that consultations with their lawyer are usually possible.

PART D. GENERAL ASSESSMENT

D.1 Challenges

Capacity

Six interviewees (two police officers, a prosecutor and three social experts) referred in their final observation to the problem of **capacity** in the provision of assistance. This occurs at every level. This concerns places in closed facilities as a measure imposed by the juvenile court. One of the social experts speaks of waiting lists for specialised youth care programs of up to one year. In addition, **the high workload** of the actors is also mentioned by three interviewees (two police officers and a prosecutor) as a challenge in the sense that it has an impact on the legal safeguards of children. In theory, all rights are guaranteed, but in practice, actors do not have enough time to realize everything. Examples given by the interviewees are children being locked up in police cells for longer periods of time because of having to wait for lawyers, juvenile court judges experiencing enormous time pressure, as a result of which children cannot be heard in a fully-fledged manner, and again the enormous waiting lists in social services. In addition, the enormous workload of the social service counsellors of the juvenile court was mentioned several times during the interviews, by all categories of interviewees.

Specialised professionals

Six respondents, from the different professional groups, also stated that there is a need for **specialised training or specialised actors**. Firstly, two youth lawyers mentioned this challenge. One youth lawyer refers to making a specialisation compulsory for youth lawyers. The other youth lawyer refers to the fact that there is no specialised Salduz training for children. Secondly, a police officer points out that training in dealing with children is a challenge for police officers. At present, there is no compulsory specialised youth training for police officers, even though there are youth inspectors. Thirdly, a public prosecutor suggests recruiting more staff who know how to deal with children and not having this done by not-specialised police officers. Finally, the social experts also mention this problem. They refer to the lack of knowledge. One of the social experts states that the challenges are not to be found in the legal framework itself, but in the quality with which it is applied in practice. She refers to time, commitment and training. This position was echoed by three lawyers, two police officers and two prosecutors.

Harsher views on youth delinquency

In addition, three interviewees (a judge, a lawyer and a social expert) indicated that **the views on youth delinquency are becoming harsher**, which is a major challenge. The views have shifted from a predominantly protective to a very punitive approach. Linked to this, two respondents, a juvenile court judge and a prosecutor's office judge, indicate that the biggest challenge lies in maintaining the divestiture procedure, i.e. the mechanism of **handing children over to the common criminal justice system** – called *uithandengeving*. This is a procedure whereby children over the age of 16 commit serious crimes, and often after having had a whole series of measures in the juvenile justice system, are handed over to the adult or common criminal justice system. One prosecutor would like to see this abolished, while a judge would rather to see the formal rights of children in this procedure better defined.

D.3 Promising practices

Free legal assistance provided by trained youth lawyers

Another professional group that four respondents regard as a promising practice are **specialised youth lawyers**. Three cases are considered praiseworthy. Firstly, that they are **appointed at the beginning** of the procedure, secondly, that their assistance is **free of charge** for children and thirdly, that they are **specialized in juvenile law**. These aspects were mentioned by a judge, a lawyer and three prosecutors.

Alternative measures

According to five interviewees (a judge, a lawyer, a prosecutor and two social experts), **the wide variety of measures and the use of alternative measures** is a promising practice. Examples given are the positive project and other forms of intensive outpatient assistance. Also the handling options at the level of the public prosecutor's office are considered a praiseworthy practice, since it avoids starting a procedure at the juvenile court.

Commitment of professionals working with children

Another good practice or observation is the **commitment of different actors**. Eight interviewees representing all categories of interviewees, refer to a huge commitment and engagement by the actors in the field, with specific reference to the youth services, the youth inspectors and the youth judges.

D.4 Suggestions

Age assessments

- Introduce the triple test in a youth delinquency setting as opposed to relying only on the bone scan of the wrist.
- Establish a clear cooperative framework with the Immigration Service to conduct age assessments to avoid unnecessary duplication of medical examinations.

Right to information

- Simplify the written documents currently provided to children at the occasion of being interrogated by the police.
- Linked thereto, consider audio-visual recording of interrogations the way they are currently being conducted (i.e. without the specific interrogating technique used for victims).
- Anchor a mandatory right to information with respect to the rights in relation to and functioning of the other actors in the criminal justice chain
- Develop a good practice of providing an oral explanation to go with written documents
- Ensure the availability of adequate rooms to conduct the private consultation between lawyer and child
- Elaborate the legal framework to clearly detail the information that needs to be provided to the parents

- Develop the good practice of verifying whether the parents were informed of court proceedings if the parents of the child are not present

Right to assistance of a lawyer

- Introduce a general requirement to have followed the specific training for youth lawyers as a condition to be allowed to assist children
- Consider complementing that requirement with the requirement to follow a number of annual training sessions
- Consider complementing that requirement with a mechanism to monitor the quality of the assistance provided to children
- Establish a best practice to always verify whether a child has previously been assisted by a youth lawyer to try and have the child be assisted by the same lawyer in new proceedings
- Establish a best practice to always require the child to consult a lawyer prior to giving their consent to a prolongation of a stay in a closed facility.
- Allow children to indicate that they wish to be assisted by another lawyer
- Consider setting out clear guidelines on the cooperation between the youth lawyer and the holders of the parental responsibility.

Right to an individual assessment

- Increase the capacity of the social service of the youth court
- Redesign the Signs of Safety model into a Signs of Strength model that is better equipped to support youth delinquency cases

Deprivation of liberty as a last resort

- Develop a solid legal framework regarding the rights of children whilst being detained
- Increase the staff available in the institutions to work with children deprived of their liberty
- Reconsider the qualification of education in closed facilities to allow children deprived of their liberty to obtain a certificate for the classes taken in the facilities

Right to effective participation

- Increase the capacity of the social service of the youth court to have children participate more intensively to the individual assessment
- Have youth judges consider sitting around the table when hearing children, to establish an atmosphere of cooperation between them
- Establish a good practice among youth judges to always ask children how they wish to participate, i.e. at the beginning, at the end, reading a letter, answering specific questions, talking about specific topics
- Reconsider the design of court rooms to avoid too much distance between youth judge and children
- Reconsider the use of support persons to create a friendly atmosphere
- Ensure that children are properly prepared, i.e. know their rights, understand the procedures, have insight into the roles of the different actors involved, have prepared the court session with the help of their youth lawyer.

PART E. CONCLUSIONS

C.1. General implementation of the procedural safeguards for children who are suspects and accused persons in criminal proceedings as regulated by the Directive (EU) 2016/800

In Belgium, the general position is that **youth law procedures** are **not criminal in nature** and therefore not subject to the requirements of the Directive. However, the procedural safeguards for children are considered to be very important. In practice, the **ambition** clearly is to **adhere to the safeguards** enshrined in the Directive.

One of the safeguards relates to the **training of the professionals** that interact with children. This warrants looking into the training and the extent to which children's right and vulnerabilities are included. The mandatory **police** training only **marginally** looks into youth law and skills to interact with children. The **judges and prosecutors** working in youth law matters receive a mandatory training on youth law and family law, including not only legal but **also non-legal modules**, including communication with children. This training is said to be multidisciplinary and interactive, but could be even more interactive to be really useful in practice. In general, children are assisted by specifically trained youth lawyers. **Lawyers** can obtain a **certificate** when following a year-long training with weekly seminars or workshops. This (**voluntary**) training is considered to be very useful.

As anticipated to when drawing up the profiles of the interviewees, some of the older and more experienced practitioners did not receive any training. In general, all interviewees indicate that existing mandatory trainings are still **too theoretical** in nature, even though they are multidisciplinary and comprise workshops and roll plays on communication with children. The specific (currently non-mandatory) training of **lawyers** is considered to be the **most effective**. It is suggested to make the specific training of lawyers mandatory whilst considering whether it needs to be complemented with follow up training and/or a monitoring mechanism to ensure high quality legal assistance to children.

C.2. Age assessment and the presumption to be a child in case of remaining uncertainty

Age assessments are conducted when no official documents are available to attest the age of the child. Assessments are done via a **medical examination** that is usually limited to a **single bone scan** of the wrist and is only exceptionally extended to a **triple test** (of wrist, collar bone and teeth). Because of the large margin of error and the lack of reliability of these medical examinations, they are contested in literature. This controversy is however not found in youth law practice even though there have been several cases where different medical examinations resulted in **conflicting age assessment**. The lack of controversy in practice can be brought back to the **large margins** used and the fact that persons involved will be **presumed underaged** when there is the slightest possibility they are underaged. In the event of conflicting results in different assessments, the one that is most beneficial to the child will always take precedence.

C.3. The right to information, having the holder of parental responsibility informed and audio-visual recording of the questioning

a. Right to information

The right to receiving information about the context of the police **interrogation** is well embedded in a solid legal framework. Written information is (to be) provided to children. However, it is clear that

the added value of this **written (and overly complicated) information** is undermined in absence of an oral explanation. The efforts of the police seem to vary significantly. At the level of the prosecutor or the youth judges, no standardised information **brochures** are available. There too, the **efforts vary significantly** between individual actors.

The most important actor to provide information to the child, is the **youth lawyer**. This finding supports the argument that training of youth lawyers is of utmost importance.

b. Right to have the holder of parental responsibility informed

The rights in relation to the holders of parental responsibility are not well elaborated on. In general it is clear that parents should be informed **when the child is deprived of its liberty**, be it in case of an arrest, a pre-trial detention or following the execution of a youth law reaction involving deprivation of liberty. However, there are very little legal provisions detailing what parents should be informed of.

The interviewees often shifted between the **right of the child** to have his/her parents informed and the **right of the parents** to be informed about what is happening with that child. This shift is caused by the dual position parents have in youth justice procedures. On the one hand, they are the parents of the child and in that capacity best placed to support the child throughout the procedure. On the other hand they are responsible for that child and in that capacity a party to some parts of the procedure.

c. Right to an audio-visual recording

In general, audio-visual recording of the interrogation of child suspects is **very rare** in Belgium. When audio-visual recordings of the interrogations are made, these concern serious offences such as sexual offences. For other offences, it is rarely or never used. According to the interviewees, this is due to practical matters. The causes of the low usage mentioned in the interviews are therefore **a lack of infrastructure, trained police officers, time and budget**. Interviewees are divided in their opinions on its usefulness. Reference is made to the advantage of being able to see the child's body language and attitude during the interrogation. It is argued that this allows for a better assessment of the child. Disadvantages mentioned are that there is a lot of administration involved, it is more expensive and takes more time which slows down the process. It is also indicated that children feel less comfortable with an audio-visual recording. Additionally, some interviewees argued that 'audio-visual interviews' as we know them today go beyond the mere recording of a traditional interview, but come with a very specific interview technique which is said to be not suitable for offenders.

C.4. The rights to be assisted by a lawyer and legal aid

a. Mandatory assistance free of charge

Being assisted by a lawyer throughout the procedure, is embedded in the existing legal framework. Children do not have 'the right' to be assisted, but 'the obligation' to be assisted as **they cannot waive** their right. Assistance is state funded and therefore **free of charge** for the children involved.

"One child one lawyer": The idea behind ensuring the effectiveness of the assistance

Youth lawyers are usually appointed when a child has its first contact with the police. The idea is that **the appointed lawyer continues** to be the lawyer of this child not only throughout the pending procedure but also **in any future proceedings**. This idea to ensure the effectiveness of the assistance presupposes that e.g. police authorities actively inquire whether a lawyer has been assigned in the past and whether that lawyer is available to assist the child in a new proceeding. The fact that in practice often lawyers 'on call' are contacted to assist children arrested by the police, undermines this idea and is flagged by the lawyers as undermining the effectiveness of their assistance to children. This **effectiveness** is said to be influenced not only by the legal possibilities of the lawyer to **act**, but also by the **relationship** of trust established between lawyer and child. Although most children will be assisted by trained youth lawyers, who are therefore also trained in communicating with children, this does not guarantee effective **communication** between lawyer and child.

b. Different views on how to assist a child

From the interviews it becomes clear that there are various views on the way in which a youth lawyer should assist the child; what effective participation should mean. Whereas some lawyers try to construe '**the best interest of the child**' based on their assessment of the case file, other lawyers will consider the opinion of the child what is in their best interest. This divides lawyers in either **objective** or **subjective** defenders of the best interest of the child. Most lawyers seem to combine elements of these two approaches. This diversity in opinions can also be found in the cooperation between the youth lawyer and **the holders of parental responsibility**. Whereas some lawyers will try and involve the parents as much as possible and consider themselves to be 'working with **the child and his/her family**', other lawyers are very strict in differentiating between either assisting the child or assisting the parents. They will **not interact with the parents** altogether. Most lawyers seem to combine elements of these two approaches.

C.5. The right to an individual assessment

There are two types of individual assessments in Belgium. Firstly, there is the individual assessment carried out **by the police**. This assessment is not standard practice and takes many different shapes and sizes. Exceptionally this assessment will amount to a full-fledged social inquiry at the individual initiative of a police officer. In general, the aim of this assessment, in whatever shape it may take, is to inform the public prosecutor of the current situation of the child in all aspects of life. This allows the prosecutor to order the appropriate measures for the child in the specific situation.

Secondly, there is the individual assessment carried out **by the social service** on behalf of the youth court. This individual assessment is carried out **in execution of Article 50 Federal Youth Act**. Here too, the aim is to form a broad **picture of the child's life**. The **Signs of Safety methodology** is used for this purpose, with solutions ultimately being formulated. The aim of this investigation is to inform the juvenile judge about the current situation in which the child finds itself and to **advise** about possibly **appropriate measures**. Moreover, a second goal of the individual assessment is to see if there is no underlying problematic parenting situation. It has been flagged that these assessments are that **not always updated** and **not always of high quality**. Both problems are said to be due to the enormous **workload** of the social service consultants and the high staff **turnover**.

C.6. Deprivation of liberty as a last resort and safeguards for children who are deprived of their liberty

Deprivation of liberty of children is legally **anchored as a measure of last resort**. In practice there are some **difference in opinion** as to what 'last resort' should entail. In general the interviewees feel that deprivation of liberty is something that is **not considered lightly**. Some interviewees indicate however that deprivation of liberty is **sometimes used to easily**. Reference are made to violations of Covid-restrictions.

The **legal framework** governing children deprived of their liberty is not elaborate nor included into one specific legal instrument. **Rights and rules are scattered** over different legal instruments. Discussions are ongoing as to the need to adopt a more comprehensive and self-standing legal framework.

Due to the lack of an overarching legal framework, **a lot of uncertainty** exists among practitioners who are not working inside closed facilities. Questions on medical examination upon entry and access to health care whilst residing in a close facility, received vague answers.

The **education and training** inside facilities is better known as it is something that is particularly relevant to most practitioners, be it police officers, prosecutors, lawyers, judges or social workers. As the education of children is considered to be of utmost importance this is reflected in all the interviews. Whereas there are **some concerns** with the ability of the facilities to organise a meaningful alternative to a normal school path, there are **numerous good practices** of children being allowed to attend classes in a regular school, outside the facility.

Similarly important is the possibility to stay in close **contact with family members and friends**. The rules are considered to be rather strict, but the strictness is deemed **necessary to monitor** the contacts of the child and ensure that children are not approached by people considered to be of bad influence.

C.7. The rights to effectively participate in and be accompanied during the trial

The **right to effective participation** is enshrined as the **right to be heard**. Some decisions cannot be taken without the child being heard. At the level of the **youth judge**, the right to be heard is enshrined in a **general** fashion. At the level of the **prosecution**, the right to be heard is **scattered** across different provisions and therefore **not always provided** for.

It can be concluded that the practice of allowing children to participate still has **room for improvement**. To begin with, the **setting** is often not very child-friendly or even intimidating. However, it is stated that the setting is not the most important when aiming to support good participation of the child. The attitude of the actors towards the child is more important. In addition, it seems as if very little has been changed in the **conduct of the proceedings** to allow children to participate. The main difference is that the focus is on the child and not on the lawyer's plea as is the case in criminal cases. In particular, children are often given the floor first. The extent to which the voice of children is taken into account, is the responsibility of each individual actor. Based on the results of the interview round, it seems that today the right to participation is insufficiently guaranteed. Children are still **involved too little** throughout the procedure and things are still decided over their heads.

When it comes to the **right to be accompanied**, it is noted that involved parents (provided that they are invited) are present at the hearing. In addition, it is noticeable that children make **little use of support persons** during hearings, but that consultation with their lawyer is usually possible.

ANNEX 1 – Overview of national organizations working with children who are suspects or accused persons in criminal proceedings

The table provides an overview of the type of organizations that work with these children. As there are numerous organisations active in the field, it is not possible to list all of them.

Table 2. ORGANISATIONS WORKING WITH CHILDREN

| Organisation | Focus | (Publicly available) Contact details |
|----------------------------------|---|---|
| GI De Zande – Campus Wingene | Detention of children – boys | Sint Pietersveldstraat 3 8750 Wingene liesbeth.antens@opgroeien.be |
| GI De Zande – Campus Ruiselede | Detention of children – boys | Bruggesteeweg 130, 8755 Ruiselede bram.soenen@opgroeien.be |
| GI De Zande – Campus Beernem | Detention of children – girls | Sint-Andreaslaan 5, 8730 Beernem sarah.vanghelder@opgroeien.be |
| GI De Markt - Mol | Detention of children – predominantly boys; since 2017 also smaller number of girls | Molderdijk 2, 2400 Mol geert.bots@opgroeien.be |
| GI De Hutten - Mol | Detention of children – boys | Molderdijk 135, 2400 Mol geert.bots@opgroeien.be |
| GI De Grubbe – Everberg | Detention of children – boys | Hollestraat 78, 3078 Kortenberg (Everberg) directie.degrubbe@opgroeien.be |
| Vlaams Detentiecentrum - Beveren | Detention of children – boys | Schaarbeekstraat 2, 9120 Beveren luc.vancraenenbroeck@opgroeien.be |
| IPPJ Jumet | Detention of children – boys | Rue De L'institut 85, 6040 Jumet ippi.jumet@cfwb.be |
| IPPJ Braine-le-Château | Detention of children – boys | Chemin Saint-Joseph 3, 1440 Braine-Le-Château ippi.braine-le-chateau@cfwb.be |
| IPPJ Saint-Hubert | Detention of children – boys | Rue Du Thiers Del Borne 7, 6870 Saint-Hubert ippi.saint-hubert@cfwb.be |
| IPPJ St-Servais | Detention of children – girls | Rue De Bricgniot 196, 5002 Saint-Servais ippi.saint-servais@cfwb.be |
| IPPJ De Fraipont | Detention of children – boys | Sur-le-bois 113, 4870 Fraipont ippi.fraipont@cfwb.be |
| IPPJ De Wauthier-Braine | Detention of children – boys | Avenue des Boignes 13, 1440 Wauthier-Braine ippi.wauthier-braine@cfwb.be |
| vzw ADAM | Restorative Justice Centre Antwerp | Uitbreidingstraat 392, 2600 Antwerpen marc.vandenbranden@cawantwerpen.be |
| vzw CIRKANT | Restorative Justice Centre Turnhout | de Merodelei 116, 2300 Turnhout pola.franken@cirkant-vzw.be |
| vzw EMMAUS | Restorative Justice Centre Mechelen | Jubellaan 300, 2800 Mechelen Luc.Griens@emmaus.be |
| vzw ALBA | Restorative Justice Centre Brussels | Vanderlindenstraat 17, 1030 Schaarbeek tom.herbots@alba.be |
| L' ABSL Le Randian | Restorative Justice Centre Brussels (French) | Rue du Marché aux Herbes, 105, 1000 Bruxelles contact@leradian.be |
| vzw PARCOURS | Restorative Justice Centre Gent | Dok-Noord 4, 9000 Gent ann.moens@vzwparcours.be |
| Escale S.A.R.E. | Restorative Justice Centre Brussel | Rue de Laeken, 120, 1000 Bruxelles escalesare@gmail.com |
| Jet S.A.R.E. | Restorative Justice Centre Tournai | Rue du Cygne, 21, 7500 Tournai jet@jet-ai.be |
| Le Choix S.A.R.E | Restorative Justice Centre Namur | Rue du Travail, 47, 5000 Namur info@lechoix.be |
| OOOC T PASREL | Diagnostic Centre Brussels | Emile Zolalaan 5, 1030, Schaarbeek directie@tpasrel.be |
| OOOC CIDAR | Diagnostic Centre Kortenberg | Marie Christinastraat 8, 3070 Kortenberg karel.de.vos@cidar.be |
| OOOC GLORIEUX | Diagnostic Centre Ronse | Sint-Hermesstraat 5, 9600 Ronse stefaan.bockstal@amonvzw.be |
| SROO Auberge des Haxhes | Diagnostic Centre Liège | Rue Sous les Haxhes 51, 4041 Vottem aubergedeshaxhes@skynet.be |
| SROO Integram | Diagnostic Centre Tournai | Couture du Moulin, 58, 7750 Mont de l'Enclus |

| | | |
|---------------------|--|--|
| vzw APART | Strengthening the social network and context of the child; guidance of children in GI | espoir.integram@gmail.com Brandstraat 3, 9000 Gent |
| vzw WINGERBDBLOEI | Strengthening the social network and context of the child; guidance of children in GI | geert.ginneberge@vzwapart.be Waterbaan 153, 2100 Antwerpen |
| vzw DE WISSEL | Strengthening the social network and context of the child; guidance of children in GI | jan.bots@wingerdbloei.be Tervuursevest 110, 3000 Leuven |
| Kwadraat | Organises resilience trainings | luc.deneffe@wissel.be Lange Lozanastraat 200, 2018 Antwerpen |
| Vzw JONG | Youth workers | kwadraat@cawantwerpen.be Antwerpsesteenweg 195, 9040 Sint-Amandsberg |
| vzw JES | Youth workers | Werkhuizenstraat 3, 1080 Brussel brussel@jes.be |
| vzw Cachet | Youth workers | Fernand Demetskaai 55, 1070 Brussel contact@cachetvzw.be |
| L'ASBL AMO Le Signe | Youth workers | secretariat@lesigne.be Rue du Laboratoire, 27 6000 Charleroi |
| I'ASBL Air Libre | Tailor-made guidance for children in the form of a project and strengthening their network | airslibres@gmail.com Chemin du Berger 1, 7900 Leuze-en-Hainaut |
| I'ASBL Siloué | Tailor-made guidance for children in the form of a project and strengthening their network | asblsiloe@siloe.be Rue du Calvaire 43, 6200 Chatelet |
| I'ASBL Le Chanmurly | Guidance for children when they leave a youth institution (IPPJ) | asblsiloe@siloe.be Rue Vivegnis 10C, 4000 Liège |
| I'ASBL Les sentiers | Youth workers | chanmurly.asbl@gmail.com Rue Emmanuel Mertens, 44, 1150 Woluwé-Saint-Pierre sentiers@lessentiers.be |

ANNEX 2 – Criminal responsibility in Belgium

Based on these different age limits, there are different ways the interpret the age of criminal responsibility in Belgium.

18 as a safe reference

In any event, a distinction should be made between criminal responsibility and criminal maturity. In Belgium, criminal maturity is reached at 18. As of that age, persons will be subject to the adult criminal justice system and will be held criminally responsible. However, even before that age, there can be forms of criminal responsibility.

16, provided that a divestiture procedure is conducted

There is no discussion about the fact that children subject to divestiture procedures are being held criminally responsible. Therefore, children as of 16 years old can be held criminally responsible if they have been subject to divestiture and the youth judge is applying the adult criminal code to determine the reaction to the offence committed.

14 or even 12 based on the possible sanctions in the youth law systems

Mirroring the discussion on the applicability of the directive (to the procedures that apply to children as of 12 years old who are suspects or accused persons of having committed a youth offence), the discussion in Belgium relates to the qualification of the legal system as either or not criminal in nature. The policy makers explain in the different explanatory memoranda accompanying the legal instruments, that it is important to recognise the ongoing development of children, and they should therefore be treated differently. It is argued that the system introduced for children is not a criminal system as we know it for adults. However, the policy makes do refer to ‘criminal responsibility’ and ‘criminal procedures’ both in the explanatory memoranda as well as in the bodies of the legal instruments. The majority opinion among academics and practitioners is that regardless of the theoretical and conceptual differences that are made between children and adults, the nature of the youth system should be considered ‘criminal’ to the extent that it invokes the applicability of procedural safeguards linked to criminal procedures. This reasoning is based on the ECtHR case law and the severity of ‘the sanctions’ that can be imposed to children. These most severe ‘sanctions’ are intended to be limited to children as of 14 years old, but could be applicable to children as of 12 years old (see footnote 5).

ANNEX 3 – Age assessments in Belgium

In Belgium the standard practice is that police officers arresting a child will do whatever they can to identify the child. They will either use official documents in the position of the child, or the information found in their databases. There are no differences in the various regional legal frameworks.

When no official documents exist, practices vary: usually a medical examination is conducted. However, we do not have a separate legal basis for these medical examinations in the context of youth justice or criminal justice procedures. If there is a discussion on the age of the person involved, rules

included in the Belgian asylum and migration legislation as “a source of inspiration”. There are a lot of different practices in this respect, which will be discussed in the interviews.

The only legal basis in Belgium, can be found in the asylum and migration legislation. The responsibility to conduct a medical examination to determine the age of the unaccompanied or undocumented child, rests with the *Custody Department of the Ministry of Justice*. This Department will have to assign a legal guardian to underage asylum seekers. If they are not sure about the age of an asylum seeker, they will request a medical examination to take place in one of the listed medical facilities. An age assessment is done based on the combination of three medical examinations, being the radiography of the teeth, the collar bone and the wrist.⁵⁴ Based on the outcome of those examinations, a medical practitioner will include a presumed age and the possible deviation. The most favourable age is used. Decisions are always taken in the best interest of the person involved – meaning that the lowest possible age is used.

It is important to understand that these medical examinations are only used to answer the question: is the person a child or an adult? The examinations are not used to determine the exact age of the person.

As there is no legal framework exists, criminal law actors draw from the legal framework and practices used in the migration and asylum context. Some prosecutors will refuse to do examinations (as they feel it is the responsibility of the Custody Department) and will treat the person as a child until an official decision from the Custody Department comes in attesting that the person is to be considered an adult. Some prosecutors will request for their own medical examination (usually only a single bone scan as opposed to the full-fledged triple-examination conducted at the request of the Custody Department) (as they argue it is important to have a decision rather soon, and they argue they cannot await the decision of the Custody Department). The practices are anticipated to vary between regions and even between prosecutors in the same region. This will be subject to analysis based on the outcome of the interview round.

As we do not have an explicit legal basis for the age assessments, Belgian law does not foresee any remedies in this regard. When a medical examination is conducted and the medical practitioner has declared that the person is to be considered an adult, even when the widest margins of appreciation are considered, the person will be treated as an adult.

⁵⁴https://justitie.belgium.be/nl/themas_en_dossiers/kinderen_en_jongeren/niet-begeleide_minderjarige_vreemdelingen/dienst_voogdij/identificatie_van_een_niet-begeleide_minderjarige_vreemdeling.

ANNEX 4 – Right to information in Belgium

1. Information about the procedural safeguards in case of an arrest or interrogation by the police

The right to information is enshrined in article 47*bis* of the Belgian Criminal Procedural Code. These rules apply to any child suspected or accused of having committed an offence.⁵⁵ A distinction is made between children that are **free to go home** (article 47*bis* §§2-3 CCP) and children that are **deprived of their liberty** (also §4 CCP).

Salduz III - Children not deprived of their liberty

The general right to information for a child not deprived of its liberty and about to be interrogated is enshrined in Article 47*bis* §2 juncto §3 CCP. These provisions stipulate that any person subject to an interrogation will be informed of the facts for which s/he will be interrogated and will be informed: (1) that s/he is heard as a suspect or accused person and that the interrogation cannot start without him/her having had a confidential consultation with a lawyer of his/her own choosing, and that this lawyer will assist him/her during the interrogation⁵⁶; (2) that s/he has the choice to make a declaration, the answer the questions put to him/her or to remain silent; (3) that s/he cannot be obliged to incriminate himself/herself; (4) that his/her declarations can be used as evidence in court; (5) that s/he can ask to take note ‘verbatim’ of any questions put to him/her and any answer provided by him/her; (6) as the case may be, that s/he is not deprived of his/her liberty and that s/he is free to go at any time; (7) that s/he can ask for certain investigative measures to be conducted or interrogations to be conducted; (8) that s/he is free to use any documents in his/her possession (without it postponing the interrogation) and that s/he can ask to add these documents to the official documents of the interrogation or more generally in the criminal file.

Ongoing discussions

It is commonly known that children often omit to contact a lawyer prior to presenting themselves for the interrogation. This means that a lawyer should still be appointed before the interrogation can start and the confidential consultation should still take place. It is argued that these consultations are often superfluous and not detailed enough to properly execute this right. There is no clear legal basis on the length of this consultation. Based on an analogous interpretation, it has been argued that the consultation should not last less than 30 minutes.⁵⁷ Although the child has the right to postpone the

⁵⁵ The rules will apply regardless of regional differences and the decision to either or not opt for a divestiture procedure. These rules also apply to children who will stay within the ‘protective’ juvenile justice systems shaped by any of the regional legal frameworks.

⁵⁶ For adults it is stipulated that there is a right to a lawyer, for children it is an obligation in the sense that a child cannot waive his/her right to be assisted by a lawyer. Furthermore it is added that this right is provided that the underlying facts constitute an offence that is punishable with a sanction involving a deprivation of liberty, but this rule does not apply to children. Finally – to the extent that he/she is not deprived of his/her liberty – for adults who have been invited in writing, this right to a lawyer only applies to the extent the adult has made arrangements for a lawyer to be present to assist him. Article 47*bis* §3 clarifies however, that this does not apply to children. In case a child is being interrogated, it is mandatory to be accompanied by a lawyer. A child cannot waive this right. Furthermore, whereas for adults it suffices to have explained that there is a right to a confidential consultation with a lawyer, an interrogation of a child cannot start without such a confidential consultation to have taken place. In practice this means that, if the child has not taken any initiative to contact a lawyer, and has not had any such confidential consultation, this should be organised before the interrogation can start.

⁵⁷ Article 2*bis* §2 section 2 of the Act of 20 July 1990 on Pre-Trial Detention (as amended by the Salduz-legislation), Belgian Official Journal 18 August 1990.

interrogation once, there are no clear rules or guidelines as to whether this postponement should go beyond those 30 minutes of the confidential consultation.

Previous research has revealed that lawyers are frustrated with the lack of information they (both the lawyer and the child) received before the interrogation by the police. A brief summary of the facts (without access to the case file or background information of the child involved) is not sufficient to form an overall picture of the situation of the child. Information is considered not detailed enough to properly prepare the client for the interrogation that will take place. It is argued that in those circumstances, they are not able to fully do their job in assisting the child.

More generally, it is argued that the information provided to the child is not adapted to children. The language used is standardised and does not take account of the age of the person involved, its vulnerabilities and is not written in simple enough terms, despite the fact that this is expressly included in the provisions. Article 47*bis* §6 (2) CCP stipulates that the wording of the information should be adapted in light of the age of the person involved or in light of any vulnerabilities of the person which may impact on the ability to understand the information.

Salduz IV - Children deprived of their liberty

The extended right to information for a child that is deprived of its liberty and about to be interrogated is enshrined in Article 47*bis* §4 CCP. It is stipulated that the person involved, deprived of its liberty based has the additional rights included in the Pre-Trial Detention Act.

Pursuant to Article 2*bis* Pre-Trial Detention Act, a child suspected or accused of having committed an offence will be provided with a written declaration of his/her rights and his/her rights will be explained orally by a police officer. He/she will be informed of his/her right of access and assistance by a lawyer. These children have an extended right to information, in the sense that they are granted some additional rights. Article 2*bis* §7 stipulates that children deprived of their liberty have the right to have another person informed of their arrest. Additionally, §8 stipulates that anyone deprived of their liberty has the right to medical assistance.

2. Information about the role and functioning of the prosecutor's office

At the level of the prosecutor not distinction is made in the legal basis, based on the child being either or not deprived of its liberty. The differentiation here, is based on the applicable law, linked to the place of residence of the holders of the parental responsibility of the child.

- For children (whose parents are) residing in Brussels Capital region, the Brussels ordonnance includes a specific reference to the right to be informed of the right to be assisted by a lawyer in the course of a mediation measure.⁵⁸
- For children (whose parents are) residing in Wallonia, the Walloon decree includes a specific reference to the right to be informed of the right to be assisted by a lawyer in the course of a mediation measure⁵⁹
- For children (whose parents are) residing in Flanders, no specific information provisions are included.
- For children (whose parents are) residing in the German speaking region, no specific information provisions are included.

⁵⁸ Article 28 (1) Brussels ordinance

⁵⁹ Article 97 §2 Walloon Decree

3. Information about the role and functioning of the youth court

At the level of the youth judge or youth court not distinction is made in the legal basis, based on the child being either or not deprived of its liberty. The differentiation here, is based on the applicable law, linked to the place of residence of the holders of the parental responsibility of the child.

- For children (whose parents are) residing in Brussels Capital region, the Brussels Ordonnance includes an explicit reference to the right to be informed of the right to be assisted by a lawyer in in the case of a restorative justice measure⁶⁰
- For children (whose parents are) residing in Wallonia, no specific information provisions are included.
- For children (whose parents are) residing in Flanders, no specific information provisions are included.
- For children (whose parents are) residing in the German speaking region, no specific information provisions are included.

4. Overview of the legal bases of the information that needs to be provided to the child pursuant to Article 4 of the directive.

Note: When no reference is included in this table, this does not mean the child will not have these rights. It merely means there is no legal provision that refers to the right to be informed about it.

Table 3. Overview of the legal bases regarding the provision of information to children

| RIGHT TO INFORMATION | | LEGAL BASIS IN BELGIAN LAW | | |
|---|---|--|--|---------------|
| Rights included in Article 4 of the Directive | Other rights included in Belgian legislation | Via official documents (and explanation by the police) in the context of a police interrogation as detailed in the general criminal procedural framework | Via oral explanation by other actors as indicated in the youth law legal framework | |
| | | Salduz III | Salduz IV | For any child |
| Have the holder of parental responsibility informed | | | Article 2bis Pre-Trial Detention Act | |
| Be assisted by a lawyer | Right to have a private consultation with a lawyer before the interrogation | Article 47bis §2 juncto §3 CCP | idem | |

⁶⁰ Article 52 (1) Brussels ordinance.

| | | | | |
|--|--|--------------------------------|--------------------------------------|--|
| | Right to consult the lawyer whilst being deprived of their liberty | Not applicable | Article 2bis Pre-Trial Detention Act | |
| | Right to remain silent & non-self-incrimination | Article 47bis §2 juncto §3 CCP | idem | |
| | Right to use any documents during the interrogation | Article 47bis §2 juncto §3 CCP | idem | |
| | Right to have a 'verbatim' statement in the interrogation report | Article 47bis §2 juncto §3 CCP | idem | |
| | Right to be assisted by a lawyer in mediation at any time | | | Informed by the public prosecutor's office: Article 97 §2 Walloon Decree; Article 28 (1) Brussels ordinance |
| | Right to be assisted by a lawyer in in the case of a restorative justice measure | | | informed by the judge and the juvenile court: Article 52 (1) Brussels ordinance |
| Have privacy protected | | | | |
| Be accompanied outside of court hearings | | | | |
| Have legal aid | | | | |
| Individual assessment | | | | |
| Medical examination | | | | |
| Limited deprivation of liberty and use of alternatives | Right to be informed of possible prosecutorial measures | | | Article 45 ^{quater} Federal Youth Protection Act |
| Be accompanied during court hearings | | | | |
| To appear in person | | | | |
| Effective remedies | | | | |
| Specific treatment during deprivation of liberty | | | | |

5. Legal remedy when the right to information is violated

Article 47*bis* §6 (9) CCP clarifies that any declaration done in violation of the rules relating to the right to information cannot be used as a basis to convict a person. The official report of the interrogation should include a declaration of the interrogated person that these rights were handed to him/her and a signed version of the official document detailing all the rights should be annexed to any interrogation report. If these rules are not followed the interrogation will be declared inadmissible. This can be brought up by the judge or by the defence at any point in the procedure.

There is an ongoing discussion as to whether this sanction suffices or not. The mere fact that a statement or declaration cannot be used as evidence in court does not seem to be a sufficient sanction to guarantee the rights of the child. This critique is linked to the fact that in Belgium we do not have a full-fledged concept of the fruits of the poisonous tree, as a result of which any further investigative measures initiated on the basis of the problematic interrogation will not necessarily be affected by this sanction.

Moreover, if a final decision would refer to a statement made during an interrogation where the child was not properly informed of his/her rights, this could be a reason for appeal, but it is not a guarantee that the decision would be overturned in appeal, as the decision could be based on other elements in the case file, possibly ‘fruits of the poisonous tree’.

ANNEX 5 – Right to be assisted by a lawyer

1. Right to be assisted during the (police) interrogation

Here too, the legal basis of the right to be assisted by a lawyer will differ in light of either or not being deprived of your liberty.

Children not deprived of their liberty

Since the entry into force of the Salduz-*bis* Law on 27 November 2016⁶¹, which provides for the first time that children interrogated have to be assisted by a lawyer, the lawyer is given an active and participative role during the interrogation of his/her client. This role is different from what it was before the law changed. The lawyer can now sit next to his/her client. He/she is also allowed assist during the interrogation. The purpose of the assistance is for him/her to be able to monitor (1) the respect of the interrogated person’s right not to incriminate himself/herself, as well as his/her right to choose to make a statement, answer questions or to remain silent. (2) the treatment of the person interviewed during his/her hearing, in particular regarding any manifest exercise of unlawful pressure or constraints. (3) the notification of the rights of the defence and where appropriate the legality of the interrogation.

The lawyer is expected to report any violations on the interrogation sheet, as he/she thinks he/she has observed them. The lawyer can request that the child be allowed to provide certain information about the case or he/she can request that certain questions are asked. He/she can ask for clarification of questions that are being asked. He/she can make observations about the investigation and the

⁶¹ Salduz-bis Law

interrogation. However, he/she is not allowed to respond to questions instead of his/her client or to hinder the interrogation.

All these elements are written down precisely in the police report, that is signed by both the child and the lawyer.

It would seem that it is not so much the legislative text, but rather the guidelines issued to the interrogating officers that shape the relationship between the lawyer and the police.⁶² Whereas in some police stations lawyers are said to be allowed to actively participate, in other police stations lawyers are said to be asked to refrain from any kind of intervention. The position of the lawyer during the police interrogations will therefore be subject to analysis in the interview round.

Children deprived of their liberty

Article 2bis §5 Pre-Trial Detention Act stipulates that the person who is to be interrogated, has the right to be assisted by his/her lawyer at interrogations which take place within the pre-set time limits. The interrogation can be interrupted for a maximum of 15 minutes for further confidential consultation, either once at the request of the person to be interrogated or at the request of his/her lawyer, or in the event of the disclosure of new crimes which are not related to the facts that were brought to his/her knowledge at the onset of the interrogation.

Since the entry into force of the *Salduz-bis* Law on 27 November 2016, the lawyer who assists the child during the interrogation has to adopt the active and participatory role described above. As soon as a person is released, the rules of the general criminal code will apply.

2. Right to be assisted by a lawyer in front of the prosecutor or the investigative judge

During an interrogation by the prosecutor or the investigative judge

A child suspected or accused of having committed an offence can be interrogated directly by the public prosecutor⁶³ or the investigative judge.⁶⁴ S/he will have the same rights s/he enjoys during police interrogations and here too the child cannot waive his/her right to assistance of a lawyer.

In addition, children have the right to be assisted by a lawyer when the investigative judge orders a visit to the crime scene, a confrontational interrogation or a line up of suspects. During the visits of the crime scene and the confrontation interrogation, the lawyer has the same role as during the interrogation. Upon completion of the line-up of suspects, the lawyer may request that his/her observations on the conduct of the session are recorded in the minutes.

During a hearing at the prosecutor's office, in the context of a mediation procedure.

⁶² COL-8-2011 of 24 November 2016, Circular of the College of Attorneys General of the Court of Appeal on the right to access to a lawyer, pp 43; Protocol of 9 June 2016 signed by the Attorney General of Antwerp, the first president of Antwerp, the prosecutors of Antwerp and Limburg, the presidents of the courts of Antwerp and Limburg, and the president of the Order of the Flemish Bar.

⁶³ Article 47bis §6 (6) Belgian Criminal Procedural Code

⁶⁴ Article 49 and 54 Federal Youth Law

At the level of the prosecutor, a mediation procedure between the suspected child and the victims can be started as an alternative measure, and in order to avoid that the prosecutor brings the case to the youth court.⁶⁵

Interestingly, there is no overarching legal basis for an explicit right to a lawyer when the prosecutor proposes a mediation. This means the right to be assisted by a lawyer is dependent on the specific regional provisions in this respect. Only in the Brussels Ordonnance and explicit reference is made to this right: Art 20 §5 Brussels ordinance indicates that the parties may be assisted by a lawyer during a mediation. For all other regions the general rule on the right to assistance of a lawyer apply: this means that s/he may consult a lawyer beforehand and be assisted when the actual mediation agreement is drafted at the prosecutor's office. However, there is no legal basis for being assisted by a lawyer during the mediation with the victim or injured party itself.⁶⁶

During the discussions drawing up a positive project / youth project

At the level of the prosecutor, a youth project or positive project can be imposed. This means that the child commits to an individualised project to amend 'the damage' done by the offence and make sure s/he would not commit any more offences in the future.

Art 58 §1 (1) Brussels ordinance and the Flemish Decree indicate that the child must be assisted by a lawyer at the time when the positive project (alternative measure) is confirmed. The Walloon Decree does not explicitly refer to this right. It is assumed that the general rules on the right to assistance of a lawyer will continue to apply.

3. Right to be assisted by a lawyer during the trial stage

When the child is brought before the youth court judge, he/she will appear either in a cabinet meeting or in a court session. Regardless of the format of the youth court meetings, the child is always entitled to assistance of lawyer. The Federal Youth Act clearly states that where a person who is less than 18 years of age is a party in the procedure and has no lawyer, he/she will be assigned one.⁶⁷ In practice, assigning a lawyer at the trial stage will only exceptionally have to be done, as the child will already have a lawyer from the police interrogation.

⁶⁵ This mediation procedure is copied from the mediation procedure we see in adult procedures, with however one significant different, i.e. that a successful mediation will not dismiss the case and will not impede the prosecution from taking the case to the youth court anyhow.

⁶⁶ DCI Belgium p 48.

⁶⁷ Article 52bis and Article 54bis Federal Youth Law. – this provision continues with "§1 When the youth court is seized under section 45.2 (a) or (b) or section 63ter (a) or (c), the public prosecutor shall immediately notify the president of the bar association. Such notice shall be sent at the same time, depending on the nature of the case, as requisitions, summons or substantiated warnings. The President of the Bar association or the consulting and defence office shall make the appointment no later than two working days after the date of such notice. § 2. The public prosecutor shall send a copy of the notice informing the President of the Bar association of the seizure to the youth court. § 3. The President of the Bar association or the consulting and defence office shall, if there is a conflict of interests, ensure that the person concerned is assisted by a lawyer other than the one of his/her father, mother, guardian, or person who has custody of him/her or who are vested with a right of action

4. Free legal assistance

The legal assistance provided to children is free of charge. Lawyers will be appointed by the bar association and the legal aid office of a specific bar. The lawyers are remunerated by the Ministry of Justice based on an intricate coding system of performances that need to be attested.

5. Right to confidential consultation

Throughout the procedure, the child has the right to a confidential consultation with his/her lawyer. If he/she has not been able to meet with his/her lawyer physically in his/her office or over the phone, the confidential consultation hearing will be organised before the procedure continues. In principle, the lawyer always receives the necessary time to talk to his/her client.

Previous research indicates that these onsite consultations can be quite hasty in the corridors of the police office or the tribunal. It is argued that these short encounter under such circumstances do not contribute to the creation of a bond of trust and a defence appropriate to the needs of the child.⁶⁸

6. Sanction for violation

The lack of assistance during any of the steps in the procedures can be used as a ground for appeal.

ANNEX 6 – Right to an individual assessment

1. Individual assessments at the level of the prosecutor's office

At the level of the prosecutor's office, the decision to either or not dismiss the case, opt for a prosecutorial measure or take the case to court, is informed by the content of the police reports, which may be complemented by a social report drawn up by the police.

There are no common rules on the requirement to consider these social reports and if or how they should be drawn up. The interview phase will reveal to what extent the lack of a legal framework gives way for different legal practices. The general right of the prosecutor to instruct the police to look into the case, can also be used to instruct to police to do house visits, inform about school performances or consult any other party they deem fit to get a picture of the child before them.

⁶⁸ DCI Belgium p 49.

2. Individual assessment at the level of the youth courts

At the level of the youth court a distinction needs to be made between children that are not deprived of their liberty and children that are deprived of their liberty. Only the latter category is formally entitled to a report being drawn up. The former category is formally entitled to have their personality and context taken into account, but this can also be done based on an in court ex officio assessment by the youth judge.

Children not deprived of their liberty

The assignments of the youth courts and youth court judges are enshrined in the Federal Youth Acts. Article 50 Federal Youth Act⁶⁹ stipulates that the court will do all that is necessary to ensure that proper investigation is conducted into the personality of the child involved, and the environment in which he/she is brought up, and to understand what the interest of the child in a particular case is, and which means for its upbringing are available and appropriate.

The fact that the Federal Youth Act refers to this assessment does not mean that an official report is to be drawn up. It is equally accepted that the judge would do this assessment ex officio, based on the input he/she finds in the case file and what has been discussed in a cabinet meeting or court session. If deemed necessary, the court can order its social services to conduct a so-called 'Social Inquiry'. This means that the youth judge considers necessary to collect more detailed information and have the experts at his/her social service look into the case. This means that one of the consultants will be assigned to the case who will interview both the child and the parents and any other actors deemed relevant to draw up a report and formulate an advice towards the judge about the appropriateness to impose any of the possible alternative measures or opt for a deprivation of liberty. In such cases, the court has to await the report before being allowed to take any decisions.

Additionally, if the court is of the opinion that the information it received through the Social Inquiry is not sufficient, it may order an additional Psycho-Medical Report. Here too, the baseline is, that the court is to wait for the report before taking any further decisions.⁷⁰

However, as these provisions are not drafted in a way that they would provide a formal right to an individual assessment via a report drawn up by the social service of the youth court, there are no legal remedies available should the child feel his/her background was not sufficiently assessed and taken into account.

- A mirroring provision can be found in *Art 99 Walloon Decree*. This provision indicates that the youth court carries out all useful research in advance in order to know the personality of the young person and his/her living environment, to determine his/her interest and to determine the means adapted to his/her social reintegration and to his/her education or treatment. Art 99 Walloon Decree also indicates that the youth court can make the young person undergo a medical-psychological examination or a medical examination. When a social study is taken away, the juvenile court judge can only make or change his/her decision after taking note of this study, barring urgency or if this study is not due to him/her within the 45 days.
- A mirroring provision can be found in *Art 40 Brussels ordinance* indicates that the judge and the juvenile court shall do everything necessary and have all useful investigations carried out in order to know the personality of the young person and the environment in which he/she was

⁶⁹ Still applicable to the German Speaking Community, Brussels Capital and Flanders

⁷⁰ Some exceptions are allowed. Additionally, if the report is not available within 75 days, the court can proceed without it.

raised, to determine his/her interests and the appropriate means of his/her upbringing or treatment. The social examination can be carried out through a social service. They can subject the young person to a medical-psychological examination when the file submitted to them proves insufficient. When the judge or the juvenile court orders a social inquiry, he/she can only take or change his/her decision after having heard the advice of the competent social service, unless he/she does not receive this advice within the time limit or in case of urgency.

Children deprived of their liberty

Whereas the Federal rules do not differentiate between children either or not deprived of their liberty, the regional rules do;

Art 65 Walloon Decree indicates that children deprived of their liberty are subject to an evaluation that is to be carried out by a multidisciplinary team. Reports are to be send to the youth court. Similarly, Art 41 Brussels ordinance indicates that each young person entrusted to a public institution is the subject of an evaluation report drawn up by the institution's multidisciplinary team.

Along the same vain, a psycho-medical report is required before the judge can decide to submit the child to the specialized guidance of a mental health center, a professional person or a recognized psycho-medical-social service. Art 120 (4) Walloon decree indicates that the judge may, on the basis of a medical or psychological report after an examination establishing the therapeutic necessity of specific guidance, order the child to submit to these kinds of services.

ANNEX 7 – Deprivation of liberty in a Belgian context

1. Deprivation of liberty as a criminal measure or sanction

Children suspected or accused of having committed a crime, can be subject to two types of deprivation of liberty that are criminal in nature: first, the deprivation of liberty found in the Pre-Trial Detention act, second, the deprivation of liberty found in the general Criminal Code (which can be applied after a divesture procedure). These two types of deprivation of liberty will be analysed more in depth.

a. Deprivation of liberty as a last resort: Culture without a legal basis

In general, there is a culture of recognising that deprivation of liberty should at all times be seen as the last resort.⁷¹ To date, the general Belgian criminal codes do however not include a legal provision referring to this principle. This means that there is no legal basis for a remedy should the child feel the deprivation of liberty imposed was not a measure of last resort.

In the Pre-trial detention act, it is stipulated that pre-trial detention should be the exception.⁷² Article 16 Pre-trial detention act stipulates that it is only possible when it is really necessary in light of the societal security and provided that the underlying offence is punishable with a prison sentence of at

⁷¹ Van den Wyngaert C. and Traest P. (2019), *Strafrecht en strafprocesrecht op hoofdlijnen*, Turnhout: Gompel&Svacina.

⁷² Tulkes J. (1979), 'Les origines de la détention préventive: l'habeas corpus et les lettres de chachet', *JT*, pp. 49-55.

least one year. As of 2012⁷³, the possibility was introduced to execute a pre-trial detention in the form of an electronic monitoring, to further the idea that a stay in a detention facility should be avoided as much as possible.

The deprivation of liberty as a final sentence is based on the general criminal code. Today, the Belgian criminal code does not make explicit reference to the deprivation of liberty being only the last resort. However, as the Belgian criminal code is currently subject to review, this might change in the future. In Article 28 of the proposed new Belgian criminal code⁷⁴, it is stipulated that in order to ensure proportionality of the sanctions, judges should be mindful of the impact of a sanction on the personal life of the offender, and should only make use of sanctions involving deprivation of liberty if the sentencing goals cannot be achieved otherwise. The last paragraph explicitly states that deprivation of liberty should be the last resort.

Whereas in other parts of the criminal law (e.g. in the provisions relating to the interrogation of suspects or accused) reference is made to different rules that should apply to children and adults, this is not the case in relation to the provisions concerning the deprivation of liberty.

To date, no reliable statistics are available regarding the respect for the hierarchy in measures imposed to children having committed an offence (or an act deemed to constitute an offence). A large scale research was conducted between 2011-2012 analysing the decisions of youth judges. The analysis revealed significant differences between the regions. In the French speaking courts, up to 46% of the measures requested by the prosecution relate to a form of detention, whereas this is the case only in 12% of the measures requested in the Flemish speaking courts. Despite the fact that restorative initiatives are to take precedence over anything else, it appears from the analysis that in only 3% of the cases, this is pursued.⁷⁵ It has been argued that these low numbers – to a certain extent – are due to refusal on the side of the victims as a result of which the restorative initiatives cannot get airborne.

b. Alternatives to detention

Children who have been subject to divestiture, will be tried according to the general criminal code. This means that the general principles on sanctioning will apply to them. Article 7 CC details the different sanctions available in the Belgian criminal system: detention, electronic monitoring, community service, probation, financial penalties and confiscation. All of these are available to a sentencing judge confronted with a child. There are no explicit rules that – particularly with respect to children – alternative sanctions should be considered. No initiative has been taken to change this with the proposed new criminal code. This means that there is no legal basis for a remedy should the child feel that an alternative measure should have been imposed rather than a sanction involving a deprivation of liberty.

Limits to deprivation of liberty: general rules apply

Within the Youth Protection System in Belgium (and its communities and regions) several limits are set to the possibility to impose a deprivation of liberty to a child. It should be noted that none of the

⁷³ Article 2 Act 27 December 2012 – Wet 27 december 2012 houdende diverse bepalingen betreffende justitie, [Act concerning different aspects of justice], Belgian Official Journal 31 January 2013.

⁷⁴ Proposed Act 13 March 2019 – *Wetsvoorstel 13 maart 2019 tot invoering van een nieuw strafwetboek, boek 1 en boek 2* [Legislative proposal 13 March 2019 to introduce a new criminal code, book 1 and book 2], Parl. St. DOC 54 3651/001

⁷⁵ NICC (Ravier, I., Goedseels, E. e.a.), *Onderzoek naar de beslissingen van jeugdrechters en jeugdrechtbanken in MOF-zaken, Samenvatting onderzoeksrapport*, Brussel, NICC, 2012, ranssens, M., Put, J. en Deklerck, J., *Het beleid van de jeugdmagistraat*, Leuven, Universitaire Pers, 2009, 316,

Federal rules apply in Wallonia. Most of the rules apply in Flanders. All of the rules apply to Brussels Capital and the German Speaking Community.

Firstly, limits are in place, based on the age of the child involved. Based on the rules in the Federal Youth Protection Act, children below the age of 12 cannot be placed in a closed facility⁷⁶ unless they have committed a serious assault against the life or health of a person and are deemed a danger for society.⁷⁷ As of 16 years of age, children can be subject to divesture and this subject to the limits known in the general criminal justice system.

Secondly the age limits, are complemented with limits based on the offence committed either now or in the past and based on the way previous measures have been executed.

For children of 12 years of age or older, deprivation of liberty in an open regime is only possible if the child is convicted for having committed an offence which would be punishable with a deprivation of liberty of at least 3 years if committed by an adult⁷⁸; or a type of assault causing bodily injury.⁷⁹ This offence-based requirement is lifted, if (1) the child had already been subject to one or more detention measures⁸⁰ or (2) the child unsuccessfully executed measures in the past.⁸¹

For children of 14 years of age or older, deprivation of liberty in a closed regime is possible if the child is convicted for having committed an offence which would be punishable with a deprivation of liberty of at least 5 years if committed by an adult⁸²; or a type of sexual assault, participation to a criminal organization, threatening to kill a person,⁸³ aggravated assault, destruction of constructions or disobedience to police authorities.⁸⁴ This offence-based requirement is lifted if (1) the child has already be subject to one or more of these detention measures⁸⁵ or (2) the child unsuccessfully executed measures in the past.⁸⁶

For children of 16 years of age, divesture is possible. However, as divesture is limited in light of the offences committed, the possibility to be subject to lengthier forms of detention is equally limited in light of the offences committed. The Federal Youth Protection Act allows for divesture if the child involved is now suspected or accused of having committed one of the offences listed, being: sexual assault, rape, homicide, aggravated assault, torture or degrading treatment or aggravated theft.⁸⁷

In the Belgian general criminal code it is stipulated in Article 12 that the most severe type of deprivation of liberty, namely the life sentence, is not available to a person who was not over 18 years of age at the time of committing the offence. This rule can also be found in the proposal for a new criminal code. The proposed article 35 CC stipulates that a level 8 deprivation of liberty (the longest

⁷⁶ Article 37 §2quater section 1 Federal Youth Law. This rule is still applicable in Flanders, German Speaking Community and Brussels Capital. It is not applicable to Wallonia.

⁷⁷ Article 37 §2quater section 2 Federal Youth Law.

⁷⁸ Article 37 §2quater section 1, 1° Federal Youth Law.

⁷⁹ Article 37 §2quater section 1, 2° Federal Youth Law.

⁸⁰ Article 37 §2quater section 1, 3° Federal Youth Law.

⁸¹ Article 37 §2quater section 1, 4° and 5° Federal Youth Law. This rule is not applicable in Flanders.

⁸² Article 37 §2quater section 2, 1° Federal Youth Law.

⁸³ Article 37 §2quater section 2, 2° Federal Youth Law.

⁸⁴ Article 37 §2quater section 2, 4° Federal Youth Law.

⁸⁵ Article 37 §2quater section 2, 3° Federal Youth Law.

⁸⁶ Article 37 §2quater section 2, 5° Federal Youth Law. This rule is not applicable in Flanders.

⁸⁷ Article 57bis §1

and most severe level) is not available to children. It should be replaced with a level 7 deprivation of liberty.⁸⁸

The lack of any further limitations means that deprivations of liberty up to 40 years can be imposed on children who have been subject to divestiture and are being tried based on the provisions of the general criminal code.

c. The right to medical examination and treatment whilst detained

In general, anyone deprived of their liberty is entitled to medical assistance, no explicit reference is made to the right to a medical examination for children deprived of their liberty in the *criminal* sense of the word. It is important to note that the execution of a deprivation of liberty imposed based on the general Belgian Criminal law is the responsibility of the communities. This means that each of the communities is responsible to organize their own Detention Facilities for the execution of sentences imposed on children who have been subject to divestiture.

For children deprived of their liberty in a pre-trial context, the Pre-Trial Detention Act should be complemented with the rules and procedures that apply to the Local Detention Center they are transferred to.

Article 2bis §8 Pre-Trial Detention Act stipulates that anyone deprived of his/her liberty is entitled to medical assistance. The costs of any type of medical assistance provided during the pre-trial detention are included in the judicial costs. Anyone deprived of his/her liberty can always ask that he/she is seen by a doctor of his/her own choosing. However, in those situations the cost should be borne by the person himself/herself.

For children deprived of their liberty in a sentence execution context are subject to the provisions of the Law on the intra muros legal position of detainees,⁸⁹ complemented with the rules and procedures that apply to the Local Detention Center they are transferred to.

The overarching federal rules are included in the Federal Intra Muros Act. Chapter VII is dedicated to the medical health care for detainees. As a base line, the right to health care of detainees is no different from the right to health care of the general population. Pursuant to Article 89 Intra Muros Act, every detainee will be subject to a medical examination as soon as possible upon arrival in the detention facility. From then on, every detainee has the right to ask for a medical examination at any given point. The right to be seen by a doctor of one's own choosing is anchored in Article 91 Intra Muros Act. The applicable provisions make no explicit mention of separate or additional rights of children.

The rules governing treatment whilst being detained are also included in the Intra Muros Act. No specific set of rules applies to children who are detained. Only one provision related to the isolation and individual special security regimes, i.e. Article 118 §11 Intra Muros Act, mentions that this provision cannot be applied to a child in detention.

⁸⁸ Proposed Act 13 March 2019 – *Wetsvoorstel 13 maart 2019 tot invoering van een nieuw strafwetboek, boek 1 en boek 2* [Legislative proposal 13 March 2019 to introduce a new criminal code, book 1 and book 2] , Parl. St. DOC 54 3651/001

⁸⁹ Act of 12 January 2005. - *Basiswet van 12 januari 2005 betreffende het gevangeniswezen en de rechtspositie van de gedetineerden* [Act of 12 January 2005 concerning the intra muros legal position of detainees.] Belgian Official Journal 1 February 2005.

Should the right to have a medical examination conducted not be granted, the child has the right to file a complaint via the regular channels of the facility. It will have no bearing on the case or the remainder of the sentence that needs to be served. Obviously, should the breach of this right amount to a ECHR violation, the child could take the case to Straatsburg.

2. Deprivation of liberty as a reaction to a youth offence

In addition to these federal ‘criminal’ rules on deprivation of liberty, there are various types of deprivation or limitation of liberty in the **youth laws** put in place in Belgium, be it at the Federal level or at the local levels, these types of deprivation or limitation of liberty are all deemed to be protective, educational or corrective in nature. However, as they are often considered as calling for the application of the rules included in the Directive, they are also taken into account for the purpose of this analysis.

Within a juvenile delinquency setting, the Youth Protection Acts have explicitly anchored this idea. Article 37 §2 section three of the Federal Youth Protection Act clarifies that a hierarchy should be taken into account when choosing a measure. Firstly, restorative justice systems should always get precedence over any other measure. Secondly, it should be assessed to what extent the child involved is willing to draft a ‘written project’ in response to the offence. This means that the child itself takes the initiative to indicate what would be an appropriate way to restore the damage done and improve his/her behaviour towards society. Only if this is not possible or not deemed appropriate any of the other measures can be considered. Thirdly, any measure involving a change in the context of the child and involving that the child is placed in a different context should be the last resort. Amongst these placement measures, a further distinction is made between open and closed settings, the latter being the ultimate last resort.

Similar provisions can be found in the regional systems further shaping the reactions to juvenile delinquency.

Flanders – Article 20 §2 section 2 Flemish Juvenile Delinquency Decree stipulates that any type of restorative justice intervention should take precedence. With respect to measures involving a deprivation of liberty, it is consistently mentioned that these should only be considered in exceptional circumstances.

Brussels – Art 7 Brussels ordinance indicates that assistance and protection must take place as a priority in the living environment, with removal from it being exceptional. If the young person is removed, except where this is contrary to his/her higher interests, care must be taken to respect his/her right to maintain personal relations and direct contacts with his/her parents and siblings, and the possibility of returning to his/her parents shall be regularly evaluated, so that the duration of the removal is limited as far as possible. Art 42 Brussels ordinance indicates that placement in a closed institution is at the very bottom of the hierarchy of measures and that all other measures are preferable Art 71 Brussels ordinance indicates that placement in a public institution in an open section is preferred to placement in a public institution in a closed section. Art. 75. states that a placement in a closed unit can only be ordered if, in addition, the following conditions are met: 1° the juvenile displays behavior that is dangerous for himself/herself or for others; 2° fear of reoffending, evading justice, trying to make evidence disappear or reaching a collusive agreement with third parties.

- *Wallonia – In the Walloon Decree, it is indicated in Article 1 (1) that prevention is an absolute priority. This could be seen as an indirect reference to the fact that sanctioning and definitely deprivation of liberty should be the last resort – albeit that this is not explicitly mentioned. Art 63 Walloon Decree indicates that deprivation of liberty is not to be considered in any case. It lists the requirements that have to be met before a detention can be considered. This too is an indirect indication of the ultima remedia thought underlying the legal framework.*