

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

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

Directive 2016/800/EU was implemented into German law through the amendments introduced to strengthen the procedural rights of accused persons in juvenile criminal proceedings “*Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren*”¹. Whereas the law decisively influenced the practice concerning the information provided for to the children by the police, the early involvement of the juvenile court assistance² and legal representatives, procedures concerning age assessment, deprivation of liberty and participation during trial hardly changed. Generally, this was confirmed by the study. Whereas concerning the practical implementation of the information provided for by the police, the early involvement of legal representatives and juvenile court assistance, there still seems to be room for improvement, with regard to age assessment, deprivation of liberty and participation during trial, the practice seems to be established.

Age assessment and the presumption to be a child in case of remaining uncertainty:

The first chapter elaborates on the legal provisions on age assessment and the corresponding practice as described by the interviewees. In the vast majority of cases, the identity can be verified by official documentation. An age assessment is necessary, when the age cannot be verified by documentation (ID e.g.), therefore most cases concern unaccompanied refugees. In Germany there is a so called “*Führungspersonalie*” in the files, this is the identity which was officially documented when the person entered the country. Even if there is no ID, the police works with the documented identity. Only if they have the impression that the maturity of the person concerned does not match with the assumed age documented, they raise the corresponding concerns with the prosecution who then decide whether an assessment is requested which is ultimately always ordered by the court.

A parallel procedure is conducted by the youth welfare offices. When they doubt the documented age of the juvenile, they conduct an age assessment through conversation with the children to determine the entitlement to youth welfare services.

Apart from that, hardly any cases remain, in which a medical assessment is requested and ordered by the courts. In such rare cases of uncertainty, the medical assessment is conducted by institutes for forensic medicine through an x-ray of the hand bones and a jawbone. In these cases, there always remains a margin. It is impossible to exactly determine the age.

In cases of uncertainty if the child is under 14, under 18, or over 21, the most favourable legal regime for the child is applied. In case there is a possibility that the child is under 14, it is assumed that the child is not criminally responsible. In case the child might be under 18, juvenile criminal law is applied, in case the child might still be under 21, the rules for young adults will be applied.

The rights to information, having the holder of parental responsibility informed and audio-visual recording of the questioning:

The provisions of the Directive concerning the rights to information, having the holder of parental responsibility informed and audio-visual recording of the questioning required major changes in the Youth Courts Act and the corresponding practice. A leaflet covering all necessary information was

¹ Germany, Draft Act to Strengthen the Procedural Rights of Accused Persons in Juvenile Criminal Proceedings (*Entwurf eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten in Jugendstrafverfahren*), Drucksache 19/13837, 09.10.2019.

² The juvenile court assistance („*Jugendgerichtshilfe*“ or *Jugendhilfe im Strafverfahren*“) is a special department within the youth welfare services which is responsible to support juveniles in criminal legal proceedings according to section 52 Social Security Code VIII and section 38 of the Youth Courts Act.

prepared and is used by the police. The leaflet is based on the catalogue provided for in Section 70 a of the Youth Courts Act which incorporates the provisions of Article 4 of the Directive 2016/800/EU. Accordingly, information is provided about the conduct of the proceedings and the rights of respective rights of the juveniles, e.g. that the holders of parental responsibility have to be informed, that they have a right to legal assistance (e.g. which is also contained in the general provisions on instructions) and the law provides that the information should be given in a child-friendly, comprehensible manner.

Another leaflet on the general conduct of the proceedings was also prepared by the juvenile court assistance. The leaflets are provided to the children and their parents when being summoned to the interrogations at the police, this is a newly established practice described by many interviewees across professions. Some interviewees identified a problem concerning situations, in which the child is “caught in the act” and, occasionally, the knowledge of single police officers about the new requirements were called into question. The reflection of the interviews showed that many interviewees, mainly lawyers, still voiced major concerns that the information is not given in a way that complies with the age and the level of maturity of the individual children and that many accused children did not properly understand the information and conduct of the proceedings. Some interviewees indicated that the sheer amount of information could be overwhelming. Against this backdrop, there is room for improvement concerning the way the information is given.

The holders of parental responsibility are in principle informed together with their children and involved in the proceedings (Section 67 a of the Youth Courts Act). In exceptional cases, if the considerable impairment of well-being of the child is to be expected, if there is the suspicion that the parents are involved in the crimes, if the purpose of the examination would be endangered or the parents cannot be reached within a reasonable time, the authorities shall refrain from informing the holders of parental responsibility and legal representatives. In such cases, which are very rare according to the interviewees, either a legal guardian is appointed by the family court, or the child names a person of trust, or another suitable person is appointed. This could be a representative of the juvenile court assistance. In this respect concerns are raised by one interviewee, that this person replaces the parents while not falling under the protective scope of Section 52 of the Code of Criminal Procedure.

The possibility of audio-visual recording exists and, in compliance with the requirements of the Directive, interrogation rooms were equipped accordingly. However, no interviewee reported to have had any direct experiences with such recordings in practice yet.³ The reason for this is, that audio visual recording is only mandatory when legal representation is also mandatory, and the representative is not present at the interrogation (section 70 c of the Youth Courts Act). Consequently, either the legal representative is present or, as interviewees from the police and the prosecution reported, the right to remain silent is revoked and no interrogation will take place anyways. The interrogations are documented in a written report that must be confirmed by the signature of the accused.

The rights to be assisted by a lawyer and legal aid:

This section comprises the topics of assistance by a lawyer and legal aid, as well as effective participation of a lawyer, communication between the lawyer and his/her client confidentiality, and the coop-

³ In practice, the interrogation is documented in written minutes signed by the suspected/accused. This is based on Section 136 and 96 of the Code of Criminal Procedure. The practice cannot be verified by the interviews, since the questions focussed on audio-visual recording.

eration with the holder of parental responsibility. In this area the legal amendments were highly controversial which is also reflected in the practical implementation. Whereas the first two topics were commented passionately by all interviewees, showing a divide between the perception of lawyers and the other professionals, the last topics specifically concern the perception of lawyers.

The section on the right to be assisted by a lawyer and legal aid reflects that the corresponding amendments are most controversial. The evaluation of the interviews shows a divide between defence counsels and other professionals on this. When having a closer look at the reasons for the divide, the picture gets more nuanced. Lawyers outline that the police and the prosecution and, partly, also the juvenile court assistance oppose their involvement, because they would encourage their clients to exercise their right to remain silent, which amounts to a formalization of the criminal proceedings which is detrimental to the specialities of juvenile criminal law emphasising on the pedagogical purpose. Representatives of the police, the prosecution and the juvenile court assistance then indeed find that this purpose of education is better served with a confession and subsequent educational measures addressing the acknowledged wrong. Formalizing, besides, amounts to a complication and prolongation of the proceedings. Zooming into the statements, this fundamental divide is relativised, because, in fact, lawyers often emphasise that their main task is balancing the classical defence adhering to the general principles of criminal procedure and at the same time being considerate of the particularities of juvenile criminal law. The latter implies that they have to cooperate with the juvenile court assistance and find alternative measures that could be beneficial to the client, focussing on the outcome of the proceedings. And judges, as well as prosecutors and police officers, refer to defence counsels who are trained in juvenile criminal law as partners with whom cooperation to the best of the child is possible. Eventually, many interviewees from these groups welcome the early participation of legal representatives in view of the effective safeguard of procedural rights, while noting that there might be room for improvement.

The interviewees unanimously confirmed that, once a lawyer is appointed by the court, s/he can participate without exceptions or hurdles throughout the proceedings. And, in practice, courts in all cases refer to the exception from the allocation of costs on the child provided for in the Youth Court Act. Therefore, in these cases, legal aid is guaranteed without exception.

Concerning communication, all lawyers referred to the need to explain a lot, refraining from legal jargon, and some added that being sensitive to the individual needs requires time and empathy.

The right to an individual assessment:

This section firstly outlines the legal provisions, and what the interviewees reported on whether, how, by whom, when and by what means an individual assessment is conducted. Secondly, it summarizes the findings on the questions of whether and, if so, for what purposes the results of the assessment are used. The interviews clearly show that the juvenile court assistance ex officio conduct consultations with the accused children, assessing their personality, their social and educational deficiencies and problems and derive the respective needs. Finally, they identify measures that could be applied to address the problems found.

Some interviewees were raising concerns about the correct implementation of the requirement to involve the juvenile court assistance as soon as possible and to have an assessment before the indictment is filed. The evaluation is not conclusive in this regard, but there are indications that the option to bring charges without a prior assessment is referred to more often than legally foreseen and that there is room for improvement. The results of the assessment are seriously taken into account by judges in their sentencing and their determination of the sanction (deprivation of liberty; alternative measures) to be imposed. Depending on the time within the proceedings the report is delivered, the

results are also used to determine alternative measures applied in the pre-trial phase concerning alternatives to detention or diversion measures. Otherwise, though there is no final report, the police, the prosecution, and the legal representatives interviewed indicated that they cooperate with the juvenile court assistance to elicit which measures could be applied before trial and which measures could be suggested to the court, because the availability of measures can be a problem.

A challenge that is repeatedly named is language. Since consultation, according to the interviewees of the juvenile court assistance, is central to the assessment and since there are no capacities for professional interpreters, language barriers are a serious problem. Here the lack of resources is identified by a judge to be a challenge to the effective early participation of the juvenile court assistance.

Deprivation of liberty as a last resort and safeguards for children who are deprived of their liberty:

The section on Deprivation of liberty as a last resort and safeguards for children who are deprived of their liberty comprises a range of different topics. The interviews unanimously confirmed that, in practice, deprivation of liberty is used as a last resort. However, with respect to juvenile detention, concerns were raised that, since this is not considered to be deprivation of liberty in the strict sense, judges are more likely to impose this form of temporary arrest.

Alternative measures to pre-trial detention are institutions where close supervision can be guaranteed (*Hafvermeidungseinrichtungen*)⁴. However, in practice there are regional differences regarding the availability of places in such institutions and if there is no place, pre-trial detention cannot be avoided. Alternative measures to imprisonment are enumerated in Section 13 et.sequ. of the Youth Court Act. This could be a warning, the imposition of conditions (such as an anti-violence training) or detention (Arrest).

As regards the medical examinations of children deprived of their liberty, the interview findings are not conclusive. They indicate that a medical examination is conducted as part of the intake procedure in detention facilities. Furthermore, if medical issues become apparent, an examination is requested by the police, the prosecution, the lawyer, or the judge respectively. Whether juveniles are informed about the right to a medical examination cannot be verified, the interviews were inconclusive. At the same time, lawyers criticised that, overall, medical care is deficient in detention. Since the medical examination is either part of the admission procedure or conducted when there are indications for a medical issue, there were irritations about the question about the information on the right to request such a medical examination. Interviewees took it for granted that examination take place when required and did not see the necessity of informing accordingly, therefore the finding is not conclusive in this respect.

Regarding pre-trial detention, it is required that the child appears before the investigative judge (*Haftrichter*) within 24 hours of arrest. It is mandatory that the judge inquires whether there are medical issues that preclude the execution of the detention order.

Concerning the treatment of children when deprived of their liberty, all interviews indicate that separation of juveniles from adults is guaranteed in detention-facilities post-trial. With regard to police custody and prison collection centres, the interviews were not consistent. In this respect, there seems to be room for improvement, depending on the capacities of and the conditions in the respective facilities.

⁴ Section 71 of the Youth Courts Act.

In view of juvenile-specific offers in detention, the overall evaluation shows that the eligibility of different services and measures depends on the size and occupancy rate of the particular detention facility.

Contact to family members is principally ensured. Some interviewees however point to the distance between the home of the family and the detention facility as being a hurdle, especially for less privileged families.

The rights to effectively participate in and be accompanied during the trial:

The section on the rights to effectively participate in and be accompanied during the trial comprises the reflection of the interviews on the settings of the main hearing and the modifications in comparison to adult criminal proceedings and how children are heard, and if and how their views are taken into consideration. Overall, the interviewees agree that there are slight formal modifications in juvenile criminal trials compared to the adult counterpart, but that the main distinction is the approach of the juvenile judges being considerate of the educational purpose. Depending on the individual judge, more emphasis is laid on communication and explanation and less on the formalities of criminal proceedings. Juvenile judges are then also described as being more considerate about the views of the accused, especially bearing on their needs. The court setting itself is not different from adult court rooms, hearings are always held in camera. The holders of parental responsibility are summoned to the hearing, but attendance is voluntarily.

PART B. INTRODUCTION

The social fieldwork research was undertaken by means of interviews conducted with various professional groups based on tailored questionnaires provided by FRA. This included five interviews with judges and public prosecutors, three judges and two prosecutors specialised in juvenile criminal law, five interviews with defence lawyers, four interviews with police officers and six interviews with other professionals working in the field of juvenile justice, most of which were involved with the juvenile court assistance, or as it is called in some areas of Germany, juvenile assistance in criminal proceedings. The interviews were carried from March 2021 to September 2021. The geographic distribution of interviewees focused on the areas of Berlin, Bremen, Cologne, Düsseldorf, and Freiburg. Therefore, four German federal states were covered. The distribution by gender was balanced within the group of judges and prosecutors, lawyers, and police officers. The group of other professional respondents, however, comprised six male interviewees. As the study was mainly conducted in urban areas of Germany, it is indicative of the situation in cities and does not reflect the situation in rural areas.

Due to COVID-19 and the measures to restrict social contacts, face-to-face interviews were generally not possible. All interviews were conducted via telephone, which proved to be adequate because of the structured interview template. It was still possible to capture the overall sentiment towards the implementation of the directive since all interviewees were very committed to their professions and had distinct opinions about the practical implementation of Directive (EU) 2016/800.

○ PREPARATION OF FIELDWORK, IDENTIFICATION AND RECRUITMENT OF PARTICIPANTS

The social fieldwork research has been prepared and conducted by two interviewers meeting FRA's predefined requirements.

To approach potential interviewees, cover letters explaining the scope and aim of the study and the expected length of the interviews were drafted. The aim was to reach interviewees from different areas of Germany in order to cover the practice in different states. In each area, different professions should be interviewed to understand the situation more comprehensively, covering the perspectives of different professionals.

Initially, a research was conducted about practitioners who were publishing in the field of juvenile justice. Those persons were contacted primarily. Then, because of their affirmative answers from Freiburg, Cologne, Bremen and Berlin, other professionals from those areas were contacted, using official contacts.

○ SAMPLE AND DESCRIPTION OF FIELDWORK

Police officers:

Requested: 4, completed: 4

Defence lawyers:

Requested: 5, completed: 5

Judges/prosecutors:

Requested: 5, completed: 5

(Non-legal) Specialists:

Requested: 6, completed: 6

Table 2: Sample professionals

Group	Expertise in juvenile criminal justice	Gender
Police officer	Police officer responsible for the juvenile department	male
Police officer	Police officer responsible for the juvenile department	female
Police officer	Police officer responsible for the juvenile department	female
Police officer	Police officer responsible for the juvenile department	male
Defence lawyer	Criminal defence lawyer working in the field of juvenile criminal justice	male
Defence lawyer	Criminal defence lawyer working in the field of juvenile criminal justice	female
Defence lawyer	Criminal defence lawyer working in the field of juvenile criminal justice	male
Defence lawyer	Criminal defence lawyer working in the field of juvenile criminal justice	female
Defence lawyer	Criminal defence lawyer working in the field of juvenile criminal justice	male
Prosecutor/Judge	Juvenile Judge	male
Prosecutor/Judge	Juvenile Prosecutor	female
Prosecutor/Judge	Juvenile Judge	male
Prosecutor/Judge	Juvenile Judge	male
Prosecutor/Judge	Juvenile Prosecutor	female
(Non-legal) Specialist	Juvenile court assistant	male
(Non-legal) Specialist	Juvenile court assistant	male
(Non-legal) Specialist	Juvenile court assistant	male
(Non-legal) Specialist	Juvenile court assistant (with legal background)	male
(Non-legal) Specialist	Juvenile court assistant	male
(Non-legal) Specialist	Social worker	male

The duration of the interviews varied from 40 minutes to two hours. The atmosphere during the interviews was consistently pleasant and professional and the interviewees generally showed great interests in the topic.

○ **DATA ANALYSIS**

All interviews were audio-recorded. In the beginning, the interview reporting templates (summaries of the interviews) were finalized without previous transcription of the interviews. The templates served as the basis for analysing and coding the interviews using qualitative content analyses. The answers to all questions and sections were scanned back and forth for recurring themes. Firstly, the

further analysis of the sample focused on identifying themes which were common amongst the interviewees' replies depending on the professions. Then, relevant commonalities and/or discrepancies in experiences made by the interviewees across professions was derived in line with the overall research objectives of the practical implementation of Directive (EU) 2016/800. Finally, the preliminary findings were discussed, scrutinized and finalized.

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

The report comprises the legal and practical analysis of the implementation of Directive (EU) 2016/800 in Germany. Each chapter is structured accordingly: the first part focusses on the legal amendments followed by elaborations on the practical implementation which is based on the analysis of expert interviews with police-officers, judges, prosecutors, lawyers, and other professionals working in the field of juvenile justice. Each chapter is concluded by a discussion of the findings.

The sections comprise age assessment and the presumption to be a child in case of remaining uncertainty; the rights to information, to have the holder of parental responsibility informed and to an audio-visual recording; the rights to be assisted by a lawyer and legal aid; the right to an individual assessment; deprivation of liberty as a last resort and safeguards for children who are deprived of their liberty; and the rights to effectively participate in and be accompanied during the trial. Therefore, structurally the report is based on and follows the structure and order of the respective provisions of Directive (EU) 2016/800. Concluding the report, the findings are summarized, challenges and best practices are identified, and suggestions formulated.

In deviation from the German legal terminology and the terminology used by the interviewees, referring to juveniles, the report refers to children, in line with the terminology of the Directive (EU) 2016/800.

PART C. RESEARCH FINDINGS

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

- a. Law to strengthen the procedural rights of accused persons in juvenile criminal proceedings “*Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren*”

Directive 2016/800/EU was implemented into German law through the amendments to strengthen the procedural rights of accused persons in juvenile criminal proceedings “*Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren*”⁵, passed on 16 December 2019, entering into force on 17 December 2019, with the exception of certain regulations that entered into force on 1 January 2020. Since the deadline for implementation of the Directive was, according to its Article 24 (1), the 11 June 2019, the national implementation was late. The law introduced major changes within the German juvenile criminal legal procedure. Especially with regard to the right to information (Section 70 a Youth Courts Act); the right to have the holder of parental responsibility informed (Section 67 a Youth Courts Act); assistance by a lawyer (here, Directive EU 2016/1919 is decisive to ensure the right of access to a lawyer and prompted mayor amendments of the German Code of Criminal Procedure) Section 68 et seq. Youth Courts Act and Section 140 et seq. Code of Criminal Procedure); and the right to an individual assessment already in the investigation phase of the criminal proceedings (Section 38 Youth Courts Act). Whereas it is controversial whether or not the regulations on mandatory defence are in compliance with Art. 6 of the Directive, it is criticised that the law does not imply a mandatory evaluation according to Article 21 and Recital 64 of the Directive, and the qualification of the law enforcement authorities is not sufficiently guaranteed by law according to Article 20 para. 2 of the Directive, most commentators are of the opinion that the implementation generally meets the requirements of the Directive.⁶

This becomes especially obvious regarding the requirements of the Directive on the right to information where the provisions of the Directive were copied almost word for word into additional provisions of the Youth Courts Act.

It has to be noted that, when the provisions of the Directive were implemented into German law, the terminology was adjusted:

The term suspect/accused corresponds to the terms *Beschuldigter* during the investigation phase, once a formal investigation is initiated; *Angeschuldigter* during the pre-trial phase, once charges have been brought, before the court decides to open the main hearing; and *Angeklagter* during the main hearing until judgement. In German criminal proceedings, legal aid in the sense of *Prozesskostenhilfe* does not exist, the equivalent is mandatory defence, the specifics will be addressed in the respective chapter on legal representation and legal aid. About the individual assessment, this relates to the report by the juvenile court assistance, which is contrasted to the assessment which is conducted only upon request by the defence counsel, the prosecution, or the court. Lastly, as already mentioned, the

⁵ Germany, Draft Act to Strengthen the Procedural Rights of Accused Persons in Juvenile Criminal Proceedings (*Entwurf eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten in Jugendstrafverfahren*), Drucksache 19/13837, 09.10.2019.

⁶ Höynck, T.; Ernst, S. (2020), ‘Das Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren’, ZJJ Vol. 3, pp. 245-258; DVJJ, Stellungnahme zum Referentenentwurf eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren sowie zu den das Jugendstrafverfahren betreffende Teilen des Entwurfs eines Gesetzes zur Neuregelung des Rechts der notwendigen Verteidigung, 30. November 2018.

report refers to children, while all interviewees mostly referred to juveniles, because this corresponds to the German legal terminology.

b. Special training

i. Legal overview

The requirement of special qualifications of youth court judges and juvenile public prosecutors appointed is provided for in section 37 of the Youth Courts Act. It explicitly requires that the persons concerned be educationally qualified and experienced in youth education. Furthermore, the federal guidelines to section 37 of the Youth Courts Act in their current version also serve to ensure the special qualification requirements. According to these, special consideration is to be given to aptitude and inclination as well as relevant professional experience when staffing youth courts and selecting youth prosecutors. Frequent changes of office are to be avoided. In addition, the benefits of knowledge in the fields of pedagogy, youth psychology, youth psychiatry, criminology and sociology are emphasized. Still, there remains ample criticism demanding more binding qualification requirements.⁷ In the course of considerations regarding the draft of a law to strengthen the rights of victims of sexual abuse, a respective attempt to amend Section 37 accordingly failed, in view of the massive concerns, especially those relating to the organisation of justice.⁸ With respect to training, due to the federal system, the respective states are responsible. The German Judicial Academy (Deutsche Richterakademie) - a supra-regional training institution jointly supported by the Federal Government and the states - regularly offers events which also deal with the teaching of youth-specific expertise for juvenile judges and public prosecutors. Experienced participants in juvenile criminal proceedings - from the practice of juvenile prosecution, juvenile court, and juvenile court assistance - present their work, explain the legal basis and offer help for practical work. In addition to the courses offered by the German Judicial Academy, there are also further training courses organized by the German Association for Juvenile Justice, among others.⁹

The promotion of relevant continuing education of lawyers, is primarily a matter for lawyers' self-organisation.

With regard to the members of the child and youth welfare services working in the context of juvenile criminal proceedings, Book VIII of the Social Code (SGB VIII) is applicable. According to Section 72 thereof, the public youth welfare organisations shall only employ persons as full-time staff at the youth welfare offices who are suitable for the respective task according to their personality and have received training corresponding to this task (specialists) or who are able to fulfil the task due to special experience in social work. Above that, further training and practical counselling for the staff must be ensured.

Regarding detention facility staff in juvenile detention facilities, the practical training during the apprenticeship already takes place in the respective juvenile detention facilities.¹⁰ The theoretical part of the apprenticeship requires for the training of candidates intended for later deployment in juvenile

⁷ Eisenberg/Kölbl, ,§ 37' in, Eisenberg/Kölbl, Youth Courts Act (*Jugendgerichtsgesetz*), 21. Ed. 2020, Beck, München, Para. 6a.

⁸Eisenberg/Kölbl, ,§ 37' in, Eisenberg/Kölbl, Youth Courts Act (*Jugendgerichtsgesetz*), 21. Ed. 2020, Beck, München, Para. 6a.

⁹ Germany, Draft Act to Strengthen the Procedural Rights of Accused Persons in Juvenile Criminal Proceedings (*Entwurf eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten in Jugendstrafverfahren*), Drucksache 19/13837, 09.10.2019, p. 42.

¹⁰ Section 11 paragraph 2 Training regulations for general law enforcement service North-Rhine Westphalia *Ausbildungsordnung allgemeiner Vollzugsdienst NRW*, section 5 paragraph 2 Bremen.

detention and in youth detention centres that they take place jointly in special training groups for these types of detention. The contents of the courses take into account the specific characteristics of juveniles and the corresponding legal provisions and are regulated in the curricula and material distribution plans.

With the consent of the Ministry responsible for justice, this may be deviated from in exceptional cases.¹¹

In Brandenburg, Saxony-Anhalt, Rhineland Palatinate, Berlin, no such special provisions on juvenile detention are contained in the training regulations for general law enforcement service. In Thuringia, some aspects with respect to juvenile prisoners are part of the theoretical training for all apprentices.¹² Apart from this, no special provisions are entailed in the Training regulations for general law enforcement of the federal states.¹³

ii. Special training received by interviewees

The special training received by the interviewees depended on their respective profession. The overall impression is that the legal and practical situation described corresponds with the experiences of the interviewees.

- Police officers (P)

All police officers interviewed were either part of, or head of the special departments for juvenile offences. As a precondition, the officers had to complete a special training with a focus on the basics of the Youth Court Act and the special police regulations concerning juvenile criminal investigations.¹⁴

In these courses, special attention is also paid to the different approaches of diversion procedures (alternative measures foreseen in the youth welfare system in order to avoid stigmatization through criminal legal proceedings) and approaches for so-called multiple offenders. During these trainings, youth clubs and penal institutions are visited. Three interviewed officers confirmed that in view of the legal developments, the trainings are constantly updated, to include new legal provisions like, for example, those that were adopted and implemented to transpose Directive (EU) 2016/800.¹⁵

One police officer referred also to the instances, where police officers are trained by representatives of different professions in the field of juvenile justice, including juvenile judges and prosecutors, social workers in the field and the juvenile court assistance.¹⁶

The trainings for police officers are conducted by the Police Academy and the School for Public Administration. No interviewee knew of trainings addressing effective communication with children.

- Judges and Prosecutors (J)

¹¹ Section 12 paragraph 6 Training regulations for general law enforcement service North-Rhine Westphalia, this is not provided for in the training regulations in Bremen.

¹² Section 9 No. 2 Training regulations for general law enforcement.

¹³ There might be further requirements set by internal regulations on training on the level of the federal states, unfortunately they are not publicly available.

¹⁴ See interviews with all police officers/Germany.

¹⁵ See interviews with three police officers/Germany.

¹⁶ See interview with one police officer/Germany.

The judges interviewed did not receive any special training before becoming juvenile judges.¹⁷ One judge reported about his previous experience as a prosecutor in the different legal areas before practicing juvenile criminal law.¹⁸

Voluntarily, a judge participated in trainings offered by the German Judicial Academy (*Deutsche Richterakademie*) or received trainings as a member of the the "*Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen*" (German Association of juvenile courts and juvenile court assistance)¹⁹ but this is no precondition to work as a juvenile judge.

For prosecutors, no special training is required either.²⁰ As reported by a prosecutor, trainings are offered by the German Judicial Academy (*Deutsche Richterakademie*) or by the German Association of juvenile courts and juvenile court assistance "*Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen*" as well.²¹ They are voluntary.

- Lawyers

Two lawyers reported that there is a general special training for criminal defence counsels (*Fachanwalt Strafrecht*) containing a part on juvenile criminal law with a focus on the specifics of juvenile criminal proceedings.²² This must be updated continuously and, depending on the individual lawyer, topics relating to juvenile criminal procedure can be picked. Otherwise, according to four lawyers, it depends on the individual motivation to participate in special trainings offered.²³

- (Non-legal) Specialists

All interviewees, but one²⁴, from this group worked for the juvenile court assistance and five of them understood the question in relation to Directive (EU) 2016/800.²⁵ The reason may be that, according to two professionals, their practical education and professional background already contains trainings on juvenile criminal proceedings. Regarding trainings offered, two interviewees also refer to the "*Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen*" (German Association of juvenile courts and juvenile court assistance).²⁶ Apart from this, no conclusive finding can be derived from the interviews.

iii. Discussion of findings

Special trainings on juvenile criminal law and procedure are offered. Whereas for police officers it is a precondition to attend special trainings to become a specialised juvenile officer working in the respective departments, it is no precondition for juvenile judges, prosecutors, and lawyers in the field. For the legal professionals, it depends on their personal motivation and commitment to attend trainings. Most interviewees reported to have attended trainings offered by the German Judicial Academy (*Deutsche Richterakademie*) and the "*Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfen*" (German Association of juvenile courts and juvenile court assistance). The focus of the

¹⁷ Two judges/Germany.

¹⁸ Judge/Germany.

¹⁹ See interview judge/Germany.

²⁰ See interview with two prosecutors/Germany.

²¹ Prosecutor/Germany.

²² See interviews with two defence lawyers/Germany.

²³ See interviews with four defence lawyers/Germany.

²⁴ (Non-legal) Specialist/Germany.

²⁵ See interview with five (Non-legal) Specialists/Germany.

²⁶ See interviews with two (Non-legal) Specialist/Germany.

trainings is on the specialities of the Youth Court Act and the juvenile criminal procedure in general. Sometimes, these trainings involve professionals with different backgrounds.

c. Effectiveness of measures / Monitoring

There exist no special provisions concerning the monitoring of the implementation of Directive (EU) 2016/800 in particular. The reasoning of the legislator being that with the criminal justice statistics published annually by the Federal Statistical Office (here in particular the public prosecution statistics, the statistics on criminal and administrative fine proceedings and the criminal prosecution statistics), data is available that can be used to assess the implementation.²⁷ Commentators regret the lack of an obligation to specially evaluate the implementation of the Act to Strengthen the Procedural Rights of Accused Persons in Juvenile Criminal Proceedings (*Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren*) implementing Directive (EU) 2016/800.²⁸

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

a. Legal overview

The newly introduced Section 1 Paragraph 3 of the Youth Courts Act now explicitly provides that, where it is uncertain whether the age of eighteen was reached by the time of the act, the provisions of the Youth Courts Act applicable to a juvenile shall be applied. Although the wording only refers to accused juveniles ("*Beschuldigte*"), this applies to all phases of the proceedings. Previously, the Youth Courts Act did not entail such a provision. Nevertheless, the courts basically ruled accordingly. The Federal Supreme Court, referring to the *in dubio pro reo* principle, ruled that, in case of uncertainty about the age, the more favourable legal regime has to be applied.²⁹ The same applies, if there is uncertainty about the exact time of the crime.³⁰

The violation of this principle is a ground to appeal the judgement based on the absolute ground of appeal on points of law Section 338 Nr. 4 German Code of Criminal Procedure (*Strafprozessordnung*), because the court erroneously assumed jurisdiction.³¹

Before this uncertainty is assumed, the age of the juvenile is to be investigated. Section 43 (2) of the Youth Courts Act allows investigations of the accused only to the extent that they are necessary. The specific admissibility of a physical examination is then based on Sections 81a, 81b of the German Code of Criminal Procedure in conjunction with Section 2 (2) of the Youth Courts Act, since, according to the general opinion, Section 43 (2) JGG alone is not a sufficient legal basis.³² When such examinations are ordered, the principle of proportionality must be observed.³³ That means that less invasive measures have to be prioritized. As a last resort, an age medical test can be ordered according to Section 81 a

²⁷ Germany, Draft Act to Strengthen the Procedural Rights of Accused Persons in Juvenile Criminal Proceedings (*Entwurf eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten in Jugendstrafverfahren*), Drucksache 19/13837, 09.10.2019, p. 42.

²⁸ Höynck, T.; Ernst, S. (2020), 'Das Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren', ZJJ Vol. 3, pp. 245-258, 258.

²⁹ Germany, Federal Supreme Court (*Bundesgerichtshof*), 1 StR 723/53, Judgement of 23. February 1954.

³⁰ Germany, Federal Supreme Court (*Bundesgerichtshof*), 3 StR 63/07, Order of 11. April 2007.

³¹ Germany, Federal Supreme Court (*Bundesgerichtshof*), 3 StR 58/02, Judgement of 23. Mai 2002.

³² Germany, Draft Act to Strengthen the Procedural Rights of Accused Persons in Juvenile Criminal Proceedings (*Entwurf eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten in Jugendstrafverfahren*), Drucksache 19/13837, 09.10.2019, p. 21.

³³ Germany, Federal Constitutional Court (*Bundesverfassungsgericht*), 1 BvR 542/62, Order of 25. July 1963.

of the German Code of Criminal Procedure.³⁴ However, the ethical implications and the constitutionality of such a test are highly controversial.³⁵ The violation of the principle of proportionality with regard to Section 81 a of the German Code of Criminal Procedure is a ground for appeal according to Section 337 of the German Code of Criminal Procedure. While the proceedings are ongoing, the juvenile can already lodge a complaint against court decisions pursuant to section 304 of the Code of Criminal Procedure.

- b. How is the age of a person suspected or accused of a crime assessed and determined in practice?

The answers by the interviewees who describe the procedure mainly correspond while reflecting different aspects of age assessment. In practice, the age of the accused is determined by official documentation, normally by IDs and passports.³⁶

Cases in which the age cannot be determined predominantly involve unaccompanied minor refugees who do not possess valid documentation/identification.³⁷ There is an identity noted in the files "Führungspersonalie" which is registered when the children first entered the country, including the age which was reported by the child.³⁸ When the police have the impression that this age does not correspond with the child's maturity, they report to the prosecution who decide whether to request an age assessment³⁹, which ultimately has to be ordered by the courts.⁴⁰

Many of the interviewees reported that they hardly ever had such cases in practice.⁴¹

"I have to be honest; I can hardly remember any cases. I think we had one case in my entire career where this was even a question for the police. If we receive a case and a child is stated to be under 14 and we have seen and spoken to him/her and are of the opinion that s/he is certainly already 15-16, from the attitude, from the appearance, then, we would write down the corresponding information for the prosecutor's office and ask them to check whether an order on age determination should be requested. That also depends on the crime in question and the prosecutor's office would take care of the rest. As a rule, we only make the suggestion and write down what we have noticed." (Police officer, Germany)

„Ich muss ehrlich sagen, ich kann mich an so gut wie keinen Fall erinnern. Ich glaube wir hatten mal einen in meiner ganzen Laufbahn, wo das überhaupt in Frage kam für die Polizei. Wir würden, wenn wir einen Vorgang bekommen und da ist ein Kind angegeben unter 14 und wir haben ihn gesehen und gesprochen und sind der Meinung, der ist bestimmt schon 15-16, von der Einstellung vom Aussehen, vom Auftreten her, dann würden wir das entsprechend der Staatsanwaltschaft

³⁴ Heintschel-Heinegg, '§ 19', in: BeckOK German Criminal Code, 48. Ed. 1. November 2020, München Beck, Paras. 6-9.

³⁵ [German Parliament \(Bundestag\), Scientific Service \(Wissenschaftlicher Dienst\), Legal basis of an age determination examination, \(Gesetzliche Grundlagen einer Untersuchung zur Altersfeststellung\)](#), Sachstand WD 3 – 3000 – 008/18, 22 January 2018, p. 4.

³⁶ This was reported by two police officers, one specialist and one prosecutor. (Non-legal) Specialist/Germany

³⁷ This was explicitly mentioned by a police officer, a prosecutor and a specialist. (Non-legal) Specialist/Germany judge/Germany, PROSECUTOR/GERMANY.

³⁸ Police officer/Germany, Police officer/Germany, PROSECUTOR/GERMANY.

³⁹ judge/Germany, prosecutor/Germany, defence lawyer/Germany.

⁴⁰ A police officer/Germany, a defence lawyer/Germany who reported of having one recent case, and two judges/Germanys.

niederschreiben und bitten zu prüfen, ob da gegebenenfalls ein Beschluss zur Altersbestimmung erfolgen soll. Das hängt auch vom Delikt ab und entsprechend würde die Staatsanwaltschaft das Weitere in die Hand nehmen. Wir machen da in der Regel nur die Anregung und schreiben nieder, was uns aufgefallen ist.“

One interviewed lawyer reflected on this meager rate of cases and thought this might be a blind spot of the judiciary, not determining the age more closely and more often, especially when it comes to very young accused.

A parallel determination of the children's age is conducted by the youth welfare services, to decide whether a child is entitled to aid within the youth welfare system. This is done through conversation with the child by professionals from the youth welfare services. This could be social workers, social pedagogues, and psychologists. They assess the maturity of the child:⁴²

“The youth welfare service itself makes an age assessment with specialised experts, simply by meeting with the people and speaking to them, evaluating the level of maturity. This way they say s/he is 16, 17 or s/he is not a child anymore. Then, there is the assessment by the police using official documents. And the courts (and the prosecution) request a medical age assessment, which is valued more than the assessment through conversation. But it is an ongoing issue of dispute, because, naturally, also with the medical age assessments, a margin of two years remains. When the juvenile court assistant says he or she is 24, the medical age assessments say he or she is 23, but he or she could also be under 21, then there is a dispute.”
((Non-legal) Specialist/Germany)

„Die Jugendhilfe macht selber mit spezialisierten Fachkräften eine Altersfeststellung, einfach, indem sie sich mit den Menschen trifft und guckt was für eine Reife sie erkennen. Auf diese Art sagen sie, der ist 16...17 und der ist schon kein Kind mehr. Dann gibt es natürlich die Alterserfassung über die Polizei, über irgendwelche Papiere oder auch gerichtliche Alterserfassung und da wird dann geguckt, wenn es ein medizinisches Gutachten gibt, dann wird das natürlich höher bewertet als der Eindruck, den der junge Mensch im persönlichen Gespräch gemacht hat. Aber es ist ein Dauerstreitthema, weil natürlich auch die medizinischen Gutachten immer so einen Spielraum haben, oft zwei Jahre. Wo die Jugendhilfe sagt, der ist mindestens 24, und wo das medizinische Gutachten sagt, er ist vielleicht 23, aber er könnte auch noch unter 21 sein, und da kommt es dann zum Streit.“

A German judge explains the parallel procedures, firstly, when entering Germany as an unaccompanied minor refugee and the practice in juvenile criminal proceedings. In the first case, the age assessment is carried out by the Youth Welfare Office which is then accepted by other institutions, such as the police, the prosecution. Just in cases the court seriously doubts this assessment, it orders a medical assessment to be used within the criminal proceedings.⁴³

Accordingly, interviewees across professions report that in the criminal proceedings, when there is uncertainty about the age of the accused, the prosecution requests a medical examination.⁴⁴ This must

⁴² This is confirmed by a police officer/Germany, a judge/Germany and a prosecutor/Germany and five Non-legal) Specialist/Germany.

⁴³ Judge/Germany.

⁴⁴ Police officer/Germany, two prosecutors/Germany, defence lawyer/Germany, three (Non-legal) Specialists.

be ordered by the court. Then, either a computer tomograph, or an x-ray of hand bones and/or teeth is performed.⁴⁵ This medical assessment results in the definition of approximate age margins. An exact age determination is impossible. When serious doubts remain, the court assumes the age that is most favorable for the child. This was already the case in the past according to the *in dubio pro reo* principle but is now standardized by law due to the Directive.⁴⁶

c. Discussion of findings

The fact that most interviewees did never themselves experience a case where a medical examination was ordered by the court indicates that this measure is in practice indeed ordered as the last resort. The practice itself, which was described by all interviewees, seems to be established and is not questioned. When uncertainty about the exact age remains, the legal framework which is most favourable for the accused child is applied.

C.3 The rights 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 right to information provided for in Section 70 a of the Youth Courts Act was fundamentally reformed in line with Article 4 of the Directive 2016/800/EU. Section 70 b of the Youth Courts Act ensures that the information provided for in Section 70 a of the Youth Courts Act are given in a way that complies with the age and the child's level of maturity and that the educational level is taken into account. Also, the holders of parental responsibility shall be informed in a way that enables them to fulfil their parental responsibilities towards their child.

According to Section 70 a of the Youth Courts Act, at the point in time where the juvenile is informed that s/he is an accused, s/he must be informed immediately about the main features of juvenile criminal proceedings. S/he is also to be informed without delay of the next steps to be taken in the proceedings, provided that this does not jeopardize the purpose of the investigation. Furthermore, juveniles shall be informed without delay that:

- in accordance with section 67a, the legal guardians and legal representatives or another suitable adult person must be informed⁴⁷,
- that they may request the assistance of a defence counsel and may request the postponement or interruption of the interrogation for a reasonable period of time⁴⁸;
- that the hearing before the adjudicating court shall in principle not be public and that in the case of a main hearing which is exceptionally public, they may request the exclusion of the public or of individual persons under certain conditions⁴⁹;
- that they may object to the release of a copy of the audio-visual recording of the interrogation to those entitled to inspect the files and that the release of the recording or the release of copies to other bodies requires consent⁵⁰;

⁴⁵ Two judges/Germany, two defence lawyers/Germany, one prosecutor/Germany.

⁴⁶ Two judges/Germany, three defence lawyers/Germany, two prosecutors/Germany, one (Non-legal) Specialist/Germany.

⁴⁷ Section 70 a para 1, No. 1.

⁴⁸ Section 70 a para 1, No.2.

⁴⁹ Section 70 a para 1, No.3.

⁵⁰ Section 70 a para 1, No.4.

- they may be accompanied by their legal guardians and legal representatives or another suitable adult person during examination measures⁵¹;
they may request a review of the measures and decisions concerned due to an alleged violation of their rights by one of the authorities involved or by the court⁵².

In Germany, there is no equivalent to legal aid in criminal proceedings, there are cases of mandatory defence. In such cases, a defence counsel is assigned to the accused. Therefore, the information about legal aid pursuant to Art. 4 para 1 lit a (V) of the Directive forms part of the prescribed instructions according to section 136 para. 1 of the German Code of Criminal Procedure, referring to mandatory defence and the imposition of costs and expenses (section 465 of the German Code of Criminal Procedure). Therefore, it is not included in section 70 a of the Youth Courts Act. In proceedings against juveniles, the costs may be dispensed according to section 74 of the Youth Courts Act, the corresponding information does not have to be given to the juvenile.

According to paragraph 2 of section 70 a of the Youth Courts Act, to the extent that this is relevant in the proceedings or as soon as this becomes relevant in the proceedings, the juvenile shall also be informed as early as possible of the following:

- the consideration of their personal circumstances and needs in the proceedings⁵³;
- the right to a medical examination to which they are entitled in accordance with the law of the states or the law of the federal police forces in the case of temporary deprivation of liberty, as well as about the right to medical assistance if it is found that such assistance is required during this deprivation of liberty⁵⁴;
- the application of the principle of proportionality in the case of temporary deprivation of liberty, namely
 - the priority of alternative measures by which the purpose of the deprivation of liberty can be achieved,
 - the limitation of the deprivation of liberty to the shortest reasonable period of time; and
 - the consideration of the special burdens caused by the deprivation of liberty with regard to their age and stage of development and the consideration of any other special need for protection ⁵⁵
- that other measures might generally be considered to avoid detention in appropriate cases⁵⁶;
- The prescribed ex officio reviews⁵⁷, referring to the judicial review after 6 months pursuant to section 121 Code of Criminal Procedure, the information concerning the right to lodge a complaint against the warrant of arrest or request a review of detention at any time belongs to the prescribed instructions according to Section 114 para. 2 No. 8 of the Code of Criminal Procedure;
- the right to the presence of the legal guardians and legal representatives or another suitable adult person at the main hearing⁵⁸ ;
- their right to and duty of being present at the main hearing⁵⁹.

⁵¹ Section 70 a para 1, No.5.

⁵² Section 70 a para 1, No.5.

⁵³ Section 70 a para 2 No. 1.

⁵⁴ Section 70 a para 2 No. 2.

⁵⁵ Section 70 a para 2 No. 3.

⁵⁶ Section 70 a para 2 No. 4.

⁵⁷ Section 70 a para 2 No. 5.

⁵⁸ Section 70 a para 2 No. 6.

⁵⁹ Section 70 a para 2 No. 7.

According to paragraph 3, in cases of pre-trial detention, the juvenile must also be informed that:

- their accommodation must be separated from adults according to Section 89 c of the Youth Courts Act, which provides that the juvenile under the age of 18 may only be accommodated with young prisoners who have reached the age of 18, if joint accommodation is not contrary to their best interests (section 89 c para. 2)⁶⁰, that in accordance with the enforcement laws of the federal states, care for their health, physical and mental development is to be provided, their right to education and training is to be guaranteed, their right to family life and the opportunity to meet the legal guardians and legal representatives is to be guaranteed, it has to be ensured that there is access to programs and measures promoting their development and reintegration, and that freedom of religion and belief is to be guaranteed.⁶¹

According to paragraph 4, the respective information has to also be given in the event of a temporary deprivation of liberty other than pre-trial detention. Above that, the prescribed instructions (Section 136 of the Code of Criminal Procedure) have to be provided prior to an interrogation.

The prescribed instructions at the commencement of the first examination listed in Section 136 of the Code of Criminal Procedure are:

- information about the offence with which the juvenile is charged and the corresponding norms,
- the right to respond to the charges or to remain silent,
- the right to consult with the defence counsel of their choice, and
- the right to request the appointment of defence counsel in case of mandatory defence.

Accused who are arrested must be informed through written instructions; in this case the additional information⁶² also must be provided in written form. Otherwise, oral information suffices. In case the juvenile does not understand the oral explanation, there is a written leaflet and police directive no. 382, containing instructions on the procedure to be followed by police officers in juvenile proceedings, is amended.⁶³ Some scholars doubt the practicability of this approach, arguing that the juvenile might be overwhelmed by the amount of information provided.⁶⁴

According to Section 70 b of the Youth Courts Act, information must be given in a manner appropriate to the juvenile's age and level of development and education. It shall also be addressed to the legal guardians and legal representatives who are present and shall be given in a manner that enables them to fulfil their responsibility with regard to the subject matter of the instruction. If the legal guardians and legal representatives are not present when the juvenile is informed of the significance of legal consequences ordered by the court, they must be informed of this in writing.

The legal remedies depend on the kind of omitted information. With regard to information about the conduct of the proceedings, the omission to inform can be healed within the proceedings by rectifying it. By contrast, when mandatory instructions according to section 136 of the Code of Criminal Procedure are not provided prior to the first examination, it amounts to a ground for appeal according to

⁶⁰ Section 70 a para 3 No.1.

⁶¹ Section 70 a para 3 No.2.

⁶² According to section 70 a of the Youth Courts Act.

⁶³ Höynck, T.; Ernst, S. (2020), 'Das Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren', ZJJ Vol. 3, pp. 245-258, 257.

⁶⁴ Eisenberg/Kölbl, '§ 70a' in, Eisenberg/Kölbl, Youth Courts Act (*Jugendgerichtsgesetz*), 21. Ed. 2020, Beck, München, Paras. 10-13.

Section 337 of the Code of Criminal Procedure. Section 337 of the Code of Criminal Procedure requires a violation of the law and that the judgment is based on this violation of law, which is the case when it cannot be excluded that the violation of the law influenced the decision taken. A cure of the error within the proceedings or a compelling alternative application of the law leading to the same procedural outcome precludes that the judgement is based on the violation.⁶⁵

ii. Information about procedural rights and safeguards in practice

Regarding the information about procedural rights and safeguards, the answers provided by the interviewees differ decisively. Whereas police officers and prosecutors stated that information are provided according to the legal provisions, which changed with the implementation of the Directive, already in the first interrogation, the defence counsels all had doubts about the proper provision of information, which they often based on the fact that they were only called after the first interrogation and on conversations they had with their clients later in the proceedings.

The same applies to the question of whether the information are provided in a child-friendly way and/or efforts are made in the individual cases to make sure that the individual child understands the information and if the information is provided in a way that is considerate of the situation of certain distinct groups.

The first possible contact between police officers and children who are suspects in criminal proceedings is, when being caught in the act by the officers on duty. In these cases, the child is instructed orally, but no interrogation takes place, which is left to specialized police officers:

“Here, there is a tested standard. It is regulated in such a way that the patrols and the first police officers, whoever they are, instruct the children and adolescents verbally and then there is no written interrogation, but it is left to the specialised staff and the parents are simply informed. So, there is no interrogation, but only the instruction. Why are you here? Why are you the accused? And the formal interrogation is then carried out by the specialist department of the criminal investigation department or by the youth officer at the police station or at the district service of our offices. As a rule, they are trained youth investigators. And they then carry out the whole procedure with the summoning of the parents and the juvenile or adolescent and then with the written instruction.” (Police officer/Germany)

“Also bei uns gibt es einen bewährten Standard. Es ist so geregelt, dass die Streifendienste und oder ich sage jetzt mal ersteinschreitenden Polizeibeamten, wer das dann auch immer ist, die Kinder und Jugendliche auf jeden Fall mündlich belehren und dann aber keine schriftliche Vernehmung stattfindet, sondern das quasi dann den spezialisierten Fachkräften überlassen wird und die Eltern dann auch informiert werden. Also es findet dann keine Vernehmung statt, sondern quasi nur die Belehrung. Warum bist du heute angetroffen worden? Warum bist du Beschuldigter? Und die förmliche Vernehmung findet dann eben durch die Fachinspektion bei der Kriminalpolizei oder durch den Jugendsachbearbeiter beim Polizeiposten oder beim Bezirksdienst von unseren Dienststellen statt. Es sind in der Regel ausgebildete Jugendsachbearbeiter. Und die machen dann das ganze

⁶⁵ Wiedner, § 337', in: BeckOK German Code of Criminal Procedure, 38. Ed. 1. October 2020, München Beck, Para. 1.

Prozedere mit der Vorladung und Einbestellung der Eltern und des Jugendlichen oder des Heranwachsenden und dann mit der schriftlichen Belehrung.“

All interviewees, who addressed the topic, confirm that there is a new standardized information leaflet containing all information prescribed by the Directive provided to the suspect by the police.

“Since I do not personally carry out interrogations and summonses, I know it is provided that the summons is accompanied by a written leaflet, which is also always sent to the legal guardian. The summons is 7 pages long. The content of the leaflet is nationally coordinated, and it contains the entire procedure, from the report of an offence to the court proceedings. This is then communicated to the minors and the legal guardians again during the interrogation by way of the extended instructions. In addition, the Office for Social Services has produced a flyer in which the whole information has been summarised in a more child-friendly and compact way.” (Police officer/Germany)

„Da ich ja persönlich keine Vernehmungen und Vorladungen vornehme, ist es aber ja so vorgesehen, dass mit der Vorladung, schriftlich schon das Merkblatt mitgeschickt wird, das geht ja immer auch an den Erziehungsberechtigten. Die Vorladung umfasst 7 Seiten, das Merkblatt ist bundeseinheitlich abgestimmt, da stehen die kompletten Verfahrenswege, von der Anzeige bis zum Gerichtsverfahren drinnen. Das wird dann nochmal im Rahmen der Vernehmung im Wege der erweiterten Belehrung, die Belehrung ist ja auch ausgeweitet worden, den Minderjährigen und den Erziehungsberechtigten auch nochmal mitgeteilt. Zusätzlich hat das Amt für Soziale Dienste einen Flyer erstellt, wo das Ganze nochmal kindgerechter und kompakter zusammengeführt wurde.“

One interviewed police officer reported that the leaflet attached to the formal summons, contains a QR-Code, thereby the information can be accessed online.⁶⁶ This procedure was described by the interviewed police officers and prosecutors.⁶⁷

Lawyers, while confirming that amendments were introduced, doubted that this procedure was always followed as prescribed, saying it decisively depends on the individual police officer in charge.⁶⁸ A social worker had the impression that sometimes in the direct contact of suspected children with police officers, pressure is exerted on the child to tell what had happened.⁶⁹ A police officer explained that there might be situations where there is immediate danger for others and then the police officers might question the child on the spot.⁷⁰ The judges have to rely on the documentation about the instruction and information provided for by the police in the files.⁷¹ A judge reported that, especially in these “caught in the act” situations, concerning instructions and information, there might be room for improvement.⁷²

Representatives of the juvenile court assistance elaborated that they try to explain the proceedings when they have the impression that the child did not understand the information provided for by the

⁶⁶ Police officer/Germany.

⁶⁷ Three police officer/Germany, a judge/Germany, a prosecutor/Germany.

⁶⁸ Four defence lawyers/Germany.

⁶⁹ (Non-legal) Specialist/Germany.

⁷⁰ Police officer/Germany.

⁷¹ Two judges/Germany.

⁷² Judge/Germany.

police. At the same time, they were divided on their concrete role. Some explicitly mentioned that they are not responsible – and not trained – to provide legal assistance.⁷³

“Regarding legal advice, it is difficult. We keep a low profile regarding legal aspects. But we do have a kind of social advocacy. And that's why, of course, within the framework of the pedagogical discussion, we look at what the current procedural situation is, or is it perhaps still pending?” (Non-legal) Specialist/Germany

„Das ist immer so ein bisschen schwierig bei der Jugendgerichtshilfe mit rechtlicher Beratung. Da halten wir uns zurück. Aber man hat schon so eine Art Sozialanwaltschaft. Und deswegen wird natürlich im Rahmen des pädagogischen Gesprächs geguckt, ja, wie ist die aktuelle Verfahrenssituation oder steht die vielleicht auch noch aus“

Others saw it as their task to also explain the legal implications.⁷⁴

“We have information, i.e. what rights the children and adolescents have during an investigation or criminal proceedings. And we inform them about this. So, when it comes to the right to refuse to testify. We tell the young people that they can make use of this right. And we also advise the parents that they have a say in whether their child testifies or not.” (Non-legal) Specialist/Germany.

„Wir haben Informationen, also welche Rechte die Kinder und Jugendliche dann haben während eines Ermittlungs- oder Strafverfahrens. Und wir klären sie darüber auf. Also, wenn es um das Recht, die Aussage zu verweigern geht. Das sagen wir den Jugendlichen, dass sie sich von diesem Recht Gebrauch machen können. Und wir beraten auch die Eltern darüber, dass sie auch da mitentscheiden, ob ihr Kind aussagen oder nicht.“

It is suggested by a judge that the individual practice and effort depends on the individual police officer and that it is generally not in the interest of the police to inform appropriately, because, then, it would be more likely that the suspect refers to his/her right to be legally represented and they do not provide statements anymore.⁷⁵ In fact, with regard to the involvement of defence counsels, the police officers, the prosecution and the juvenile court assistance criticized that it would sometimes be detrimental for the proceedings, because, then, the suspect, rather than telling what had happened, remains silent and the pedagogical purpose, particular to juvenile criminal law, could not be reached.⁷⁶

Regarding the comprehensibility of the information provided, there were major concerns raised by defence lawyers. Being asked whether the interviewee has the impression that the child understands the information provided to them by the police officers, the lawyers have a very strong opinion and state that children do not understand the instructions:

“Clearly, no! They don't understand! It is the exception that the children understand.” (defence lawyer/Germany)

⁷³ Three (Non-legal) Specialists/Germany.

⁷⁴ (Non-legal) Specialist/Germany.

⁷⁵ Judge/Germany.

⁷⁶ (Non-legal) Specialist/Germany.

„Ganz klar Nein! Verstehen sie nicht! Es ist die Ausnahme, dass die Kinder das verstehen.“

“In practice, the maximum that happens is: There is an information sheet on juvenile criminal law, a 3-page sheet with narrow print, where rights are written down. It's supposed to be written in a comprehensible way, but when they hand it to a 16-year-old, s/he usually doesn't understand a thing.” (defence lawyer/Germany).

„In der Praxis ist das Maximale was passiert: Es gibt ein Merkblatt zum Jugendstrafrecht, 3-seitig eng bedrucktes Blatt, wo Rechte draufstehen. Das soll nachvollziehbar formuliert sein, aber wenn sie das einem/einer 16-jährigen hinlegen, der/die versteht in der Regel nur Bahnhof.“

This was confirmed by another lawyer who adds that the lack of understanding and the focus on the pedagogical purpose might negatively affect the right to remain silent:

“I believe that often there are problems of understanding, especially with regard to the nemo tenetur principle and the right to remain silent. Because of the educational purposes of the juvenile criminal proceedings, it is conveyed that it is an advantage to confess and that invoking the right to remain silent would have negative effects.” (Lawyer, Germany)

“Ich glaube, dass es da häufig Verständnisprobleme gibt. Insbesondere was das Recht sich nicht selbst belasten zu müssen und das Recht auf Schweigen angeht. Gerade weil das Jugendverfahren dem Erziehungsgrundsatz folgt, wird häufig vermittelt, dass es nur von Vorteil ist, wenn man reinen Tisch macht oder dass es nachteilige Auswirkungen hat, wenn man von seinem Recht auf Schweigen Gebrauch macht.“

But also interviewed police officers doubted, whether the information provided to the children by the police in the first stage of the proceedings is always understood.⁷⁷ They partly attributed this to the amount of information and to the stressful situation of the children.⁷⁸ Nevertheless, while lawyers doubt that the police make an effort to provide information in a comprehensible way, police officers generally emphasize that they are considerate of the level of education and the individual abilities.⁷⁹ They also point out that specially trained officers conduct interrogations and therefore are able to assess whether the information are understood.⁸⁰

Still, a defence counsel stated that, in his/her practice, s/he had never objected to the use of a statement reasoning on the lack of proper instructions.⁸¹ Reasoning that s/he sees a dilemma for the defence in this respect, because it would formalise the proceedings while the cooperation with the prosecutor's office and with the court could be more beneficial for the client. The focus in practice is on the outcome of the proceedings in the interest of the client. And the interviewee has the experience that reprimanding formalities is often not conducive in this regard. According to one defence lawyer,

⁷⁷ Three police officers/Germany.

⁷⁸ Police officer/Germany.

⁷⁹ Three police officers/Germany.

⁸⁰ Two police officers/Germany.

⁸¹ Defence lawyer/Germany.

it seems improbable that the practice of instructing children will be reviewed by higher courts, because the lawyers are not making use of legal remedies even if they are convinced that the instructions were insufficient.⁸²

The interviews are not conclusive concerning the information provided to the holders of parental responsibility. According to the interviewed police officers and juvenile court assistants, they are informed immediately and receive the same leaflet as their child.⁸³ The defence counsels voice doubts that the police wait with the interrogation until the holders of parental responsibility are present and informed, but they do not have direct knowledge about this initial phase of the proceedings, because they are not present.⁸⁴

In the main hearing, the judges check whether the accused were informed, referring to the respective information in the files.⁸⁵ One judge stated that the proceedings before the district court are quite comprehensible, therefore, further information is not required.⁸⁶ Another judge stated, that s/he checks whether or not the accused knows “what is going on” and tries to explain as much as possible.⁸⁷ The other interviewees confirmed that juvenile judges in general are more attentive to the state of information of the accused and put more effort into explaining the proceedings.⁸⁸ If there is the impression that the accused is lacking information, the hearing is interrupted and the defence counsel or the juvenile court assistance is asked to explain again.⁸⁹

The amendments through the Directive were generally welcomed by the interviewees, but it was suggested that the amount of information provided could be overwhelming for the children in practice.⁹⁰ Therefore a police officer and a defence lawyer, identify a good practice in giving the information to the accused child and then asking him or her to summarize what they understood in their own words to check, whether it was understood by the child.⁹¹ The worst practice is described as just reading the leaflet to the child without checking whether it was understood, because the leaflet itself is not comprehensible.⁹²

iii. Information about the general conduct of the proceedings

The abovementioned new standardized information leaflet used by police officers also contains general information about the criminal proceedings.⁹³ Furthermore, the juvenile court assistance prepared an information leaflet, explaining the general conduct of the proceedings in a child-friendly language.⁹⁴

⁸² Defence lawyer/Germany.

⁸³ Four police officers/Germany, five (Non-legal) Specialists/Germany.

⁸⁴ A defence lawyer/Germany assuming that it depends on the individual case when police officers expect a „broken home situation“ they put less effort into informing the parents, three defence/lawyers/Germany.

⁸⁵ Two judges/Germany.

⁸⁶ Judge/Germany.

⁸⁷ Judge/Germany.

⁸⁸ (Non-legal) Specialist/Germany.

⁸⁹ Two judges/Germany, (Non-legal) Specialist/Germany.

⁹⁰ Prosecutor/Germany.

⁹¹ Police officer/Germany; defence lawyer/Germany.

⁹² Two defence lawyers/Germany.

⁹³ Four police officers/Germany, one judge/Germany.

⁹⁴ (Non-legal) Specialist/Germany.

Nevertheless, a prosecutor and two non-legal specialists were unsure whether the police already provide information about the general conduct of the proceedings, or of this is rather done by the juvenile court assistance and/or the lawyers later in the proceedings.⁹⁵

Interviewees from the judiciary (judges and prosecutors), who are not present at this stage of the proceedings assumed that it is practically the job of the juvenile court assistance to explain in a child-friendly and more comprehensive way, containing information about the general conduct of the proceedings.⁹⁶ A prosecutor assumes that that information are also provided by a legal representative.⁹⁷ A judge voiced concerns about the reasonableness of providing information about the general conduct of criminal proceedings, especially concerning the conduct of the main hearing – the exclusion of the public – at this early stage, since it is uncertain yet, whether there will be a complete criminal proceeding and in fact oftentimes there won't be.⁹⁸

S/he also criticized the reasonableness of providing information about later stages in the proceedings already before the first interrogation.⁹⁹

The police, in case of an official investigation against a child, inform the juvenile court assistance.¹⁰⁰ The latter invite the child to a consultation. Together with the letter of invitation, the information leaflet is sent.¹⁰¹ Attendance of the consultation is voluntary. But several invitations and reminders are sent to make sure that the child is reached.¹⁰² During the consultation, the child is informed about the general conduct of the proceedings and if the juvenile court assistant has the impression that the child did not understand the information provided by the police, they also inform about the procedural rights and safeguards.¹⁰³

The same applies to the lawyers that were interviewed. They all described that they have the impression that the children do not always understand the information provided to them by the police. Therefore, they inform them accordingly, and they also explain the general conduct of the proceedings.¹⁰⁴

As a challenge to the practical implementation of the Directive with respect to the provision of information, almost all interviewees identify language as being a major problem.¹⁰⁵ Even if there are interpreters available in the preliminary proceedings, understanding each other is difficult. A police officer explains that language mediators can be consulted in these cases and that they even sometimes involve cultural mediators.¹⁰⁶ A social worker problematized the cultural background of a child as potentially challenging, because the respect vis á vis authorities and adults could be a reason why children do not exert their rights.¹⁰⁷ S/he also emphasised that there might be interpreters, but often they do not speak a child-friendly language or do not speak the right dialect.¹⁰⁸

⁹⁵ (Non-legal) Specialist/Germany, two prosecutors/Germany and a judge/Germany.

⁹⁶ Judge/Germany.

⁹⁷ Prosecutor/Germany.

⁹⁸ Judge/Germany.

⁹⁹ Judge/Germany.

¹⁰⁰ Four police officers/Germany, three (Non-legal) Specialists/Germany.

¹⁰¹ (Non-legal) Specialist/Germany.

¹⁰² Two (Non-legal) Specialist/Germany.

¹⁰³ Three (Non-legal) Specialist/Germany.

¹⁰⁴ Four defence lawyers/Germany.

¹⁰⁵ Two defence lawyers/Germany.

¹⁰⁶ Police officer/Germany.

¹⁰⁷ (Non-legal) Specialist/Germany.

¹⁰⁸ (Non-legal) Specialist/Germany.

In the main hearings, interpreters are mandatory, if the accused do not speak German sufficiently. Nevertheless, the lack of understanding is still identified to be a problem, especially with regard to giving effect to the pedagogical purpose of the proceedings.¹⁰⁹

b. Right to have the holder of parental responsibility informed

i. Legal overview

Section 67 a of the Youth Courts Act has been introduced with the “*Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren*” (Act to Strengthen the Procedural Rights of Accused Persons in Juvenile Criminal Proceedings) to implement Article 5 of the Directive (EU) 2015/800.

It provides that, if a notification to the accused is prescribed, the corresponding notification shall also be addressed to the holders of parental responsibility and the legal representatives. The same applies to the information given to the juvenile under section 70a of the Youth Courts Act. If the juvenile is temporarily deprived of liberty, the holders of parental responsibility and legal representatives shall be informed as soon as possible of the deprivation of liberty and the reasons for it.

In exceptional cases, the authorities shall refrain from informing the holders of parental responsibility and legal representatives. This is the case, when

- a considerable impairment of the juvenile's well-being is to be expected, in particular if the juvenile's life, body or freedom is endangered¹¹⁰
- if the prerequisites of section 67 paragraph (4) sentence 1 or 2 are fulfilled, namely when the juvenile court has deprived the holder of parental responsibility and the legal representatives of their rights, because they are suspected of being involved in the misconduct of the accused or they have been convicted of involvement. In this case, the family court shall appoint a guardian to represent the interests of the accused in the pending criminal proceedings. The main hearing shall be suspended until the guardian has been appointed.¹¹¹
- if the purpose of the examination would be considerably endangered due to the information provided¹¹², or
- the holder of parental responsibility or legal representative cannot be reached within a reasonable period of time¹¹³.

If neither the holders of parental responsibility nor legal representatives are informed, another adult person suitable for the protection of the juvenile's interests shall be informed. The juvenile shall be given the opportunity to designate a person whom they trust. The person may also be the representative of the juvenile court assistance responsible for the juvenile's care in the juvenile criminal proceedings¹¹⁴.

As soon as the exceptional circumstances are no longer fulfilled, pursuant to section 67 a para 5 of the Youth Courts Act, notifications and information prescribed in the further proceedings shall also be addressed to the holders of legal representation and legal representatives concerned again. In addition, in this case they shall also subsequently receive such notifications and information, which the

¹⁰⁹ Defence lawyer/Germany.

¹¹⁰ Section 67 a para 3 No.1.

¹¹¹ Section 67 a para 3 No.1.

¹¹² Section 67 a para 3 No.2.

¹¹³ Section 67 a para 3 No.3.

¹¹⁴ Section 5 paragraph 6.

juvenile has already received in accordance with section 70a of the Youth Courts Act, insofar as these remain of importance in the course of the proceedings or as soon as they become important.

ii. Informing the holders of parental responsibility

Generally, all interviewed police officers and three interviewed non-legal specialists reported that the legal guardians are informed by the police¹¹⁵ and the juvenile court assistance¹¹⁶, but attendance at interrogations and at the consultations with the juvenile court assistance is voluntarily and an interviewed defence lawyer and a police officer add that many parents do not appear.¹¹⁷ Regarding the juvenile court assistance, an interviewee said that their decision whether to inform the parents also depends on the age and the type of crime the child is accused of. If the child is almost of legal age and accused of relatively marginal offences, e.g. fare-dodging, they do not necessarily inform the parents.¹¹⁸ The legal guardians are summoned to the main hearings, but, again, appearance is voluntarily, and most parents do not attend.¹¹⁹

The national authorities (police and juvenile court assistance) examine whether there are reasons not to inform the parents.¹²⁰ In relation to the juvenile court assistance, one interviewee explained that when they are searching for the child in the system of the youth welfare services, there are restriction notices (Sperrvermerke), implying that the holder of parental responsibility should not be informed.¹²¹ The non-legal specialist was certain that the police and the prosecution have access to the same database as the juvenile court assistance and therefore also check whether reasons exist not to inform.

Reasons named by two police officers were the suspected involvement of the holders of parental responsibility in the crime of which the child is suspected/accused or a history of sexual abuse.¹²²

“Yes, if the minor really has extreme concerns about the guardians being there, it's not enough to say, I'll get in trouble, that have to be serious reasons. Then, we would approach the youth welfare office and a case manager would then take over the educational responsibility.” (police officer/Germany)

„Ja, wenn der Minderjährige wirklich extreme Bedenken hat, dass die Erziehungsberechtigten dabei sind, es reicht nicht aus zu sagen, ich kriege dann Ärger, das müssen schon schwerwiegende Gründe sein, dann würden wir an das Jugendamt herantreten und ein case-manager würde dann die Erziehungsbereitschaft übernehmen.“

Those interviewees who had knowledge about the cases, in which there are reasons not to inform the legal guardians, reported that the youth welfare service is involved.¹²³ In practice, this does not play a big role, hardly any cases were known to the interviewees. The same applies to the question of whether or not it is possible to name a person of trust.¹²⁴ To the knowledge of the interviewees, this is possible, if the person is approved to be trustworthy by the police or the juvenile court assistance,

¹¹⁵ Four police officers/Germany.

¹¹⁶ Three (Non-legal) Specialists/Germany.

¹¹⁷ A defence lawyer/Germany sees a major problem, because the parents do not support their children in the interrogations. A police officer/Germany also problematizes this.

¹¹⁸ (Non-legal) Specialist/Germany.

¹¹⁹ Three judges/Germany.

¹²⁰ Four police officers/Germany, judge/Germany .

¹²¹ (Non-legal) Specialist/Germany.

¹²² Two police officers/Germany.

¹²³ Police officer/Germany, judge/Germyn, two (Non-legal) Specialists/Germany.

¹²⁴ Three police officers/Germany.

nevertheless, in terms of guardianship, the youth welfare service is involved.¹²⁵ One interviewed lawyer voiced a serious concern with regard to the procedural rights of the child being infringed by the possibility to involve persons who are not related to the child, because, according to section 52 of the Code of Criminal Procedure, only those persons who are directly related to the accused have the right to refuse to give evidence, consequently,

„whereas the legal guardian has the right to refuse to testify, the juvenile court assistants who stand in for the parents do not. In the instance of the first contact with the juvenile, both, the defence lawyer and the legal guardians, naturally ask the question: what was going on? But both have a right not to testify. The juvenile court assistant will also, out of human empathy, have the impulse to ask what happened. But s/he would be eligible as a witness to these proceedings and the protective purpose of the right to refuse to give evidence comes to nothing.“ (Lawyer, Germany)

„ dass eben kein Zeugnisverweigerungsrecht von Jugendgerichtshelfern, die als Elternersatz einspringen, besteht, während die gesetzlichen Vertreter:innen dieses hätten. Sowohl der Verteidiger, wie auch die Erziehungsberechtigten werden doch in der Situation des Erstkontakts, nachdem so eine Straftat im Raum steht, die Frage stellen, ‚was war denn los?‘. Wenn das aber einem Jugendgerichtshelfer, einer Jugendgerichtshelferin geschildert würde, die natürlich aus menschlicher Empathie im Zweifelsfall denselben Impetus hat, mal zu fragen, was da los war, ist er/sie als Zeug:in dieses Verfahrens verfügbar und das, insoweit läuft das Zeugnisverweigerungsrecht ins Leere.“

iii. Having a nominated/designated person informed

Concerning nominated or designated persons being informed, it is confirmed that, if there is no legal representative or if the legal representative is excluded, the authorities make an effort to find persons of trust. This could be persons nominated by the child or appointed by the court. Once this person is nominated, they are provided with all information that would be provided to the legal representatives.¹²⁶

An interviewed social worker voiced serious concerns regarding the information of the legal guardians appointed to unaccompanied minor refugees. According to him oftentimes the guardians are not informed prior to the interrogation:

“I have sometimes experienced that the police did not inform the official guardianship in time about the questioning, so that the young person, especially the young person, was questioned without the declaration of consent of the legal guardian and thus without assistance. And whether that is legally possible, I cannot judge conclusively... But there were also complaints about this from the legal guardians. I have informed the legal guardians about it, and they have written to the police in such cases with the request to inform the legal guardian immediately if there are appointments or any arrests of their ward. Whether this works well in the meantime, I can't answer that now.”

¹²⁵ Two (Non-legal) Specialists/Germany.

¹²⁶ A police officer/Germany, judge/Germany, two (Non-legal) Specialists/Germany.

“ Und da habe ich manchmal erlebt, dass die Polizei die Amtsvormundschaft über die Vernehmung nicht rechtzeitig informiert hat, sodass der Jugendliche oder die Jugendliche, ohne Einverständniserklärung der Amtsvormundschaft und somit ohne Beistand vernommen worden ist. Und ob das rechtlich möglich ist, kann ich leider nicht abschließend beurteilen. Ob die Polizei da eine rechtliche Grundlage dafür hätte, habe ich nicht überprüft. Also es kamen aber auch darüber Beschwerden von den Vormündern. Ich habe die Amtsvormundschaft darüber in Kenntnis gesetzt, und die haben die Polizei in solchen Fällen angeschrieben mit der Aufforderung, die Amtsvormundschaft sofort darüber zu unterrichten, wenn es Termine gäbe oder irgendwelche Festnahme ihres Mündel. Ob das mittlerweile gut funktioniert, das kann ich jetzt nicht beantworten.”

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

Generally, most interviewees confirm that parents, or legal guardians are involved in all phases of the criminal proceedings, if they want to.¹²⁷

The interviewed lawyers almost all problematize the involvement of the parents.¹²⁸ They voice concerns because their involvement influences the client-lawyer relationship.¹²⁹ Depending on the relationship between the parents and their children, when parents are involved, it could have an impact on the openness of the children towards their lawyers.¹³⁰ Therefore, all lawyers prefer to always have confidential conversations with the children alone. All of them emphasise that the children are their clients and that there might be conflicts of interests between the children and their parents, therefore involvement might not always be beneficial to the children.¹³¹

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

i. Legal overview

For the purpose of implementing Article 9 (1) and (2) of Directive (EU) 2016/800, section 70 c of the Youth Courts Act was introduced. It holds that, outside of the main hearing, interrogations can be recorded in audio and video. Examinations other than judicial interrogations are to be recorded in video and sound if the participation of a defence counsel is mandatory at the time of the interrogation, but a defence counsel is not present.

Otherwise, Section 136 (4) sentence 2 of the Code of Criminal Procedure applies, providing that audio-visual recording is required in cases where the proceedings are based on a homicide committed intentionally and neither the external circumstances nor the particular urgency of the interrogation prevent the recording or the interests of accused persons who are suffering from limited mental capacity or a serious mental disorder and who are worthy of protection can be better safeguarded by the recording.

¹²⁷ With the exception of two defence lawyers/Germany who say that parents are not informed by the police.

¹²⁸ Two defence lawyers/Germany.

¹²⁹ Two defence lawyers/Germany.

¹³⁰ Three defence lawyers/Germany.

¹³¹ lawyer/Germany, lawyer/Germany, defence lawyer/Germany, defence lawyer/Germany, defence lawyer/Germany.

The legislator argues that the intended protection of the juvenile is sufficiently secured by the presence of a defence counsel, the recording may have possible negative effects on the accused and that the technical-organisational effort is too high to always ensure recording.¹³²

In this regard, it is criticised by legal theorists that the protection and control function of audio-visual recording is delegated to judges and defence counsels who are not necessarily equipped for this.¹³³

A violation of the obligation to audio-visually document an interrogation of the accused does not lead to a prohibition to use the evidence. The accused (and his or her defence lawyer) could insist on a video recording of the interrogation, explaining previously unknown reasons, if necessary, also afterwards. Correspondingly, erroneous written records of the interrogation can therefore in principle be used in the proceedings but will regularly have to be subjected to a critical and cautious assessment.¹³⁴

In all cases, in which no audio-visual recording is foreseen by law, there are written minutes of the interrogations which have to be verified by the accused juvenile and validated by signature.¹³⁵

ii. Implementation in practice

All interviewees reported that the police acquired the technical apparatus for audio-visual recording of interrogations and installed respective interrogation rooms. In practice however, this is hardly ever used.¹³⁶ Accordingly, a police officer describes the theoretical cases of audio-visual recording and why it is not used:

“The department would use the equipment in cases of mandatory defence only if the defence counsel says that his/her client is willing to speak in relation to the accusation but he/she [the defence counsel] could not take part in the examination. ... However, we then fix dates with the accused and the defence counsel, so that the defence counsel is present, rendering any audio-visual documentation unnecessary.” (Police officer/Germany)

„Wir würden diese Geräte nutzen in Fällen der notwendigen Verteidigung, wenn ein Rechtsanwalt sagt, ja mein Mandat kann sich zu der Sache äußern und soll das auch, aber ich bin nicht dabei. Also machen sie das mal ohne mich. Dann wären das Fälle, wo wir sagen würden, dass das dokumentiert werden muss. Ist aber in der Praxis so noch nicht vorgekommen. Wir hatten schon so Fälle der notwendigen Verteidigung [...] dann werden aber Termine mit dem Rechtsanwalt und dem Beschuldigten gemacht und der Rechtsanwalt ist bei der Vernehmung dabei. Was dann wieder die audio-visuelle Vernehmung nicht notwendig macht.“

¹³² Sommerfeld, M (2018), Die EU-Richtlinie über Verfahrensgarantien in Strafverfahren für Kinder (= Personen im Alter von unter 18 Jahren), die Verdächtige oder beschuldigte Personen in Strafverfahren sind, und ihre Umsetzung ins deutsche Jugendstrafverfahrensrecht ZJJ Vol. 4, pp. 296-311, 309.

¹³³ Eisenberg/Kölbl, ‚§ 70c‘ in, Eisenberg/Kölbl, Youth Courts Act (*Jugendgerichtsgesetz*), 21. Ed. 2020, Beck, München, Paras. 19-21

¹³⁴ Monka, ‘§136’, in: BeckOK German Code of Criminal Procedure, 38. Ed. 1. October 2020, München Beck, Para. 26a.

¹³⁵ See fn. 3.

¹³⁶ Fourt police officers/Germany, (Non-legal) Specialist/Germany.

No interviewee recalled a case from own experience. One reason being that, in cases where audio-visual recording is required (in cases of a suspicion of intentionally committed homicide), defence counsels are mandatorily appointed and then, the accused refer to their right to remain silent.¹³⁷

d. Discussion of findings

The leaflets produced in order to practically implement Art. 4 of Directive 2016/800/EU contain all information on procedural safeguards. They are either handed out to the suspected/accused children and their parents or sent in advance to the interrogation. Trained police officers again read the information to the accused and their parents (if present).

Uncertainty remains concerning the information on the general conduct of the proceedings and the timing of the information. Many interviewees from all professions were unsure if the police already provides information on the general conduct of the proceedings, or if this is done by the juvenile court assistance or the lawyers at a later stage in the proceedings.

Furthermore, almost all interviewees doubt whether information is generally given in a way that complies with the child's age and level of maturity. Although there is a legal requirement that information is provided in a way that the accused child can understand, it seems to depend on the individual situation of the child and police officers whether the child really understands the information. The interviewees all suggest that the holders of parental responsibility are informed, still, doubts remained on the side of the defence counsels regarding whether this is always done with enough vigour before the interrogations take place. In practice, cases where the authorities refrain from informing the holder of parental responsibility are seldom. In theory, this is considered, when they might be involved in the crime in question and when there might be a history of abuse. In the abstract case of the nomination of a person of trust, who is not related, including representatives of the juvenile court assistance, despite the requirement to build a relationship of trust and closeness to the accused child, cannot invoke the right to not testify, since they do not fall under the protective scope of section 52 of the Code of Criminal Procedure.

The involvement of the parents or the designated/nominated person is guaranteed, they are informed by the police, invited by defence counsel and the juvenile court assistance, and summoned to court hearings. Nevertheless, attendance is voluntary, and, in many cases, the holders of parental responsibility are absent.

Whereas the equipment for audio-visual recording was purchased and interrogation rooms installed, audio-visual recordings of interrogations outside court are hardly ever practiced, because of the presence of a defence counsel. Audio-visual recording is only required by law in cases of homicide, in these cases defence is mandatory due to the seriousness of the offence/felony, therefore there is hardly any cases where the defence counsel is not present, and an interrogation is conducted.

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

a. Legal overview

The system installed to implement Art. 6 and 18 of the Directive is an interplay of Section 68 of the Youth Courts Act and the amended Sections 140 et seq. of the Code of Criminal Procedure. These amendments probably cause major changes in the previous practice with regard to the requirement of mandatory defence and the time the defence counsel has to be appointed.

Pursuant to Section 68 paragraph 1 of the Youth Courts Act a case of mandatory defence exists if a case of mandatory defence would exist in proceedings against an adult.

According to Section 140 of the Code of Criminal Procedure, this is the case when:

¹³⁷ Judge/Germany.

- it is to be expected that the main hearing at first instance will take place before the Higher Regional Court (*Oberlandesgericht*), the Regional Court (*Landgericht*) or the District Court in a case involving lay judges (*Amtsgericht, Schöffengericht*).
- the accused is charged with a serious criminal offence/felony;
- the proceedings may lead to a ban from practicing a profession
- the accused is to be brought before a court under sections 115, 115a (arrest warrant), 128(1) or 129 (provisional arrest) for a decision on detention or temporary accommodation, this implies all types of remand orders with the purpose of a decision on deprivation of liberty.
- the accused is in an institution on the basis of a judicial order or with judicial authorisation;
- an expert report on the mental state of the accused is prepared because his placement in a psychiatric hospital under section 81 of the Code of Criminal Procedure is contemplated;
- it is to be expected that precautionary proceedings (preventive detention) will be carried out; the reason behind the last cases being, that no decision on the deprivation of liberty shall be taken in the absence of a defence attorney
- the previous defence counsel has been excluded from participation in the proceedings
- the injured person has been assigned a lawyer in accordance with sections 397a and 406h paragraphs (3) and (4) (joint plaintiff¹³⁸);
- the participation of a defence counsel appears necessary due to the importance of the judicial hearing for the protection of the rights of the accused;
- a visually, hearing or speech impaired accused requests the appointment;
- the involvement of a defence counsel appears necessary due to the seriousness of the offence, the seriousness of the legal consequence to be expected or due to the difficulty of the factual or legal situation or if it is evident that the accused cannot defend themselves.

Apart from these cases, pursuant to Section 68 paragraph 2 of the Youth Courts Act, a defence counsel must be appointed for a juvenile, when

- the legal guardians and legal representatives are deprived of their rights under the Youth Courts Act¹³⁹,
- the legal guardians and the legal representatives have been excluded from the hearing pursuant to section 51 paragraph 2 and the impairment in the exercise of their rights cannot be sufficiently compensated for by a subsequent briefing¹⁴⁰ or the presence of another suitable person of full age,
- an expert report on the developmental state of the accused¹⁴¹ is prepared
- his or her placement in an institution is contemplated, or
- the imposition of a juvenile sentence, the suspension of the imposition of a juvenile sentence or the ordering of placement in a psychiatric hospital or in a detoxification institution is to be expected.

About the time of the appointment, Section 68 a of the Youth Courts Act provides that a public defender shall be appointed for the juvenile who does not yet have a defence counsel at the latest before the juvenile is questioned or confronted. This shall not apply, if the following three requirements are cumulatively fulfilled: (i) there is a case of mandatory defence, because the juvenile is charged with a serious criminal offence/felony (section 140 para 1 No. 2 of the Code of Criminal Procedure), (ii) it can be expected that the prosecution terminates the prosecution according to section 45 paragraph (2) or (3) of the Youth Courts Act and (iii) the appointment of a public defender would be disproportionate

¹³⁸ According to section 395 paragraph 1.

¹³⁹ Section 67 paragraph 4.

¹⁴⁰ Section 51 paragraph 4 sentence 2.

¹⁴¹ Section 73.

taking into account the best interests of the juvenile and the circumstances of the individual case. Previous to the amendments, a public defender was only appointed after the indictment was issued.

In exceptional cases (Section 68 b of the Youth Courts Act), interrogations and confrontations with the juvenile may be conducted in preliminary proceedings prior to the appointment of a public defender, provided this is also in the best interests of the juvenile and it is necessary to avert serious detrimental effects on the life or limb or the liberty of a person, or the immediate action by the criminal prosecution authorities is imperative, in order to avert a considerable threat to criminal proceedings relating to a serious criminal offence. The juvenile's right to request a defence counsel to be chosen by them at any time, even before the interrogation, shall remain unaffected.

According to the newly introduced Section 51 a of the Youth Courts Act, the main hearing must be restarted if the juvenile was not defended from the start of the main hearing, if it only emerges during the main hearing that the participation of a defence attorney was mandatory in accordance with Section 68 number 5 (the imposition of a juvenile sentence, the suspension of the imposition of a juvenile sentence or the ordering of placement in a psychiatric hospital or in a detoxification institution is to be expected).

To ensure that the presence of a lawyer during the interrogation of the accused, as provided for in the guideline, is recorded in writing in each case, the provision of Section 168b paragraph 2 of the Code of Criminal Procedure on the recording of interrogations carried out by the investigating authorities has been supplemented. These additions apply as general provisions in accordance with Section 2 paragraph 2 of the Youth Courts Act also in juvenile criminal proceedings.

As legal remedies, the juvenile may file an immediate complaint according to Section 322 of the Code of Criminal Procedure. Otherwise, the possibility of appeal remains, whereas it is questionable if the absence of a defence attorney during interrogation, where it was mandatory, leads to a prohibition to use the evidence. According to the established case law of the Federal Constitutional Court and the Federal Supreme Court (balancing doctrine (*Abwägungslehre*)), this means that a prohibition of the use of evidence (only) exists in the case of serious, deliberate or objectively arbitrary violations of the law.

With regard to the costs of the defence, no changes are introduced with the new regulations described. This means that the involvement of a public defender is not dispensable, but that the convicted person is nevertheless obliged to bear the costs upon conviction (section 2 (2) of the Youth Courts Act in conjunction with section 465 of the Code of Criminal Procedure). So far, in juvenile proceedings, the imposition of costs has very often been waived pursuant to section 74 of the Youth Courts Act. This varies from region to region.¹⁴²

The case law with regard to the amendments primarily concerns the obligation to bear costs in the case of retroactive assignment. So far, this has been rejected by the courts. In view of the amendments in connection with Directive (EU) 2016/1919, this case law is no longer tenable.¹⁴³

¹⁴² Höynck, T.; Ernst, S. (2020), 'Das Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren', ZJJ Vol. 3, pp. 245-258, 251.

¹⁴³ Germany, Regional Court (*Landgericht*), Hechingen, 3 Qs 35/20, Order of 20. May 2020; Germany, Regional Court (*Landgericht*), Mannheim, 7 Qs 11/20, Order of 26. March 2020.

While challenges are expected in practice, the changes are generally welcomed by the literature.¹⁴⁴ In particular, the police's prognosis as to whether a case of mandatory defence exists and the attitude that defence lawyers are detrimental to investigatory effectiveness may lead to the police hesitating to enable the consultation of a defence lawyer at these early stages of the proceedings.¹⁴⁵

At the same time, it is highly controversial whether the amendments live up to the requirements of Art. 6 para 6 of the Directive. Mandatory defence is only foreseen in cases, in which the deprivation of liberty in the form of juvenile penalty (section 17 Youth Courts Act) is to be expected, excluding cases of juvenile detention (section 16 Youth Courts Act). The legislator argues that juvenile detention as a disciplinary measure does not carry the same legal consequences as a criminal sentence according to section 13 para. 3 of the Youth Courts Act and, therefore, deprivation of liberty is not imposed as a criminal sentence. Referring to the European Court of Human Rights (ECtHR), *Ilseher vs. Germany* No. 10211/12 and 27505/14, 02 February 2017, this is highly contested.¹⁴⁶

b. Assistance by a lawyer and legal aid

Concerning the broadened scope of mandatory defence and the so-called “*Anwalt der ersten Stunde*” (meaning the immediate participation of a legal representative) the interviewees all had quite strong viewpoints, with differences depending on the professions.

Interviewed police officers explained the procedure applied. The police have to prognose whether a case of mandatory defence is applicable, if so, they inform the prosecution before interrogation to confirm the legal prognosis and to request a public defence counsel,¹⁴⁷ which is ultimately ordered by the court, who asks the accused and the legal representatives whether s/he already have a counsel of choice.¹⁴⁸ If not, a defence counsel is appointed. Only then, an interrogation can be conducted. A police officer reported that they developed guidelines for the officers in charge:

“... it starts with asking the question: Is the person accused in the criminal proceedings, yes or no? if no, then of course no defence lawyer is necessary.(...) If yes, then the second question would be: The accused person is to be brought before a court? If yes, the public defence is necessary. If no, the next question is: Is the accused in an institution? If yes, the public defence is definitely mandatory. If no, the next question is: If the accused person is expected to be placed in an institution, is the public defender's office necessary? Yes. If no, then the next almost final question:

¹⁴⁴ Höynck, T.; Ernst, S. (2020), ‚Das Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren‘, ZJJ Vol. 3, pp. 245-258.

¹⁴⁵ Höynck, T.; Ernst, S. (2020), ‚Das Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren‘, ZJJ Vol. 3, pp. 245-258.

¹⁴⁶ Stellungnahme Nr. 21 zum Regierungsentwurf eines Gesetzes zur Neuregelung des Rechts der notwendigen Verteidigung (Umsetzung der Richtlinie [EU] 2016/1919) – BR-Drs. 364/19 sowie Regierungsentwurf eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren (Umsetzung der Richtlinie [EU] 2016/800) – BR-Drs. 368/19, Bundesrechtsanwaltskammer, September 2019, p. 22; Stellungnahme des DBH-Fachverbandes für Soziale Arbeit, Strafrecht und Kriminalpolitik, 29.11.2018, p. 4; Stellungnahme des Deutschen Jugendinstituts e.V. zu dem Gesetzentwurf der Bundesregierung eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren (BR-Drs. 368/19 bzw. BT-Drs. 19/13837), 17.10.2019, p. 8; DVJJ, Stellungnahme zum Referentenentwurf eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren sowie zu den das Jugendstrafverfahren betreffende Teilen des Entwurfs eines Gesetzes zur Neuregelung des Rechts der notwendigen Verteidigung, 30.11.2018, p. 6.

¹⁴⁷ Four police officers/Germany, three judges/Germany, prosecutor/Germany.

¹⁴⁸ Judge/Germany.

Is there a criminal offence that is NOT to be dealt with in the diversion proceedings. (...) If so, the public defence is necessary there as well."

"...das fängt an mit der Fragenstellung: Ist die Person beschuldigte Person im Strafverfahren, ja oder nein?; wenn nein, dann ist natürlich kein Verteidiger nötig. Wenn ja, käme dann die nächste Frage. (...). Die zweite Frage wäre: Die beschuldigte Person soll einem Gericht vorgeführt werden? Wenn ja, ist die Pflichtverteidigung notwendig. Wenn nein, kommt die nächste Frage: Beschuldigte Person befindet sich in einer Anstalt? Wenn ja, ist die Pflichtverteidigung schon definitiv notwendig. Wenn nein, kommt die nächste Frage: Wenn die Unterbringung der beschuldigten Person erwartet wird, ist die Pflichtverteidigung nötig? Ja. Wenn nein, dann ist die nächste Frage. Und jetzt kommt fast schon die abschließende: Liegt ein Verbrechenstatbestand vor, der NICHT im Diversionsverfahren, (...) Wenn ja, ist auch da wieder die Pflichtverteidigung notwendig."

In a next step, the prosecution is involved, when the police is unsure whether charges will be brought. In such cases another questionnaire was developed to be filled in by the prosecutor's office. Once they conclude that defence is mandatory,

"they can appoint the public defender or inquire via the court. And the court then comes back to us with the name of the public defender unless the family names a defender themselves. This is basically the loop; it is always ensured that this is checked before any hearing or questioning takes place. All legal steps are then consistently checked." (Police officer/Germany)

„... dann können die den Pflichtverteidiger bestellen oder anfragen über das AG. Und das AG sendet uns dann die Antwort oder die Nennung des Pflichtverteidigers dann zurück, sofern nicht die Familie selbst einen Verteidiger benennt. Das wird entsprechend natürlich abgefragt. Also so ist im Prinzip diese Schleife; immer sichergestellt, dass vor überhaupt einer Anhörung oder einer Vernehmung das abgeprüft wird. Also sämtliche rechtlichen Schritte werden dann konsequent abgefragt."

Some of the representatives of the police, judiciary and the juvenile court assistance criticised that the involvement of defence counsels early in the proceedings leads to a situation where children, who were willing to testify, exercise their right to remain silent, which is, on the one hand, detrimental to the pedagogical purpose and, on the other hand, proceedings might be unnecessarily prolonged.¹⁴⁹

The formalization of the proceedings through the participation of defence counsels is perceived to be contrary to the basic principle of juvenile criminal law.¹⁵⁰

"My view is that most young people and most adolescents have a defence counsel, because they are insecure and because the first thing they think is, maybe I'll get out of this another way. And above all, because we are unfortunately changing course through the EU directives and through more public defence and through more general defence. Juveniles and adolescent offenders are generally considered to be more remorseful and to confess more often (then adults) which is better in

¹⁴⁹ Four police officers/Germany, two prosecutors/Germany, two (Non-legal) Specialists/Germany.

¹⁵⁰ (Non-legal) Specialist/Germany.

criminal proceedings. These are actually the essential aspects of juvenile criminal law. [Note by the interviewer: The interviewee is referring to the pedagogical purpose of juvenile proceedings. A confession/being remorseful is seen as the precondition for pedagogical work and therefore considered better] But the more defence we have, the fewer pleas we have, the more court days we have, the more continuation dates we have. And since many people prefer to be defended and pay more euros, also for the defence lawyer, many defence lawyers are also interested in making the proceedings last longer. That means that we get a second continuation and a third continuation, because, then, the fees also increase for the defence lawyers. I must say that I find it very, very difficult. Also because of the EU directives to improve and strengthen the rights in criminal proceedings. I really have to be very, very critical of that. Perhaps this answer has been of some help.” (DE/(Non-legal) Specialist/Germany)

„Meine Ansicht dazu ist, dass die meisten Jugendlichen und die meisten Heranwachsenden einen Verteidiger haben, weil sie unsicher sind. Und weil sie als Erstes er- auch denken, vielleicht komme ich aus der Sache auch anders raus. Und vor allen Dingen, weil diese- weil wir durch die EU-Richtlinien und durch mehr Pflichtverteidigung und durch mehr generelle Verteidigung leider einen Kurswechsel hinlegen. Jugendliche und heranwachsende Täter gelten generell in jedem Strafverfahren als sehr geständige sehr reumütig und besserbar. Das sind eigentlich die essenziellen Aspekte des Jugendstrafrechtes. Doch je mehr Verteidigung wir haben, desto weniger Einlassung haben wir, desto mehr Gerichtstage haben wir, desto mehr Fortsetzungstermine haben wir. Und da natürlich viele sich dann auch lieber verteidigen lassen und lieber den Euro mehr zahlen, auch für den Verteidiger, sind viele Verteidiger auch daran interessiert, dass Verfahren länger dauern. Das heißt, dass wir noch einen zweiten Fortsetzer kriegen und noch einen dritten Fortsetzer, da sich dann die Gebühren auch erhöhen für die Verteidiger. Ich finde es sehr, sehr schwierig, muss ich sagen. Auch durch die- durch die EU-Richtlinien zur- zur Verbesserung- zur Verstärkung der Rechte im Strafverfahren. Das muss ich wirklich sehr, sehr kritisch sehen. Vielleicht ist das eine kleine Hilfe gewesen, diese Antwort.“

This conflict between the formalization of the proceedings through the involvement of a lawyer and the pedagogical value of a „confession“ is described from the lawyer’s perspective as follows:

“There is a widespread view in juvenile proceedings that lawyers are actually more of a nuisance. Not in Bremen, but there are many court districts where the juvenile court assistance tend to tell their clients that they don't need lawyers. And the reason for this is that, of course, it has to be said quite clearly, that the educational principle applies, and the legal consequences are not as fixed as in adult criminal law, so that the defence strategy looks different. In juvenile proceedings, you always have to think carefully about whether to defend towards an acquittal, even if there are good reasons for doing so, because in practice the effects of a conviction that may then be handed down are much more serious than a discontinuation under juvenile criminal law if everything else is going well in the juvenile's life. Of course, these are things that are not the case in adult criminal law, especially when it comes to offences with a minimum threat of punishment. In addition, there is

sometimes the attitude that lawyers create conflicts where none need to be created and that the young person just needs to apologise or "grovel" a bit and then everything is fine. And besides that, everyone helps and everyone pulls in the same direction. Lawyers are only a nuisance and do harm, and this attitude is even more prevalent in juvenile proceedings than in adult proceedings. That is an obstacle to guaranteeing access to lawyers. And I think that, even in juvenile proceedings, it is quite good if lawyers are present." (Defence lawyer/Germany)

*„Es gibt im Jugendverfahren die weit verbreitete Ansicht, dass Anwälte eigentlich eher stören. In Bremen nicht, aber es gibt viele Gerichtsbezirke wo auch die Jugendgerichtshilfe tendenziell ihren Klienten vermittelt, dass sie keine Anwälte brauchen. Und das hat den Hintergrund, dass natürlich, das muss man auch ganz klar so sagen, der Erziehungsgedanke gilt und die Rechtsfolgen nicht so fest vorgegeben sind, wie im Erwachsenenstrafrecht, so dass natürlich auch die Verteidigung anders aussieht. Im Jugendverfahren muss man sich immer gut überlegen, ob man eine Freispruchverteidigung führt, selbst wenn es dafür gute Gründe gibt, weil praktisch die Auswirkungen einer dann möglicherweise doch ergehenden Verurteilung deutlich gravierender sind, als eine Einstellung nach Jugendstrafrecht, wenn ansonsten alles gut läuft im Leben des Jugendlichen. Das sind natürlich Dinge, die im Erwachsenenstrafrecht nicht so sind, gerade wenn es um Tatbestände geht mit einer Mindeststrafandrohung. Zudem gibt es zum Teil die Haltung, dass Anwälte Konflikte schaffen, wo keine geschaffen werden müssen und dass der Jugendliche sich einfach nur entschuldigen müsste, oder ein Bisschen „zu Kreuze kriechen“ sollte, und dann ist doch alles gut. Und außerdem helfen ja alle mit und alle ziehen am selben Strang. Da sind doch Anwälte nur ein Ärgernis und schaden, und eine solche Haltung gibt es im Jugendstrafverfahren noch viel mehr als im Erwachsenenstrafverfahren. Das ist ein Hindernis für die Gewährleistung des Zugangs zu Anwält*innen. Und ich meine, dass es auch im Jugendverfahren ganz gut ist, wenn die [Anwälte] mitwirken.“*

Another criticism pertaining to the involvement of defence counsels is that they have a genuine interest in prolonging the proceedings, because they can bill court hours.¹⁵¹ Concerning the prolongation, one interviewee also suggested that the involvement of lawyers can prolong the deprivation of liberty.¹⁵² When accused exercise their right to remain silent, advantageous facts that might lead to a release do not become known to the prosecution until the accused detained child speaks to his or her counsel, this situation was also confirmed in one case by a defence counsel, who experienced such a situation:¹⁵³

"So, what I would like to add is that I don't find the provision of legal representation at all costs entirely fortunate. There are often situations where the children are ready and willing to testify. And that is prevented by the fact that the public defender has to be assigned first. And I think it would often be in the children's interest to be able to act earlier, without having to postpone it because of the assignment of the public defender. Autonomy is also somewhat taken away by this absolute

¹⁵¹ (Non-legal) Specialist/Germany.

¹⁵² Prosecutor/Germany.

¹⁵³ Defence lawyer/Germany.

obligation to assign a public defender, because children can also decide autonomously whether they want to testify. This possibility is taken away from them. And I believe that it is not always in the interest of the children that this possibility is taken away from them. I find that very worthy of consideration. So, one should definitely think about it again. Our experience is that it is not always better not to let the children speak for themselves." (Prosecutor/Germany)

„Also, was ich noch anfügen möchte ist, dass ich die Regelung der Rechtsbeistände um jeden Preis nicht ganz glücklich und gelungen finde. Es gibt häufig Situationen, wo die Kinder aussagebereit und willig sind. Und das wird dann gekappt dadurch, dass zunächst der Pflichtverteidiger beizuordnen ist. Und ich glaube, es wäre häufig im Sinne der Kinder, hier frühzeitiger agieren zu können, ohne das aufschieben zu müssen wegen der Beiordnung der Pflichtverteidiger. Es ist so ein bisschen auch die Autonomie entzogen durch diese absolute Pflicht der Beiordnung, weil Kinder auch darüber mal autonom entscheiden können, ob sie jetzt Angaben machen wollen oder nicht. Diese Möglichkeit wird ihnen genommen. Und ich glaube, es ist nicht immer nur im Interesse der Kinder, dass ihnen diese Möglichkeit genommen wurde. Das finde ich sehr bedenkenswert. Also, da sollte man durchaus nochmal drüber nachdenken. Unsere Erfahrung ist, dass es nicht immer besser ist, ja, die Kinder nicht selbst zu Wort kommen zu lassen.“

This is put into perspective by some interviewees who emphasise that experienced defence counsels in juvenile justice cooperate with the juvenile court assistance, the prosecution, and the court and, thereby, the educational purpose is still reached.¹⁵⁴ In fact, a judge said that effective participation is early participation of a lawyer who can effectively safeguard the rights of the accused and stand in for the respective interests.¹⁵⁵

Defence counsels, to the contrary, complain that they are often only called after the accused already testified. Either, because the police officers were not aware of the new legal provisions, or because they intentionally interrogate the children to get a confession.¹⁵⁶

“... I would say that in 80 % of the cases, the rights are not guaranteed. Full interrogations are conducted and extended statements are provided, also in cases of serious offenses/felonies, without legal representation. Why this is the case, I cannot say. I assume that the laws are unknown. " (Defence lawyer/Germany)

„... ich würde mal sagen, in 80% der Fälle werden die Rechte nicht gewahrt. Es wird erstmal eine volle Vernehmung gemacht auch bei schweren Straftaten ohne Rechtsbeistand, warum das so ist, kann ich schlicht nicht sagen. Ich würde mal sagen vielleicht weil das Gesetz nicht bekannt ist.“

Futhermore, defence is mandatory before jury courts. A lawyer suggests, that, in order to avoid cases of mandatory defence, the charges are brought before the single judge. Then it is the lawyer's responsibility, to

¹⁵⁴ Two (Non-legal) Specialists/Germany, Police officer/Germany.

¹⁵⁵ Judge/Germany.

¹⁵⁶ Five defence lawyers/Germany.

“...make it clear to the court why this is now a case of mandatory defence and this young person must not sit here alone before the judge.” (Lawyer, Germany)

„...dem Gericht klar mache, warum dieses nun ein Fall notwendiger Verteidigung ist und dieser Jugendliche hier nicht alleine beim Richter zu sitzen hat“

A judge suggested that there is still a problem concerning the right to be assisted by a lawyer when children are “caught in the act:

“Of course, when children are caught committing offences, they may be interrogated on the spot and no defence lawyer is consulted on the spot.”(Judge Germany)

„Natürlich ist es so, dass wenn Kinder bei Straftaten erwischt werden, dass da vor Ort womöglich eine Befragung durchgeführt wird und dass vor Ort kein Verteidiger konsultiert wird.“

while in cases of ordinary interrogations this is unlikely, since the provisions on mandatory defence are checked in advance and the juveniles are summoned accordingly.¹⁵⁷

Apart from that, the interviewees unanimously confirm that, once a lawyer is appointed, s/he can participate effectively in all stages of the proceedings. And free legal aid is guaranteed throughout, insofar as public defenders are paid for by the state, referring to the practice to refer to section 74 of the Youth Courts Act, waiving the costs. Although it is problematized that the information about the possibility to bear the costs of the proceedings according to section 2 (2) of the Youth Courts Act in conjunction with section 465 of the Code of Criminal Procedure might have a deterring effect in the preliminary proceedings. Saying that, when the child is informed about the possibility to bear the costs, they might refrain from calling a defence counsel.¹⁵⁸

One lawyer voiced his/her opinion, that the exception of mandatory defence for juvenile detention pursuant to section 16 of the Youth Courts Act is contrary to European law and should be reprimanded by the European Commission. According to this defence lawyer, juvenile detention, like juvenile sentences, are a deprivation of liberty according to the European Convention on Human Rights.¹⁵⁹

In cases of pre-trial detention, lawyers are appointed before the judge announces the arrest warrant. The respective hearing before a judge must be conducted immediately after the arrest, at the latest the day after the arrest (section 114b of the Code of Criminal Procedure).

That being said, when defence is not mandatory, there are still many cases before the single judge that take place without the presence of a lawyer. This was criticised by a social worker, who advocated to ensure that all accused children are always supported by a legal representative (*Verfahrensbeistand*) to safeguard their rights and represent their interests.¹⁶⁰

c. Effective participation of a lawyer

Whereas lawyers often emphasised, that early participation equals effective participation¹⁶¹, not all interviewees shared this view. As described previously, some interviewees were very ambivalent

¹⁵⁷ Judge/Germany.

¹⁵⁸ Defence lawyer/Germany.

¹⁵⁹ Defence lawyer/Germany.

¹⁶⁰ (Non-legal) Specialist/Germany.

¹⁶¹ Expressively, lawyer/Germany, but also JUDGE and (Non-legal) Specialist/Germany. Regarding the other lawyers this was implied in what they described as effective participation.

about the involvement of lawyers in the criminal legal proceedings against children, because their participation might be detrimental to the educational purpose. Lawyers, in return, addressed this conflict between the formalization of criminal proceedings and the pedagogical purpose as one of their main conflicts and described finding a balance between the two angles as an effective defence.¹⁶² In this sense, interviewees qualified a cooperative relationship between the juvenile court assistance and the defence counsels as well as a sound knowledge of the specifics of the juvenile justice systems as a prerequisite for effective participation of a lawyer:

“So, the first thing is to prevent a conviction by legally permissible means. Classic criminal defence work. But if that is not possible – it is important (...), that you know which youth welfare options are available in the broadest sense, (...). And that you also have an idea of how you can have a meaningful educational effect on one or the other young person.”(Defence lawyer/Germany)

„Es geht also zunächst darum, eine Verurteilung mit rechtlich zulässigen Mitteln zu verhindern. Klassische Strafverteidigungsarbeit. Aber wenn das nicht möglich ist – (...)-, halte ich es für sinnvoll, (...) dass Sie wissen, welche Möglichkeiten der Jugendhilfe es im weitesten Sinne gibt, (...). Und dass Sie auch eine Vorstellung davon haben, wie Sie auf den einen oder anderen jungen Menschen erzieherisch sinnvoll einwirken können.“

- d. Communication with the child and other important aspects when defending and assisting a child who is suspected or accused of a crime

Communication is described as the key to a good client-lawyer relationship throughout the interviews with defence counsels. They stress that successful communication depends on time, empathy, and respect.¹⁶³ It is important to take the children seriously with all their fears and insecurities and to give them the impression that they are listened to.¹⁶⁴ Above that, the special situation and individuality of each child must be considered. Traumatic experiences, such as escape experience in the case of unaccompanied minor refugees¹⁶⁵ and prior experiences of sexual abuse¹⁶⁶ were singled out as being especially challenging and demanding. Therefore, lawyers need to be very sensitive to the individual needs of the children:

Comparing the situation to adult clients, a defence counsel says that a lot more general explanation about the proceedings and the implications are needed.¹⁶⁷ Refraining from using the legal jargon and using a child-friendly language helps to ensure that the information is comprehensible.¹⁶⁸

“In contrast to criminal proceedings for adults, it is perhaps even more the case that one must and should first explain in a very basic way and, as I said, also in a language appropriate for children, what is happening. There is a huge question mark, a complete lack of understanding of what such criminal proceedings mean. Most people assume that, if there are criminal proceedings, they will end up in

¹⁶² Expressively, lawyer/Germany, defence lawyer/Germany and defence lawyer/Germany.

¹⁶³ Defence lawyer/Germany.

¹⁶⁴ Defence lawyer/Germany.

¹⁶⁵ Defence lawyer/Germany.

¹⁶⁶ Defence lawyer/Germany.

¹⁶⁷ Defence lawyer/Germany.

¹⁶⁸ Defence lawyer/Germany.

prison. This is completely different in juvenile criminal law. There are many possibilities you have to talk about as a defence counsel. To what extent this happens elsewhere, I don't know. " (Defence lawyer/Germany)

„Im Unterschied zum Erwachsenenstrafrecht ist es vielleicht noch mehr so, dass man erstmal ganz grundsätzlich erklären muss und sollte und wie gesagt auch in einer kindgerechten Sprache, was da gerade passiert. Es besteht ein ganz großes Fragezeichen, ein völliges Unverständnis was so ein Strafverfahren bedeutet. Bei den allermeisten ist es so, dass davon ausgegangen wird, dass wenn es ein Strafverfahren gibt dann endet das mit Gefängnis. Das ist im Jugendstrafrecht ja ganz anders, da gibt es viele Möglichkeiten, darüber wird gesprochen und darüber hat man auch zu sprechen auf der Ebene der Verteidigung. Inwieweit das an anderer Stelle passiert, weiß ich nicht.“

e. Confidential and private consultations and meetings

All interviewees unanimously say that confidential and private consultations and meetings are possible at all stages of the proceedings. If the defence is mandatory, then personal communication is guaranteed. Lawyers would ask for privacy and confidentiality, but usually the police respect that anyways. And if the person is at large, consultations are led in the lawyer's offices where confidentiality is ensured.¹⁶⁹ At police stations,

"...the lawyer has the opportunity to consult with the young person and the parents in a separate room (...). Yes, we make that possible." (Police officer/Germany)

"..., dann hat der Anwalt bei uns die Möglichkeit, mit dem Jugendlichen und den Eltern noch mal in einem separaten Raum Rücksprache zu halten. Ja, wir ermöglichen das."

A defence lawyer stresses that juveniles must be given the security of absolute confidentiality to establish a relationship of trust:

"It is important, on the one hand, to somehow convey to the juvenile what it means to be a person who has sworn to professional secrecy and confidentiality, and thus to maintain confidentiality about what is discussed with the clients. From my point of view, this is something that juveniles may not even know, except perhaps from doctors. That is a very important basis for being able to communicate confidentially, which one has to explain much more than with adults. One also has to find a way to explain things in an age-appropriate manner and to actually convey that - regardless of whether or not someone has committed the crime of which they are accused - certain procedural legal positions exist. I believe that this is not self-evident, especially for young people who are living in relationships of parenting and subordination. And, perhaps, the whole setting, e.g. how proceedings proceed, what to expect, who is there and so on, explaining such things is important, because young people are not as familiar with this and can anticipate it less than adults. These are a few things that are particularly important in juvenile criminal proceedings." (Defence lawyer/Germany)

¹⁶⁹ Defence lawyer/Germany.

„Zum einen ist es wichtig, den Jugendlichen irgendwie zu vermitteln, was es bedeutet, dass man Berufsgeheimnisträgerin ist, also Verschwiegenheit zu wahren hat darüber, was man mit den Mandaten bespricht. Das ist aus meiner Sicht etwas, das Jugendliche so vielleicht auch gar nicht kennen, außer vielleicht von Ärztinnen und Ärzten, und was eine ganz wesentliche Grundlage dafür ist vertraulich kommunizieren zu können und was man viel stärker als bei Erwachsenen erstmal erklären muss. Man muss zudem einen Weg finden, die Dinge altersgerecht zu erklären, und tatsächlich auch zu vermitteln, dass völlig unabhängig davon, ob jemand die Straftat, die ihm vorgeworfen wird, begangen hat oder nicht begangen hat, eben bestimmte prozessuale Rechtspositionen bestehen. Auch das ist, glaube ich, gerade für Jugendliche, die sich in Erziehungs- Über-Unterordnungsverhältnissen bewegen, viel mehr noch als für Erwachsene, keine Selbstverständlichkeit. Und, vielleicht noch das ganze Setting, also wie ein Verfahren abläuft, was man zu erwarten hat, wer da alles ist und so, solche Dinge auch zu erklären, weil Jugendliche das nicht so kennen und auch weniger antizipieren können als Erwachsene. Das sind ein paar Dinge, die bei Jugendstrafverfahren besonders wichtig sind.“

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

The interviewed lawyers had an ambivalent opinion about the cooperation with the holders of parental responsibility. Depending on the relationship between the child and his/her parents, cooperation was described to be important. While at the same time, they preferred to talk to their clients privately, because, in the presence of their parents, children might not be honest. All interviewees emphasised that their primary addressee is the child, and that confidentiality is also binding vis á vis the holders of parental responsibility.

“As a rule, I include the parents, but only insofar as the clients want this. But it may be more complicated, even in cases where the juveniles say that it is ok, the parents can be informed, and be present at consultations. Then I nevertheless try to consult with the client in private first, because it makes a difference if the parents are present or not with respect to the conversation atmosphere.” (Defence lawyer/Germany)

“Grundsätzlich beziehe ich die Eltern mit ein, wenn mein/e Mandant/in das so möchte. Das kann aber sehr kompliziert sein, auch wenn die Jugendlichen sagen, dass es ok sei, dass ihre Eltern informiert sind und bei Besprechungen dabei sind. Ich versuche immer erstmal mit den Mandant/innen allein zu sprechen, weil es einen Unterschied im Hinblick auf die Gesprächsatmosphäre macht, ob die Eltern anwesend sind.“

g. Discussion of findings

The evaluation of the interviews with the diverging viewpoints of the respective professions points at a general conflict imminent to juvenile criminal law, namely the contradiction between the formal presumption of innocence and the pedagogical purpose. Against this backdrop, resistance against the early involvement of defence counsels can be explained.

In practice, there seems to be room for improvement, since the interviews indicate that the implementation of the directive still very much depends on the knowledge of the individual actors involved.

Therefore, the practical transformation might vary from federal state to federal state and even from court to court. Also, the knowledge of the police officers concerning the new legal framework could still be improved. Adding to this, the prognosis on whether or not a case of mandatory defence is to be assumed is difficult to make at this early stage of the proceedings.

Once a counsel is appointed by the court, free legal representation is guaranteed throughout the proceedings, since the courts always apply section 74 of the Youth Courts Act, waiving the imposition of costs, this has been unanimously confirmed by the interviewees. Thus, legally, in principle the costs can be imposed on the juvenile, but practically, this is never applied. This might still have a deterring effect on the juvenile, since s/he is not informed accordingly. Effective participation depends on the expertise of the defence counsel in juvenile criminal law – especially in connection with alternative educational measures being offered – and on their commitment to spend time and to engage with their client. Furthermore, the cooperation between all actors can be beneficial to the child. The cooperation with the holder of parental responsibility depends on the relationship of the suspected/accused child and his/her parents and on the willingness of the parents to be involved.

C.5 The right to an individual assessment

a. Legal overview

The right to an individual assessment is regulated in Section 38 of the Youth Courts Act. Paragraphs 2 through 7 were introduced to implement the respective provisions of Article 7 of the Directive (EU) 2016/800). The Juvenile Court Assistance (*Jugendgerichtshilfe* or *Jugendhilfe im Strafverfahren*) was and still is the one responsible for the individual assessment. Accordingly,

- the representatives of the juvenile court assistance shall bring to bear the educational, social and other aspects significant with regard to the aims and tasks of juvenile assistance in the proceedings before the juvenile courts. To this end, they shall support the authorities involved by researching the personality, development and family, social and economic background of the juvenile and shall comment on any special need for protection and on the measures to be taken (section 38 para. 2 Youth Courts Act);
- the information on the result of the investigations shall be given as soon as possible when relevant in the proceedings. In custody cases, the representatives of the juvenile court assistance shall report on the result of their enquiries in an expedited manner. If there is a substantial change in the relevant circumstances, they shall conduct additional investigations, if necessary, and report on them to the juvenile public prosecutor's office and, after the charge has been brought, also to the juvenile court (section 38 para. 3 Youth Courts Act);
- a representative of the juvenile court assistance who conducted the investigation shall take part in the main hearing, unless this is waived (section 38 para. 4 Youth Courts Act);
- if, despite timely notification, no representative of the youth court assistance service appears at the main hearing and no waiver has been declared, the public youth welfare organisation may be ordered to reimburse the costs (section 38 para. 4 Youth Courts Act);
- the juvenile court assistance shall be involved in all proceedings against a juvenile. This shall be done as early as possible. Before issuing instructions (section 10 of the Youth Courts Act), the representatives of the juvenile court assistance shall always be heard; if a guardianship instruction is to be considered, they shall also give their opinion on who is to be appointed as guardianship assistant (section 38 para. 6 Youth Courts Act).

According to Section 70 paragraph 2 of the Youth Courts Act, the juvenile court assistance shall be informed of the initiation of the proceedings at the latest, when the juvenile is summoned to his or

her first interrogation as an accused. In the case of a first interrogation of the accused without prior summons, the information must be provided immediately after the interrogation at the latest.

Regarding the early time of the assessment, commentators doubt that it is possible at this early stage in the proceedings to produce an individual assessment fulfilling the requirements. On the other hand, commentators welcome that the police and the prosecution have to communicate with the juvenile court assistance when it comes to their decision to refrain from further prosecution according to Section 45 of the Youth Courts Act.¹⁷⁰

In exceptional cases, when it is justified on the basis of the circumstances of the case and it is compatible with the best interests of the juvenile, pursuant to Section 38 paragraph 7 of the Youth Courts Act, the juvenile court and, in preliminary proceedings, the juvenile public prosecutor's office may waive the compliance with the requirements of an individual assessment.

In preliminary proceedings, a waiver shall be considered, in particular if it is to be expected that the proceedings will be concluded without the filing of an indictment. The waiver of the presence of a representative of the juvenile court assistance service in the main hearing may be limited only to parts of the main hearing. It may also be declared during the main hearing and, in this case, it does not require an application.

The measures on which the juvenile court assistance can express itself (proactively, as it were) include, in principle, procedural steps in the preliminary proceedings. The corresponding spectrum is wide and extends, for example, to the question of provisional orders on upbringing (Section 71 of the Youth Courts Act) and the existence of grounds for detention (Section 72a marginal number 7 et seq. of the Youth Courts Act), to the question of the existence of the prerequisites for a mandatory defence (Section 68 of the Youth Courts Act) or an audio-visual recording of the interrogation (Section 70c, Paragraph 2 of the Youth Courts Act) as well as the need to obtain an expert opinion (especially if there are doubts about criminal responsibility) or on the importance of environmental influences (section 43 Abs. 2 S. 1 of the Youth Courts Act).¹⁷¹

Section 46 a of the Youth Courts Act regulates that, apart from the cases under Section 38 (7) of the Youth Courts Act, the indictment may also be brought before an assessment if this is in the interests of the young person and it is to be expected that the result of the investigation will be available at the latest at the start of the main hearing.

Due to the stressful and exceptional character of pre-trial detention, this exceptional case is assumed, when the individual assessment would lead to a prolongation of imprisonment before trial.¹⁷² According to commentators, this should be the main reason for the foreseen exception from the rule that an individual assessment must be completed before the indictment.¹⁷³

¹⁷⁰ Höynck, T.; Ernst, S. (2020), ‚Das Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren‘, ZJJ Vol. 3, pp. 245-258, 253.

¹⁷¹ Eisenberg/Kölbel, ‚§ 38‘ in, Eisenberg/Kölbel, Youth Courts Act (*Jugendgerichtsgesetz*), 21. Ed. 2020, Beck, München, Para. 15.

¹⁷² Laubenthal, L. (1993), *Juvenile Court Assistance in Criminal Proceedings (Jugendgerichtshilfe im Strafverfahren)*, Köln, Heymann, p. 159; Germany, Draft Act to Strengthen the Procedural Rights of Accused Persons in Juvenile Criminal Proceedings (*Entwurf eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten in Jugendstrafverfahren*), Drucksache 19/13837, 09.10.2019, p. 52.

¹⁷³ Eisenberg/Kölbel, ‚§ 38‘ in, Eisenberg/Kölbel, Youth Courts Act (*Jugendgerichtsgesetz*), 21. Ed. 2020, Beck, München, Paras. 16, 17; Höynck, T.; Ernst, S. (2020), ‚Das Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren‘, ZJJ Vol. 3, pp. 245-258, 254.

The legislator does not understand Article 7 paragraph 7 of the Directive to require the inclusion of people from different disciplines. Rather it is assumed that a content-related consideration of different aspects and perspectives in the sense of a psychosocial and pedagogical overall view is meant. Accordingly, the use of qualified specialists such as the juvenile court assistance sufficiently ensures a multidisciplinary approach.¹⁷⁴

With regard to legal remedies, it is assumed that revisability according to Section 338 no. 5 of the German Code of Criminal Procedure might be assumed in the future in cases in which the presence of the juvenile court assistance in the court hearing was unlawfully waived.¹⁷⁵ The lack of an individual assessment might also constitute a breach of the duty of the court to take into consideration all facts and means of proof which are relevant to the decision, in order to establish the truth (*Aufklärungspflicht*, Section 244 paragraph 2 of the Code of Criminal Procedure), which justifies an appeal.

b. Individual assessment and exceptions in practice

About the questions of whether, how, by whom and with what means the individual assessment is conducted, all interviews coincided.

The individual assessment provided for in Article 7 of the Directive (EU) 2016/800) is conducted by the juvenile court assistance *ex officio* but in German terminology referred to it as a report. In contrast, in Germany, an assessment is conducted by an expert upon request and only, if there are medical/psychological indications for it.¹⁷⁶

The juvenile court assistants are mostly social workers, or social-pedagogues and other professionals are only consulted in case the juvenile court assistant considers it necessary.¹⁷⁷

The juvenile court assistance, when informed by the police or the public prosecutor, invites the child and his/her parents to a consultation.¹⁷⁸ The aim of this consultation is to explain the proceedings and to assess the social and educational situation and background of the child, to determine measures to assist the child. The pedagogical findings are used to determine sanctions and sentencing or alternative measures and are considered by the court.¹⁷⁹

Concerning the timing of the involvement of the juvenile court assistance and the drafting of the report, it was remarkable that, although there is the legal provision for advanced notification of the juvenile court assistance, which was referred to by the interviewed police officers, the interviewees of the juvenile court assistance stated that the police and prosecution often only involve the juvenile court assistance when bringing charges, and that they are not sufficiently involved in the decision on whether charges are brought at all.¹⁸⁰

¹⁷⁴ Germany, Draft Act to Strengthen the Procedural Rights of Accused Persons in Juvenile Criminal Proceedings (*Entwurf eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten in Jugendstrafverfahren*), Drucksache 19/13837, 09.10.2019, p. 32.

¹⁷⁵ Höynck, T.; Ernst, S. (2020), ‚Das Gesetz zur Stärkung der Verfahrensrechte von Beschuldigten im Jugendstrafverfahren‘, ZJJ Vol. 3, pp. 245-258, 254.

¹⁷⁶ (Non-legal) Specialist/Germany, police officer/Germany, judge/Germany.

¹⁷⁷ (Non-legal) Specialist/Germany, (Non-legal) Specialist/Germany, (Non-legal) Specialist/Germany, (Non-legal) Specialist/Germany, Police officer/Germany.

¹⁷⁸ (Non-legal) Specialist/Germany, (Non-legal) Specialist/Germany, (Non-legal) Specialist/Germany, Police officer/Germany, Police officer/Germany, , judge/Germany.

¹⁷⁹ (Non-legal) Specialist/Germany, (Non-legal) Specialist/Germany, judge/Germany, JUDGE.

¹⁸⁰ Two (Non-legal) Specialists/Germany.

“Preferably the earliest stage possible and the new legal framework is providing for the involvement of the juvenile court assistance to take place immediately when the police get a new case. But this does not always happen, there is a lot of room for improvement. At the latest, the juvenile court assistance is informed when the prosecution brings charges, to ensure that, when the court enters the proceedings, the juvenile court assistance can report. In this area there is a lot of potential for improvement to ensure that the juvenile court assistance can intervene earlier.”
(Judge/Germany)

„Wünschenswert ist das so früh wie möglich und die neue Gesetzeslage sieht das ja auch vor, dass das sofort passiert, wenn ein neuer Fall bezüglich eines Kindes eintritt. Das ist nicht immer der Fall, da ist wirklich noch Luft nach oben, spätestens, wenn die Staatsanwaltschaft Anklage erhebt wird die Jugendhilfe im Strafverfahren informiert damit, wenn das Gericht letztendlich in den Entscheidungsprozess eintritt, die Jugendhilfe Bericht erstatten kann. Aber da wäre schon noch Verbesserungspotential, einfach dass früher die Jugendhilfe im Strafverfahren eingreifen kann“

"Then, in the end, it's just an administrative act. Then, I get an indictment from the public prosecutor's office, with a request for a report, because they are considering whether they want to file charges and the next day, or usually right away, the formal indictment is already stapled to the request. That just means I get every piece of paper twice." "The idea has been completely undermined in administrative practice." (DE/(Non-legal) Specialist/Germany)

„Dann ist es am Ende nur noch ein Verwaltungsakt, dann bekomme ich von der Staatsanwaltschaft am Ende eine Anklage, mit der Bitte um Bericht, weil sie überlegen, ob sie Anklage erheben wollen überhaupt und den nächsten Tag, oder meistens gleich angeheftet mit einer Büroklammer ist schon die förmliche Anklage. Das heißt einfach nur ich bekomme jeden Zettel doppelt.“ „Die Idee ist in der Verwaltungspraxis komplett ausgehebelt.“

Interviewees reported very exceptional cases, where no report is provided. A juvenile court assistant said, when the prosecution terminates the investigations according to Section 45 of the Youth Courts Act, no assessment is required.¹⁸¹ A judge reported that there are cases, where practically there is no report, because the accused did not talk to the juvenile court assistance and consequently there is no basis for a report.¹⁸² Another judge referred to the exception provided for in Section 38 paragraph 7 of the Youth Courts Act, according to which a report is not necessary, when it is absolutely impossible to get a report in time before the main hearing, because the juvenile court assistance is not available. But this is the absolute exception in practice.¹⁸³

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

¹⁸¹ (Non-legal) Specialist/Germany.

¹⁸² Judge/Germany.

¹⁸³ Judge/Germany.

Interviewees unanimously confirmed that the assessment of the juvenile court assistance is taken into account and its results are seriously considered in the sentencing decision and, even before, concerning the application of alternative measures.

“One thing is of course what sanctions are used in juvenile criminal law? And here, the considerations of the juvenile court assistance are important, simply regarding the educational status, the tendency, all circumstances, in order to be able to get an overall picture of it and to consider how one can best have an educational effect on the child. On the other hand, there is of course help in the criminal and family law context, namely care assistance. These can only partly be arranged through the juvenile courts. And, in some cases, such measures are only possible in connection with family law. And here too, the youth court services provide support through appropriate suggestions and advice.” (Prosecutor/Germany)

Das eine ist natürlich, mit welchen Sanktionen wird in dem Jugendstrafrecht reagiert? Und da sind die Erwägungen der Jugendgerichtshilfe einfach zum Erziehungsstand, zur Neigung nennen, zu allen Umständen wichtig, um sich ein Gesamtbild davon machen zu können und sich zu überlegen, wie man am besten erzieherisch auf das Kind einwirken kann. Auf der anderen Seite gibt es natürlich so Hilfen im Zusammenhang im Straf- im familienrechtlichen Kontext auch, Betreuungshilfen. Die sind nur teilweise über die Jugendgerichte zu vermitteln. Und teils bedarf es eben da Maßnahmen im Zusammenhang mit dem Familienrecht. Und auch da leisten die Jugendgerichtshilfe durch entsprechende Anregungen, Hinweise eben, unterstützende Arbeit.

Due to the difference in terminology already described, interviewees distinguished between expert assessments and the reports by the juvenile court assistance. The first are only ordered by the court in exceptional cases, when there is a legal question of responsibility etc., the second are obligatory to get an impression of the individual situation of the child.¹⁸⁴

“So, the assessments we are talking about, ... are used to get an impression of the personal situation and not least because the majority in these simple proceedings, single-judge proceedings, are also not accompanied by lawyers. And accordingly, we then also take on the job and present the view of the (...) the young people and adolescents to present their view of the accusation. ... And we report on the educational needs. (...) And that, in turn, is always taken into account in the decision-making process in the vast majority of cases.” (Non-legal) Specialist/Germany)

„Also, die Begutachtungen, von denen wir sprechen, werden benutzt um einen Eindruck von der persönlichen Situation zu kriegen und nicht zuletzt auch dahingehend, weil in diesen einfachen Verfahren, Einzelrichterverfahren, sind die Jugendlichen nicht anwaltlich begleitet, dann ist es auch unsere Aufgabe die Sichtweise auf die Vorwürfe zu schildern ... Und wir berichten über den pädagogischen Bedarf. (...) Und das wiederum fließt in den allermeisten- eigentlich in der Regel immer in die Urteilsfindung ein.“

d. Challenges

¹⁸⁴ Defence lawyer/Germany, two (Non-legal) Specialists/Germany, police officer/Germany, judge/Germany.

Lacking German-language skills are identified as a major challenge, throughout the proceedings. Concerning the consultation preceding the individual assessment, this is even aggravated, because interpreters are not always involved.¹⁸⁵

“For the juvenile court assistance this [challenge] starts with the invitation. Because I do not know whether it suffices to send the invitation in German. If I would however send a Turkish one, this could lead to the reproach of discrimination, because the young person is born in Germany... In the letter to the legal guardians, it is indicated in German that an interpreter can be requested. If an interpreter is requested, the juvenile court assistance takes care that there is at least a language mediator present during the consultation, which is paid for by the juvenile court assistance. (...)

I conduct a counselling interview in German and have the feeling during the interview that the accused has great difficulty understanding ...Then, I point out to the court that I am of the opinion that an interpreter or a language mediator will be necessary in the main hearing. But still, in court, even with a language mediator, the non-German speaking defendant is still disadvantaged, because the pedagogical, educational, and corrective purpose of the proceedings, including the warning of the judge, gets lost in translation...” (Non-legal) Specialist/Germany)

„Na ja, das fängt ja eigentlich schon mit der Einladung an. Ich weiß ja gar nicht, reicht das, wenn ich eine deutsche Einladung an diesen jungen Menschen schicke. Wenn ich nun eine auf türkisch hinschicken würde dann wird mir wahrscheinlich gesagt ich handle diskriminierend, der ist doch in Deutschland geboren. In dem Anschreiben an die Erziehungsberechtigten, da steht ein Hinweis auf Deutsch, wenn Sie einen Dolmetscher benötigen, dann informieren Sie uns bitte. Und das Amt sorgt dann dafür, oder ich Sorge dafür, dass mindestens ein Sprachmittler in diesem Gespräch da ist und die Jugendhilfe bezahlt den auch. Ich führe ein Beratungsgespräch auf deutsch und habe das Gefühl im Rahmen des Gesprächs, der/die Beschuldigte hat große Schwierigkeiten zu verstehen, wo er/sie war und was ich mit ihm/ihr besprechen wollte. Dann weise ich das Gericht darauf hin, dass ich der Ansicht bin, dass in der Hauptverhandlung ein Dolmetscher oder ein Sprachmittler für die und die Sprache nötig sein wird. ... Selbst mit Sprachmittler ist der Jugendliche noch benachteiligt, weil das was mit dem Jugendstrafverfahren eigentlich passieren soll, der pädagogische Kontext, geh verloren..“

A juvenile court assistant reported that they once had a social training course for refugees, which was abandoned, because they realized that refugees are “normal” juveniles and that it in fact the challenges amount to language problems and are not rooted in their cultural background or flight experience.¹⁸⁶

e. Discussion of findings

The interviewees unanimously report that the juvenile court assistance conducts an individual assessment with some exceptions. They provide a comprehensive assessment of the personality and needs of the juveniles, which is taken into account with regard to sentencing and applying alternative

¹⁸⁵ Two judges/Germany, (Non-legal) Specialist/Germany.

¹⁸⁶ (Non-legal) Specialist/Germany.

measures. Critique was raised concerning the timing of the notification by the police and the prosecution. There are indications that the prosecution, referring to the exception under which an indictment may be brought before an assessment, turns this exception into the rule. A major challenge is identified with respect to children who are not capable of speaking German. There are not sufficient measures to address this problem.

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

a. Deprivation of liberty as a last resort measure

i. Legal overview

According to the legislator, the provisions of Article 10 and Article 11 of Directive (EU) 2016/800 are fully covered by the constitutional principle of proportionality binding the courts in their decision on detention.¹⁸⁷

The principle of proportionality is derived from the freedom rights in connection with the rule of law, which in turn is standardized in Article 20 paragraph 3 of the Basic Law.¹⁸⁸ Whereas it is controversial which freedom rights are the legal basis for the principle of proportionality, the constitutional foundation of such a principle is undisputed. Some see the basis in Art. 1 of the basic law, protecting human dignity and guaranteeing the legally binding force of the basic rights, some in Art. 3 para. 1 the right to equality before the law and some derive it from Art. 19 para. 2 as the essence of the basic rights which in no case may be affected.¹⁸⁹

The principle of proportionality binds all state power and, thus, also courts and authorities.¹⁹⁰ Among other things, it stipulates that every measure must have a legitimate purpose and also be suitable for this purpose. The measure must also be necessary, i.e., the mildest measures have to be taken. This means that there must be no other equally effective means that would be less burdensome for the citizen.¹⁹¹ Also, the measure must be appropriate, e.g. it must be reasonable and proportional with regard to the individual person concerned.¹⁹² The effects of the interference on the legal interests of the person concerned must also be included in an overall assessment.¹⁹³

Accordingly, Section 72 (1) of the Youth Courts Act stipulates that alternative measures (temporary supervision or temporary placement in a youth welfare home Section 71 (2) Youth Courts Act) must

¹⁸⁷ Germany, Draft Act to Strengthen the Procedural Rights of Accused Persons in Juvenile Criminal Proceedings (*Entwurf eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten in Jugendstrafverfahren*), Drucksache 19/13837, 09.10.2019, p. 35.

¹⁸⁸ Germany, Federal Constitutional Court (Bundesverfassungsgericht), 2 BvR 239/88, Order of 01. June 1989. BVerfGE 80, 109, 120; 108, 129, 136; 113, 154, 162).

¹⁸⁹ Grzeszick, Art. 20, in: Maunz/Dürig, Basic Law, 92th edition 2020, München, Beck para. 108.

¹⁹⁰ Jarass / Pieroth, 'Article 20', in: Jarass / Pieroth, Basic Law, 16th edition 2020, München, Beck, para. 113.

¹⁹¹ Germany, Federal Constitutional Court (Bundesverfassungsgericht), 1 BVL 7/91, Order of 02 March 1999, 241).

¹⁹² Germany, Federal Constitutional Court (Bundesverfassungsgericht), 1 BvR 2011/07, Order of 08. June 2010, p. 152.

¹⁹³ Germany, Federal Constitutional Court (Bundesverfassungsgericht), 2 BvL 19/91, Order of 15 May 1995, p. 327; Germany, Draft Act to Strengthen the Procedural Rights of Accused Persons in Juvenile Criminal Proceedings (*Entwurf eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten in Jugendstrafverfahren*), Drucksache 19/13837, 09.10.2019, p. 35.

first be considered before pre-trial detention is ordered, taking into account the particular burden on the juvenile. The respective decision has to be substantially reasoned by the court.¹⁹⁴

In addition, Section 116 of the Code of Criminal Procedure applies via Section 2 (2) of the Youth Courts Act, which also determines the priority of less invasive measures over the execution of pre-trial detention.

Section 2 (2) of the Youth Courts Act also guarantees the juvenile's right to the judicial review of detention decisions as stipulated in the Code of Criminal Procedure, in particular the detention review according to Sections 117 sequ., the detention complaint according to Sections 304 sequ., the further complaint according to § 310 Paragraph 1 as well as the ex officio detention examinations according to Sections 121, 122 of the Code of Criminal Procedure.

- ii. Deprivation of liberty as a last resort measure and the application of measures alternative to detention

Among the interviewees, it was uncontroversial that deprivation of liberty in the sense of youth penalty and pre-trial detention is applied as a last resort.

"In juvenile proceedings There is always an attempt not to detain, if it can be avoided somehow." (Defence lawyer/Germany)

„Es wird schon versucht in Jugendstrafverfahren nicht zu inhaftieren, wenn es sich irgendwie vermeiden lässt.“

Some interviewees reported that they experienced differences between states, depending on the general existence, availability, and capacity of youth-specific institutions with close supervision.¹⁹⁵ So, it was implied that the more differentiated the offer of outpatient sanction alternatives - temporary supervision or temporary placement in a youth welfare home, the more likely deprivation of liberty can be avoided.¹⁹⁶

"... my experience is that it varies a lot from region to region, in other federal states it is different.... Therefore, my experience is that the alternative facilities, which the Youth Courts Act also provides for as Plan A, are often not available and then, the only option is detention pending trial. I have not yet succeeded in convincing a court that the state's failure to provide such facilities in sufficient numbers cannot lead to pre-trial detention being imposed. I have not yet succeeded in having such a detention order lifted. From my point of view, it should happen, but it doesn't and, then, the people are in jail." (Defence lawyer/Germany)

"Also, ja, ich würde schon sagen, dass das das letzte Mittel ist, jedenfalls in Bremen, auch da ist meine Erfahrung, dass das sehr unterschiedlich ist regional, in anderen Bundesländern ist das anders. ... Von daher ist meine Erfahrung, dass die Alternativeinrichtungen, die das JGG ja vorsieht auch als Plan A, es häufig nicht gibt und dann bleibt halt nur die U-Haft. Mir ist es noch nicht gelungen ein Gericht davon zu überzeugen, dass die staatliche Versäumnis solche Einrichtungen in

¹⁹⁴ Germany, Draft Act to Strengthen the Procedural Rights of Accused Persons in Juvenile Criminal Proceedings (*Entwurf eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten in Jugendstrafverfahren*), Drucksache 19/13837, 09.10.2019, pp. 35-36.

¹⁹⁵ Four (Non-legal) Specialists/Germany , Two police officers/Germany, three judges/Germany.

¹⁹⁶ Four (Non-legal) Specialists/Germany , Two police officers/Germany, three judges/Germany.

ausreichender Zahl vorzuhalten nicht dazu führen kann, dass doch normale U-Haft verhängt wird. Es ist mir noch nicht gelungen so einen Haftbefehl aufgehoben zu bekommen. Müsste eigentlich aus meiner Sicht passieren, passiert dann nicht und dann sind die Leute eben doch im Knast.“

With regard to youth detention pursuant to Section 16 of the Youth Courts Act, those interviewees who addressed the distinction, are more reluctant to confirm that it is used as the last resort.¹⁹⁷ Distinguishing between youth detention and a juvenile sentence, a defence lawyer observes,

“ ... an inflationary use of arrest [youth detention]”

„Ich sehe nach wie vor einen inflationären Gebrauch des Arrests“

An interviewee describes that, with respect to multiple offenders, pre-trial detention is used as a warning to demonstrate that actions have consequences:

„A typical situation where someone is imprisoned is perhaps in the case of the so-called intensive offenders, when we have many and also considerable offences and one then comes to the conclusion, "now it is enough." (Defence lawyer/Germany)

„Ein typischer Umstand wann jemand inhaftiert wird ist vielleicht bei sogenannten Intensivtätern/Intensivtäterinnen, wenn wir viele und auch erhebliche Straftaten haben und man dann zu dem Ergebnis kommt, „jetzt ist es mal gut““

Many interviewees problematized that there is a structural disadvantage for unaccompanied minor refugees when it comes to the assumption of a ground to order pre-trial detention, because they naturally speak different languages and are used to move across countries due to their escape experience.¹⁹⁸

“Yes, especially with underage unaccompanied refugees, it has a strong influence on the part of the authorities, because there is usually no stable social environment here in Germany. [...] These are people who have usually been to many different European countries and have no language skills here. And there is always the assumption that there is a risk of flight. The risk of absconding then functions as a reason for detention and usually weighs particularly heavy. That is very unpleasant in this area, but it [pre-trial detention] is actually always done. (Defence lawyer/Germany)

„Also es ist schon so, dass man sagen muss, gerade insbesondere bei minderjährigen unbegleiteten Flüchtlingen ist es so, dass es halt schon einen starken Einfluss hat, wenn man so will durch die Behörden, weil da in der Regel kein stabiles soziales Umfeld hier in Deutschland gegeben ist. Folgerichtig immer wieder eine Fluchtgefahr gesehen wird. Es sind Leute, die in der Regel im vielen verschiedenen europäischen Ländern waren, hier keine- über keine Sprachkenntnisse verfügen. Und da wird immer wieder eine Fluchtgefahr angenommen. Die Fluchtgefahr fungiert dann da als Haftgrund und wiegt halt

¹⁹⁷ Judge/Germany.

¹⁹⁸ (Non-legal) Specialist/Germany, (Non-legal) Specialist/Germany, defence lawyer/Germany, police officer/Germany, judge/Germany.

dann in der Regel auch besonders schwer, das muss man schon sagen. Das ist in dem Bereich sehr unschön, aber wird da eigentlich immer gemacht.“

A non-legal specialist puts it more broadly:

*“Well, in detention pending trial, yes. People who have no family nearby, no fixed family background and who often have a higher risk of absconding, they are of course much more often in pre-trial detention. There are also people without a German passport. You simply have to say that. Even if it is not necessarily understandable from a pedagogical point of view, yes, if you say that they have networks here, their friends, they are not at risk of absconding. But nevertheless, this is due to structural and sometimes, how shall I put it, other aspects. Otherwise, many young people and adolescents who have a bad family relationship end up in detention.”
(Non-legal) Specialist/Germany)*

„Naja, in der U-Haft prinzipiell ja, kann man jetzt kurz erwähnen. Und zwar Menschen, die keine Familie in Berlin haben und keinen festen Familienhintergrund, und auch oft dann ein erhöhtes Fluchtrisiko haben, geraten natürlich viel öfter in Untersuchungshaft. Da sind auch Menschen ohne deutschen Pass. Das muss man einfach so sagen. Auch wenn das sozusagen aus pädagogischer Sicht nicht unbedingt nachvollziehbar ist, ja, wenn man sagt, die haben hier Netzwerke, ihre Freunde, die sind nicht fluchtgefährdet. Aber trotzdem wird das aufgrund von strukturellen und manchmal auch, wie soll ich sagen- ja, anderen Aspekten eben getroffen. Ansonsten geraten vor allen Dingen viele Jugendliche und Heranwachsende in Haft, die ein schlechtes familiäres Verhältnis haben.“

A police officer referred to drug addiction being linked to loose social structures, which can contribute to being detained more likely.¹⁹⁹ For the same reason a judge named homelessness as a factor.²⁰⁰

b. Medical examination

i. Legal overview

The implementation of the requirements concerning the medical examination pursuant to Article 8 of Directive (EU) 2016/800 fall into the competences of the federal states (*Länderkompetenz*), because they are responsible for legislation on the execution of pre-trial detention and the execution of all types of deprivation of liberty (Article 70 paragraph 1, 74 paragraph 1 Basic Law). The federal states did not amend the corresponding enforcement legislation. There are provisions on medical care in general and provisions on the introduction procedure, involving a medical examination. According to the Laws on the Execution of Juvenile Punishment *Jugendstrafvollzugsgesetze* of Bremen, Mecklenburg-Hither-Pomerania, Saarland, Saxony, Schleswig Holstein, Brandenburg, Rhineland-Palatinate, Saxony-Anhalt, Thuringia, Berlin, Hesse, North Rhine-Westphalia, Baden-Wuerttemberg, prisoners have a right to necessary, sufficient, and appropriate medical services (Art. 34 para. 1, in Berlin Art. 72 para 1, in Hesse section 24 para. 1, NRW, section 36 para. 1 in conjunction with section 45 para 1 *Strafvollzugsgesetz*; Art. 31 para.1 IV. book in Baden Wuerttemberg). Prisoners are entitled to health examinations and preventive medical services, according to section 57 para. 1 in Hamburg.

¹⁹⁹ Police officer/Germany.

²⁰⁰ Judge/Germany.

The respective rule in Bavaria provides that, “the physical and mental health of the prisoners shall be taken care of” (Art. 58 para. 1 Jugendstrafvollzugsgesetz Bavaria). And according to the law in Lower-Saxony, “the prison authority shall ensure the health of the prisoner”, (Lower-Saxony section 132, 56 para .1).

Apart from these general rules, the Laws on the Execution of Juvenile Punishment regulate the introduction proceedings, involving a medical examination. According to Art. 7 para 3 Bavaria, Art. 6 para. 1 Hamburg, section 10 para 2 in conjunction with section 9 para 2 Lower-Saxony, section 8 para. 2 Hesse and North-Rhine Westphalia, section 4 para. 1 book in Baden Wuerttemberg, Art. 9 para. 3 Mecklenburg-Hither-Pomerania, Bremen, Berlin, Saarland, Saxony, Schleswig-Holstein, Brandenburg, Rhineland-Palatinate, Saxony-Anhalt, Thuringia, the prisoners shall be medically examined as soon as possible. Apart from this, the introductory assessment of the educational needs includes the examination of the general mental condition of the juveniles.

The results of the examinations are used, in order to plan measures within detention. They are not used to determine whether the child can be subject to questioning or evidence gathering acts or other measures according to Art. 8 No. 2 of the Directive. However, when there are indications that the child is physically or mentally not fit to be questioned or examined, questioning is forbidden under section 136 a of the Code of Criminal Procedure.

With regard to the Youth Courts Act, Section 70 paragraph 3 prescribes that in the event of the juvenile's temporary deprivation of liberty, when a medical examination was conducted, the authorities responsible for the deprivation of liberty shall inform the juvenile public prosecutor's office and the juvenile court ex officio that they have obtained information on the basis of the medical examination, insofar as this gives rise to doubts as to whether the child is capable of negotiating or can cope with certain investigative activities or measures. This notification requirement means that the medical findings are taken into account in the criminal proceedings. The principle of investigation, which is generally applicable in criminal proceedings, requires that the youth public prosecutor's office and the juvenile court investigate relevant information, including the medical state of the juvenile.²⁰¹

On the federal level, only police custody executed by the federal police is regulated. In order to ensure the mandatory medical examination by doctors, the Police Service Regulations (PDV) 382 as well as the Regulations, Guidelines, Instructions, Collections of Catalogues and Reference Works (BRAS) 391 were amended.²⁰² In practice, this has little relevance because of the limited scope of application.

ii. The medical examination in practice

The interviews are not conclusive regarding medical examinations in practice. Some respondents understood the respective questions to concern the general medical care in prison and referred to the right to request a medical examination if there are indications for medical issues.²⁰³ A prosecutor explains the proceeding in the hearing before the investigative judge as follows:

²⁰¹ Germany, Draft Act to Strengthen the Procedural Rights of Accused Persons in Juvenile Criminal Proceedings (*Entwurf eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten in Jugendstrafverfahren*), Drucksache 19/13837, 09.10.2019, p. 33.

²⁰² Germany, Draft Act to Strengthen the Procedural Rights of Accused Persons in Juvenile Criminal Proceedings (*Entwurf eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten in Jugendstrafverfahren*), Drucksache 19/13837, 09.10.2019, p. 33.

²⁰³ Police officer/Germany, Police officer/Germany, Police officer/Germany, Police officer/Germany, (Non-legal) Specialist/Germany, (Non-legal) Specialist/Germany, PROSECUTOR/GERMANY, JUDGE, judge/Germany.

“If there are any indications of a medical issue, an examination can be requested. And this is also explicitly stated. In the arrest warrant opening protocol, any illnesses and the like are specially recorded, in order to be able to take this into account during the execution.” Concerning the respective information: “it is not specifically provided with the opening of the arrest warrant, if one does not assume that the children and adolescents suffer from illnesses. But there are also prison hospitals in case of serious illnesses. And they are also taken there during pre-trial detention if they get sick and further detention still seems to be indicated.” (Prosecutor/Germany)

„Wenn es irgendwelche Anhaltspunkte gibt dafür, dann kann man es natürlich vortragen. Und das wird auch ausdrücklich- im Haftbefehl Eröffnungsprotokoll werden etwaige Erkrankungen und dergleichen extra aufgenommen, um das beachten zu können während des Vollzugs.“ Bezüglich der Belehrung: „Jetzt nicht spezifisch bei der Haftbefehlseröffnung, wenn man jetzt nicht davon ausgeht, dass die Kinder und Jugendlichen an Erkrankungen leiden. Aber es gibt ja auch, für den Fall, dass ernsthafte Erkrankungen auftreten, Vollzugskrankenhäuser. Und in die werden die dann auch während der Untersuchungshaft schon verbracht, wenn da Erkrankungen auftauchen und trotzdem eine weitere Inhaftierung für angezeigt scheint.“

A judge specifies, that,

“when a judge decides on detention, then s/he always asks the child if there are any mental or physical problems and if there is a need for medication. This is documented and communicated to the detention facility, in order to ensure the medical care.” (Judge/Germany))

„..., wenn der Richter über die Haft entscheidet, dann fragt er das Kind auch immer, ob irgendwelche seelischen oder körperlichen Probleme vorliegen, oder gesundheitliche, ob Medikamente benötigt werden. Diese Fragen werden gestellt und die werden dann auch dokumentiert und der JVA mitgeteilt, so dass die gesundheitliche Versorgung sichergestellt ist.“

Others referred to the medical examination as part of the intake procedure in detention facilities:

“A medical examination is absolute standard, even upon admission to pre-trial detention. The first thing is a presentation to a prison doctor.” (Prosecutor/Germany)

“Eine medizinische Untersuchung ist absoluter Standard, auch schon bei Aufnahme in die Untersuchungshaft. Das Erste ist Vorstellung vor einem Anstaltsarzt.“

But none of the interviewees had direct experience with respect to the procedure and none connected the requirement to the Directive.

Often interviewees were uncertain and sometimes confused about the question concerning the information about the requirement of a medical examination.²⁰⁴ Because, on the one hand, they considered it to be self-understanding that, if there is a medical issue, a doctor is called, regardless in which

²⁰⁴ Two judges/Germany, prosecutor/Germany.

part of the proceedings. On the other hand, it was seen as part of the intake procedure and the interviewee did not see the need to inform about the common procedure.²⁰⁵ Another lawyer reports that the information is part of an intake leaflet, which sometimes does not reach the child itself.²⁰⁶

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

The interviewees who answered the question referred to the immediate medical needs of the children that are addressed following the examination.²⁰⁷ Being explicitly asked, a police officer reports that in doubt there can be no police interrogation if the medical status is critical.²⁰⁸ Another interviewee refers to doctor/client confidentiality therefore the results can only be used when this is waived by the child.²⁰⁹

- c. Special treatment in detention

- i. Legal overview

According to Section 89 c paragraph 2 of the Youth Courts Act, in pre-trial detention, the juvenile may only be accommodated with young prisoners who have reached the age of 18 if joint accommodation does not contradict their best interests. They may only be accommodated with prisoners who have reached the age of 24 if this serves their well-being.

Concerning imprisonment, the states have the legislative power. While, in principle, a separation of juvenile and adult prisoners is obligatory, the regulations on how this is managed in practice differ. In some states: "The juvenile sentence is carried out in juvenile correctional institutions, partial institutions or in separate departments of an adult correctional institution".²¹⁰ The Rhineland-Palatinate, Saxony-Anhalt and Thuringia, for example, each require juvenile prisoners to be housed "at least in separate departments" according to section 17 paragraph 1, no. 2. At the same time, most states allow young prisoners to be housed together with adult prisoners for organisational reasons.²¹¹

Article 12 (2) of Directive (EU) 2016/800, which regulates the separation requirement for police custody, is also to be implemented by the federal states.²¹²

The states regulate the accommodation in police custody regulations. By way of example, the regulations of the state of Berlin (1.1.2.), Bremen, (2.2.2.), North-Rhine Westphalia (section 1 para 2), Rhineland-Palatinate (section 2.3.1.), Lower Saxony (section 7 para. 1) provide that children and young people may not be placed in police custody. If they cannot be immediately taken to a parent or legal guardian or the youth welfare office, they must be supervised outside of police custody. This does not

²⁰⁵ A police officer/Germany says that, if there are indications, a doctor is called, information should be provided by the juvenile court assistance; a defence lawyer/Germany reports that s/he does not know, but once s/he is mandated, s/he informs accordingly,

²⁰⁶ Defence lawyer/Germany.

²⁰⁷ A judge/Germany, saying there is no other purpose, a prosecutor/Germany und a judge/Germany say they do not understand the question, a prosecutor/Germany says that s/he never had such a case, a defence lawyer/Germany cannot speak from experience, another defence lawyer/Germany says there is no information. This reflects the confusion in relation to the topic of medical examination.

²⁰⁸ Police officer/Germany.

²⁰⁹ Defence lawyer/Germany.

²¹⁰ Ostendorf/Drenkhahn, *Jugendstrafrecht*, 10th ed. 2020, Nomos, Baden-Baden, para 347.

²¹¹ Ostendorf/Drenkhahn, *Jugendstrafrecht*, 10th ed. 2020, Nomos, Baden-Baden, para 347.

²¹² Germany, Draft Act to Strengthen the Procedural Rights of Accused Persons in Juvenile Criminal Proceedings (*Entwurf eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten in Jugendstrafverfahren*), Drucksache 19/13837, 09.10.2019, p. 36.

apply to young people who have been taken into custody for criminal procedural reasons or who significantly disrupt service operations. In Brandenburg, the separate accommodation is regulated in Section 3.1.2.

In the exceptional cases where children are taken into custody, special consideration must be given to young people, the sick, the disabled and the elderly. According to the regulation in Bremen, children are particularly vulnerable and are therefore generally not allowed to be placed in cells (2.2.2.). They are to be accommodated and supervised in a suitable manner by the guards of the police stations. If children are accompanied by their parents, they remain in their care, unless there are reasons to the contrary. Only, if a young person is expected to severely impair the service operations and there is no other way of avoiding these impairments, they can be placed in cells. The duration of the placement in cells is to be limited to what is absolutely necessary. Young people who are in custody for criminal procedural reasons can be accommodated in cells. But a handover of minors to custodians or to the youth welfare office must take place immediately. In custody, men and women as well as children, young people and adults are to be accommodated separately. Persons who have been taken into custody to avert danger should not, as a matter of principle, be accommodated in the same room with those arrested for criminal proceedings. Similar regulations exist in all states.

The temporal relevance in these cases is very limited, as police custody must end at the latest at the end of the day after the arrest, either through release or by transferring to the execution of pre-trial detention or another court-ordered deprivation of liberty.²¹³

ii. The special treatment in practice

Depending on the detention facility, the interviewees described different ways to separate children from adult prisoners.²¹⁴ One being a detention facility exclusively for children and young adults. The other being, a separate unit for children and young adults within a detention facility for adults. Generally, in post-trial detention, separation is guaranteed.

A non-legal specialist differentiates:

“There is an area for juveniles, but I do not know exactly. In the juvenile detention centre, there is generally the pre-trial detention area, which is subdivided for juveniles and adolescents. House 6 and House 9, but those who then serve their permanent sentence, that can be very mixed. They don't just separate on the basis of age, but also according to specificity. So, for example, there is the social-therapeutic department. This should then respond a little more to the individual needs.” (Non-legal) Specialist/Germany)

In der Jugendstrafanstalt in Berlin gibt es generell den Untersuchungshaftbereich, der unterteilt ist für Jugendliche und Heranwachsende. Das Haus 6 und Haus 9. Und- aber dann direkt in der sozusagen die Endstrafe beziehungsweise, die dann ihre Dauerhaftstrafe absitzen, das kann dann sehr gemischt sein. Da wird versucht, individuell in den Häusern dann eine positive Zusammenstellung eben zu treffen. Dass man nicht nur aufgrund des Alters trennt, sondern eben auch nach Spezifität.

²¹³ Germany, Draft Act to Strengthen the Procedural Rights of Accused Persons in Juvenile Criminal Proceedings (*Entwurf eines Gesetzes zur Stärkung der Verfahrensrechte von Beschuldigten in Jugendstrafverfahren*), Drucksache 19/13837, 09.10.2019, pp. 36-37.

²¹⁴ judge/Germany, JUDGE, judge/Germany, (Non-legal) Specialist/Germany, (Non-legal) Specialist/Germany, (Non-legal) Specialist/Germany, Police officer/Germany.

Also zum Beispiel gibt es den- natürlich ganz- ganz klassisch den Bereich der SothA, der sozial-therapeutischen Station, ja. Es geht dann- soll- soll dann ein bisschen mehr auf die individuellen Bedürfnisse auch eingehen.“

In respect to police custody and captive collection centres, the interviewees were uncertain as regards whether or not separation is always guaranteed in practice.²¹⁵ Much seems to depend on the local circumstances as the following quotes illustrate: A police officer is certain, that

“...minors are not allowed to be put into cells. They stay in spaces within the police stations where they can be watched, and there is also a special juvenile detention facility, distinguishing between pre-trial detention and youth penalty (‘Jugendstrafe’, post-trial detention). The juveniles are always separated from adults.“
(Police officer/Germany)

„Ja, Minderjährige dürfen ja auch nicht in die Zellen, sondern die bleiben vorne, in dem Bereich der eingesehen werden kann. Es gibt ja auch einen Jugendknast, wo auch zwischen U-Haft und Jugendstrafe unterschieden wird, da wird immer von Erwachsenen getrennt.“

A social worker, on the other hand, states that:

“in police custody, unfortunately, all come into the same prison collection centre.“
(Non-legal) Specialist/Germany)

„Im Polizeigewahrsam weiß ich leider, dass die- dass die alle auf die Gefangenenensammelstelle kommen. Da gibt es meiner Meinung nach keinen Bereich für Jugendliche, aber so richtig genau weiß ich das nicht.“

The access to health care services, physical and mental development measures, education, and training as well as programs fostering the personal development and reintegration of children into the society are described, especially by the interviewed lawyers, as deficient and depending on the size and specialization of the detention facility:

“The health care of prisoners is poor, both, for juveniles and adults, because there is no free choice of a doctor and the tendency in youth detention facilities (‘Jugendvollzugsanstalten’) is to limit medical care to the absolute necessary.“
(Defence lawyer/Germany)

„Also die gesundheitliche Versorgung von Inhaftierten ist bei Jugendlichen wie bei Erwachsenen schlecht, weil es keine freie Arztwahl gibt und die Tendenz in Jugendvollzugsanstalten dahin geht, dass man sich auf das Nötigste beschränkt.“

With regard to educational offers, a defence lawyer reports that there are insufficient efforts being made, because,

“...there are of course school and training programmes, some of which are useful to the prisoners and help them to advance. ...but there are no possibilities to respond to the personal needs.“ (Defence lawyer/German)

²¹⁵ (Non-legal) Specialist/Germany, Police officer/Germany, Police officer/Germany, judge/Germany.

“..., gibt es natürlich Schul- und Ausbildungsangebote, die zum Teil den Inhaftierten auch nützen und sie voranbringen...!. Natürlich gibt es da auch nicht die Möglichkeiten, auf die ganz persönlichen Bedürfnisse einzugehen.“

A non-legal interviewee indicated that the limitation of educational programmes is most significant with regard to what a defence lawyer called „overqualified“ juvenile, who already finished school:

“My impression is that there is still a lot of room for improvement.... As far as schooling is concerned, I've also heard: ‘S/He can already speak German. S/He doesn't need to go to school.’” (Non-legal) Specialist/Germany)

“Mein Eindruck ist, dass es da noch viel Luft nach oben gibt,... was Beschulung angeht, hab ich auch schon erlebt, dass gesagt wurde, der/die kann schon Deutsch. Der/Die braucht nicht zur Schule zu gehen.“

Interviewees also reported that, due to the fact that, unfortunately, there is only a small number of detained children, the offer of measures and programmes is limited.²¹⁶

d. Contact with family members during deprivation of liberty

Principally, interviewees confirmed that the initial and continuing contact with family members is possible in detention during visit hours and provided that there is no contact ban ordered by the court.²¹⁷ There were also special means of communication introduced in some detention facilities, to ensure contact during the corona lock-down.²¹⁸

However, not all families have sufficient means to visit their child in prison, because of the distance to the respective detention facility:

„In my view, the access possibilities in prisons, especially where young people are imprisoned, are deterrent. Take the example of a Cologne prisoner who is in a correctional institution 80 kilometers away in the remote periphery of the city of Wuppertal. I have seen elderly parents, but also recipients of social welfare, who simply fail to cover this distance due to the lack of a vehicle or with public transport at horrendous prices. And, in this respect, I have the feeling that even the theoretically available visiting appointments are by no means all taken up, because the relatives lack the resources to make these visits happen.” (Defence lawyer/Germany)

„Die Zugangsmöglichkeiten in den Justizvollzugsanstalten insbesondere wo Jugendliche inhaftiert sind sind aus meiner Sicht abschreckend. Nehmen sie das beispiel eines Kölner Inhaftierten, der 80 Kilometer weiter in der entlegenen Peripherie der Stadt Wuppertal in einer Vollzugsanstalt ist. Ich habe ältere Eltern aber auch Hartz IV- Empfänger gesehen die schlichtweg daran scheitern diese Distanz mangels Fahrzeug oder mit öffentlichen Verkehrsmitteln zu Horrorpreisen zu bewältigen. Und insofern habe ich das Gefühl, dass selbst die theoretisch zur Verfügung stehenden Besuchstermine längst nicht alle wahrgenommen werden, weil den Angehörigen die Ressourcen fehlen diese Besuche stattfinden zu realisieren.“

²¹⁶ Defence lawyer/Germany.

²¹⁷ Judge/Germany.

²¹⁸ (Two (Non-legal) Specialists/Germany, Police officer/Germany, judge/Germany.

e. Discussion of findings

In practice, all alternative measures, which might be pedagogically more reasonable/appropriate, are taken into account before detaining a child, this was confirmed unanimously by the interviewees. Nevertheless, it was outlined, that this also depends on the availability of alternatives, in the form of detention avoidance facilities with close supervision of the children and the capacity of these institutions. There are indications that juvenile detention in the form of short-term arrest is not necessarily used as a last resort.

Concerning the medical examination, the analysis of the interviews is not conclusive, because there were diverging statements concerning, on the one hand, the income procedure and, on the other hand, referring to the overall medical care in detention facilities.

Separate accommodation is at least guaranteed in detention facilities post-trial. Concerning police custody, the interviews were inconclusive. This indicates that there are differences depending on the states, cities and even the single police stations.

Analysis showed that educational, therapeutical, and social-pedagogical offers within detention facilities vary, depending on the size of the facility. There are indications that the offers regarding education are not as differentiated as it would be necessary to address the special needs of the individual children. The possibility of contact to family members, probably depends on the distance of the detention facility to the home, which again depends on the density of facilities. In city-states such as Bremen and Berlin, this is not a problem.

Unaccompanied minor refugees are once again identified as a structurally disadvantaged group, because the probability that a ground for pre-trial detention is assumed is higher.

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

a. Legal overview

The right of the juvenile to be present at the trial against them, as enshrined in Article 16 (1) of Directive (EU) 2016/800, is already contained in Section 230 (1) and Sections 285, 332 of the Code of Criminal Procedure, which are also applicable in juvenile criminal proceedings pursuant to Section 2(2) of the Youth Courts Act. These provisions provide an obligation to be present – with exceptions – rather than stipulating a right to be present. According to section 50 paragraph 1 of the Youth Courts Act, the main hearing may take place in the absence of the defendant only if this would be permissible in the general proceedings if there are special reasons to do so and with the assent of the public prosecutor.

According to Section 232 (1) of the Code of Criminal Procedure, the main hearing may be held in the defendant's absence if they were properly summoned and the summons referred to the fact that the hearing may take place in their absence and if only a fine of up to 180 daily rates, a warning with sentence reserved, a driving ban, confiscation, destruction or rendering unusable of an object, or a combination thereof is to be expected. An increased penalty or a measure of reform and prevention may not be imposed in his absence. Disqualification from driving shall be admissible if the defendant was informed about this possibility in the summons. According to Section 233 (1) of the Code of Criminal Procedure, the accused may, under the same circumstances, be released from his obligation to appear.

The summons provisions of sections 216 and 217 of the Code of Criminal Procedure ensure that the accused is informed in time when and where the main hearing will take place. This enables the accused

to comply with their duty to be present and to exercise their rights at the main hearing. Exceptions to the defendant's right to be present at the main hearing are regulated in section 247 of the Code of Criminal Procedure and section 177 of the Courts Constitution Act (*Gerichtsverfassungsgesetz*). The temporary removal of the accused are ordered according to these norms, if it is to be feared that a co-defendant or a witness will not tell the truth when examined in the defendant's presence. The same shall apply if, on examination of a person under 18 years of age as a witness if a considerable detriment to the well-being of such witness is to be feared or if the defendant's presence poses an imminent risk of serious detriment to another person's health. The defendant's removal may be ordered for the duration of discussions concerning the defendant's condition and his treatment prospects if serious detriment to his health is to be feared. As soon as the defendant is brought back into the courtroom, the presiding judge shall inform him/her of the essential content of the proceedings, including the testimony given, during absence.

Section 50 of the Youth Courts Act provides that, the presiding judge should exclude the accused for the duration of discussions in the deliberations which could be disadvantageous to their education and development. The defendants shall then be informed of the deliberations held in their absence insofar as is necessary for the purpose of the defence.

Possibilities for the main hearing or parts of the main hearing to be held in the absence of the accused are also provided by sections 231 to 233 of the Code of Criminal Procedure. However, these do not limit the right of the accused to participate in person, because it is a regulation of cases where the accused chooses to stay away or where the accused intentionally disturbs the hearing.

Concerning the right to effective participation, general provisions mentioned below also apply in juvenile criminal proceedings via 2 paragraph 2 of the Youth Courts Act. The juvenile's right to be heard and to express their opinion is provided for in section 243 (5) sentences 1 and 2 of the Code of Criminal Procedure. Accordingly, the juvenile is free to comment on the charge. If they are willing to do so, they will be questioned on the matter. The first purpose of the interrogation is to ensure the right to be heard. The defendant should be given the opportunity in the main hearing, even before the evidence is taken, to comment comprehensively on the accusation immediately after the indictment has been read out, so that the court can take his or her view of the matter into account in the course of the subsequent taking of evidence. Moreover, according to section 257 (1) of the Code of Criminal Procedure, the accused must be given the opportunity to make a statement after each interrogation of a co-defendant and after each individual taking of evidence. Pursuant to section 258 (1) of the Code of Criminal Procedure, the accused also has the right to make a closing statement. Furthermore, they are entitled to file motions for evidence and motions concerning the proceedings during the main hearing.

According to Section 48 of the Youth Courts Act, the public is generally banned in proceedings against children. Besides the participants to the proceedings, the aggrieved person, his parent or guardian and his legal representative, and, where the defendant is subject to the supervision and guidance of a probation officer or the care and supervision of a care assistant or if a social worker has been assigned to him, the probation officer, care assistant and the social worker are permitted to be present. The same shall apply to the head of institution in cases in which the juvenile receives supervisory assistance in a residential home or comparable institution. The judge may admit other persons for special reasons, *id est*. for training purposes.

The only exception with regard to children is regulated in subsection 3, when children have co-defendants who are young adults, then the deliberations shall be held in public. The public may be excluded if this is in the supervisory interests of children who are defendants.

The general criminal procedural law provides a legal remedy in the form of an appeal. The absence of a person whose presence is required by law constitutes an absolute ground for appeal under section 338 paragraph 5 of the Code of Criminal Procedure.

b. Right to effective participation in practice

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

Here the interviews agreed to a great extent. The main hearings follow the guidelines set by the code of criminal procedure, which are equally applied in adult criminal proceedings. The hearings take place in normal courtrooms at district- or regional courts. All interviewees confirmed that, in practice the public is banned, which corresponds to the legal requirement of section 48 of the Youth Court Act.²¹⁹

"These are normal courtrooms, which vary in size(...). The exclusion of the public is ensured by posting a notice outside the courtroom that it is excluded for the public. And of course, in very special proceedings with a high media impact, it is also ensured that the accused are not filmed in the hallway or something if the proceedings are not held in public anyway." (Judge/Germany)

„Es handelt sich um ganz normale Gerichtssäle, die unterschiedlich sind nach Größe. (...) Und der Ausschluss der Öffentlichkeit wird dadurch gewährleistet, dass es einen Aushang gibt an dem Gerichtssaal, dass die Öffentlichkeit ausgeschlossen ist. Und natürlich in ganz besonderen pressewirksamen Verfahren, wird natürlich auch dafür Sorge getragen, dass in etwa die Beschuldigten nicht auf dem Flur oder so gefilmt werden, wenn da ohnehin nicht öffentlich verhandelt wird.“

Concerning the difference to adult criminal proceedings, it was emphasized by interviewees across professions, that the pedagogical purpose is the focus and purpose of the proceedings.²²⁰ Therefore, more effort is put on communication with the accused and on explaining the proceedings themselves and the possible consequences.²²¹ Again, this very much depends on the individual judges in charge.

"As a rule, juvenile court judges try to explain to the juveniles in a way that is comprehensible what is happening now, how the proceedings go about. But that doesn't fundamentally change the procedures itself." (Non-legal Specialist/Germany)

„Also in der Regel versuchen Jugendrichterinnen und Jugendrichter schon den Jugendlichen halbwegs verständlich zu vermitteln, was jetzt passiert, wie das abläuft. Das ändert aber grundsätzlich nichts an den Abläufen, das ist eher eine Frage der verbalen Vermittlung.“

Apart from that, a difference to adult proceedings is the presence and participation of the juvenile court assistance who report their individual assessment in the main hearing.²²²

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

²¹⁹ This was confirmed by all interviewees.

²²⁰ Judge/Germany, (Non-legal) Specialist/Germany.

²²¹ Two judges/Germany.

²²² Judge/Germany, (Non-legal) Specialist/Germany.

There are no special measures put into place, in order to enable children to express their views.²²³ However, the majority of the interviewees describe the atmosphere as being influenced by the juvenile judge who makes an effort to communicate with the child and to take their views on the charges and their individual needs into account. A judge reports, that:

“Actually, it is the case that the judge also seeks a conversation with the child, in order to get an impression of the child's personality and not only to rely on the report of the juvenile court assistance. (...) And of course, we try, and I think this is very important, to take what the child says seriously and to deal with it argumentatively, if necessary.” (Judge/Germany)

„Eigentlich ist es schon so, dass der Richter auch das Gespräch mit dem Kind sucht um sich einen Eindruck von der Persönlichkeit des Kindes zu verschaffen und sich nicht nur auf den Bericht der Jugendgerichtshilfe zu verlassen. (...)Und da ist es natürlich schon so, dass wir versuchen, und das finde ich auch ganz wichtig, dass wir das was das Kind sagt auch ernst nehmen und uns damit auseinandersetzen auch argumentativ gegebenenfalls.“

A representative from the juvenile court assistance explains that in single-judge proceedings the public prosecutor, the court reporters, the legal guardians, and the juvenile court assistance is present. To ensure privacy, if the nature of the specific child requires so, certain persons might have to leave the courtroom.²²⁴

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

The holders of parental responsibility are summoned to the main hearing, but appearance is voluntary.²²⁵ Many interviewees, regardless of the profession, stated that many parents have no interest in appearing. When they are present, they can make statements. Furthermore, there was no controversy that lawyers and the juvenile court assistance can confer with the accused whenever requested.²²⁶

d. Discussion of findings

The right to effectively participate in and be accompanied during trial is basically guaranteed, although, apart from the presence of the juvenile court assistance, there are no modifications with respect to the procedural conduct of the proceedings compared to adult criminal proceedings. The courtrooms are the same and the procedural rules indifferently apply. Nevertheless, a special atmosphere is created by the juvenile judges, who allow more space for explanation and exchange. Holders of parental responsibility are involved when present.

²²³ Two judges Germany, two (Non-legal) Specialists/Germany.

²²⁴ (Non-legal) Specialist/Germany.

²²⁵ Two judges/Germany.

²²⁶ Two defence lawyers/Germany.

PART D. GENERAL ASSESSMENT

D.1 Challenges

The list of challenges mentioned by the interviewees were very diverse.

A police officer referred to making the prognosis whether a case of mandatory defence must be assumed as a challenge, considering the little information at the beginning of the investigation.²²⁷

In this respect, defence counsels mentioned that the proper training of police officers with regard to this prognosis and to comprehensibly communicating with children is a challenge.²²⁸

Staffing of juvenile court assistance was identified by a judge as being a challenge in the implementation of the Directive (EU) 2016/800.²²⁹

A representative of the juvenile court assistance voiced concerns that those involved in the proceedings might have the impression that the practice so far already sufficiently guaranteed the procedural rights of the child in criminal proceedings and draw the conclusion that nothing has to be changed.²³⁰

A police officer and a prosecutor respectively states that s/he found the previous practice sufficiently guaranteeing the rights of the child and that the implemented practice could be detrimental to a flexible cooperation between the institutions.²³¹

The representative of the juvenile court assistance furthermore criticized the hierarchical implementation of the Directive (EU) 2016/800, privileging the prosecution and the judges, whereas the police and the juvenile court assistance had to implement a lot of changes without being properly equipped. This was also mentioned by defence counsels stressing that the judiciary was looking for loopholes in the implementation of the directive to ensure that they can continue as practiced before.²³²

The biggest challenge to the equal application and guarantee of procedural rights and safeguards to all children is identified by almost all interviewees to be the language, since communication is key to reaching the accused children and to fulfil the educational purpose of juvenile criminal proceedings.²³³ Against this backdrop, unaccompanied minor refugees are repeatedly named, when being asked about hurdles for specific groups.

D.2 Improvements

Awareness on the side of the investigative authorities, namely police and prosecution was identified by the lawyers as an improvement since the implementation of Directive (EU) 2016/800.²³⁴ Above this, the early involvement of the juvenile court were described as an improvement and a promising practice.²³⁵ At the same time, the early involvement of legal representatives was described as a challenge.²³⁶

D.3 Promising practices

²²⁷ Police officer/Germany.

²²⁸ Two defence lawyers/Germany.

²²⁹ Two judges/Germany, prosecutor/Germany.

²³⁰ (Non-legal) Specialist/Germany.

²³¹ Police officer/Germany, prosecutor/Germany.

²³² Two defence lawyers/Germany.

²³³ Two defence lawyers/Germany, among others.

²³⁴ Defence lawyer/Germany.

²³⁵ Three judges/Germany, defence lawyer/Germany.

²³⁶ Two prosecutors/Germany.

Early involvement of the juvenile court assistance was mentioned as being a promising practice, which still must be fully implemented. Relating to this, interviewees mentioned that cooperation between the actors involved is promising to guarantee the necessary support structure for the children.²³⁷

Some lawyers also refer to their own early involvement as being a promising practice and an improvement.

"The most promising practice is definitely the early involvement of a legal counsel. Once a defence lawyer is part of the proceedings, we have the possibility to steer and guide the proceedings, to clarify and to define goals." (Defence lawyer/Germany)

„Am vielversprechendsten ist ganz sicherlich die frühe Beteiligung eines Rechtsbeistandes. Sobald ein Verteidiger im Verfahren drinnen ist, haben wir die Möglichkeit das Verfahren zu steuern und zu lenken, aufzuklären und Ziele zu definieren.“

This was also confirmed by a police officer, with regard to the expectation of high sentences²³⁸. For his/her, the establishment of the department of juvenile offenses was also an improvement since this specialized unit centralizes the expertise.²³⁹

Others identify this as detrimental to the educational purpose and therefore consider the early involvement as a challenge which should be reconsidered.²⁴⁰

D.4 Suggestions

Many interviewees from different professions wished for better qualifications in the sense of specialization of all participants in juvenile criminal law.²⁴¹ This can also be derived from interviews mentioning the lack of special pedagogical aptitude of juvenile judges and prosecutors – or defence lawyers.²⁴² Many demanded a higher level of professionalism.

²³⁷ Two police officers/Germany.

²³⁸ Police officer/Germany.

²³⁹ Police officer/Germany.

²⁴⁰ Two prosecutors/Germany.

²⁴¹ (Non-legal) Specialist/Germany.

²⁴² Two defence lawyers/Germany.

PART E. CONCLUSIONS

Overall, the study shows, that Directive 2016/800/EU was implemented legally, as well as practically mostly in line with the provisions.

Apart from that, a major legal issue that remains questionable are the exclusion of detention according to Section 16 of the Youth Court Act from regulation of mandatory defence. Another remaining legal problem, which was singled out by a lawyer, is the regulation on the appointment of a trusted person, or the juvenile court assistant replacing the holders of parental responsibility in case a reason exists to exclude them. In these cases, section 52 of the code of criminal procedure must apply in order to ensure confidentiality and to be considerate of the special situation.

In the practical implementation, a continuously recurring and overarching issue raised by the interviewees in several sections, is the conflict between the pedagogical purpose of the proceedings and the right to remain silent, which is mostly enforced by the defence counsels and therefore guaranteed by the right to be assisted by a lawyer. This conflict seems to be relativised when all professional actors are familiar with the particularities of juvenile criminal law and the opportunities of the youth welfare system, pertaining to alternative measures. This was especially obvious, concerning the amendments regarding the early involvement of legal representatives, resistance from representatives of other professions is based on the conflict described at the outset. Nevertheless, many interviewees welcome the effective participation of specialized defence counsels. In this respect there seems to be room for improvement concerning the acceptance of the work of defence counsels within juvenile criminal proceedings which also depends on their specialization and the cooperation between the professions.

This points at a second issue that was raised across professions, the necessity and advantage of education, training, and experience in juvenile criminal law on all sides. The first section of the report shows that this is not necessarily guaranteed in practice, although the special qualification in juvenile justice was identified as a key to guarantee the effective conduct of the proceedings and to be most beneficial to children who are suspects or accused in criminal proceedings.

Concerning the right to information, the analysis is not conclusive. Generally, the produced leaflets seem to cover all required information provided for by the Directive. Nevertheless, there are indications that this information is occasionally not provided before the interrogation and that there is room for improvement concerning the sensibility and knowledge of the involved practitioners. The attitude that information regarding the right to remain silent could be detrimental to juvenile criminal proceedings might be hindering the willingness to provide comprehensive information before interrogation. Above that, the interviews show, that the way the information is conveyed can be improved and needs to be adjusted to the individual child and its maturity and capability to follow, being more considerate of the stressful situation.

Whereas the work of the juvenile court assistance is generally appreciated as being a decisive feature of juvenile criminal justice, their human resources seem to not have been adjusted to the increased workload related to their early involvement and the requirement to conduct an assessment before the indictment. Moreover, occasionally, the prosecution seems to circumvent this requirement by applying the exception provided for in section 46 a of the Youth Courts Act.

With respect to detention, the report shows that there is room for improvement concerning the consistent implementation of separate accommodation in police custody and prisoner collection centres. The same applies to the range of offers concerning detention avoidance and within detention facilities

regarding a differentiation of educational measures, therapeutical offers as well as programmes to reintegrate the child after detention.

Lastly, the interviewees recurrently referred to unaccompanied minor refugees as being the most disadvantaged group in juvenile criminal proceedings. Firstly, they often lack the necessary language skills to comprehend the instructions and information by all professionals, then, they are probably not familiar with the local criminal legal system in general. They are regularly not supported by their absent family members in the interrogations, consultation and hearings therefore they depend on a different support system, not foreseen in the criminal legal framework. And lastly, the assumption of grounds for pre-trial detention are assumed more likely regarding this group, because, by definition, they lack the social bonds, have connections to different countries and often speak the respective languages. Against this backdrop, the danger of absconding is reported to be assumed more often.

By way of conclusion, though, the amendments in relation to the implementation of the Directive are overall welcomed by the interviewees despite the criticism and the identified room for improvement. Interviewees across professions are committed to contribute to the implementation of the provisions on procedural safeguards for children who are suspects or accused persons in criminal proceedings.

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

Organisation	Focus	(Publically available) Contact details
The German Association for Juvenile Courts and Juvenile Court Assistance (<i>Deutsche Vereinigung für Jugendgerichte und Jugendgerichtshilfe</i>)	Germany's professional association for juvenile criminal law. It promotes interdisciplinary cooperation between the professions involved in juvenile criminal proceedings and acts as an independent advisory body for criminal policy and practice-relevant issues.	https://www.dvjj.de
houses of Juvenile Law (Jugendrechtshaus)	They are regional prevention institutions based on legal education providing low-threshold help, education, upbringing and discussion exchanges for children, young people and adolescents as well as for their parents, carers, educators and teachers - in everyday life, around the law, legal awareness and social competence.	http://www.jugendrechtshaus.de
Kinderhilfswerk	supports the rights of children in general	https://www.dkhw.de
Juvenile assistance in Bremen		http://www.brigg-bremen.de/?page_id=58#unsere-angebote https://jus-bremen.de https://www.hans-wendt-stiftung.de http://www.toa-bremen.de https://effect-bremen.de https://www.stadtteilschule-bremen.de/index.php https://vaja-bremen.de
Juvenile assistance in Freiburg, Baden Wuerttemberg:		http://www.jugendhilfswerk.de/de/kinder-und-jugendhilfe.html https://www.jugendhilfe-freiburg.de https://www.service-bw.de/organisationseinheit/-/sbw-oe/Jugendhilfe+im+Strafverfahren+JuHiS+Stadt+Freiburg+im+Breisgau-6002252-organisationseinheit-0

		https://www.wiese-freiburg.de
Juvenile assistance in Cologne, North-Rhine Westphalia:		https://www.jugendhilfe-koeln.de https://www.cjg-jugendhilfe.de https://www.kontrast-jugendhilfe.de
Juvenile assistance in Berlin:		https://service.berlin.de/dienstleistung/327260/ https://gangway.de/kurze-einfuehrung-in-das-jugendstrafrecht/ https://www.diakonie-portal.de/jugendhilfe https://www.ejf.de/arbeitsbereiche/kinder-und-jugendhilfe/alle-angebote/integrationshilfe/bruecke/sozialer-trainingskurs-anti-gewalt-training.html http://www.jugendgewaltpraevention.de/content/sozialer-trainingskurs http://balanx-berlin.de/?page_id=913 https://www.sozius-hilfen-berlin.de/stop-projekt-823178-836529-762975-130076.html