

# Social Fieldwork Research (FRANET)

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

### Austria

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**Table 1: Sample professionals**

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## List of Abbreviations

CCBE	Council of Bars and Law Societies of Europe
EU	European Union
ECDL	European Computer Driving Licence
JCA	Juvenile Court Assistance
JCA	Juvenile Court Act
SONECO	Social Network Conference

## **PART A. EXECUTIVE SUMMARY**

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

The Juvenile Courts Act<sup>1</sup> includes the main provisions implementing the standards provided for in Directive (EU) 2016/800. The EU Criminal Law Amendment Act 2020,<sup>2</sup> which largely entered into force on 1 June 2020, recently introduced important amendments to the Juvenile Courts Act with the aim to fully implement the Directive.

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

The age assessment is carried out rarely in criminal proceedings, but rather in asylum proceedings. In criminal proceedings, it is conducted only if there is a significant difference in the expected sentencing (e.g. age of criminal responsibility, juvenile or young adult). It is not carried out if the authorities doubt whether or not they should provide for the additional procedural rights of child defendants in criminal proceedings. In case of doubt, the authorities simply implement the additional procedural rights for child defendants. The medical age assessment is carried out upon an order of the judge. This medical age assessment is based on controversial methods and its outcome is not concrete, but rather provides approximate age margins.

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

The police implement the right to information prior to the police interrogation. Child defendants are briefly and orally informed about the accusation. Moreover, they are informed by the police about their procedural rights in the framework of a standardised, computer-assisted procedure. The information system provides a right-by-right information. The children have to confirm that they have received information on what these rights foresee and on how they can exercise each of the rights addressed by the information system. The police inform formally and do not necessarily explain the meaning of the information for the child defendant's individual case. Furthermore, the police do not inform child defendants about the general conduct of the proceedings. The defence lawyers and probation officers provide this information. These actors inform child defendants repeatedly and more informally about the accusation, their procedural rights and the general conduct of the proceedings. According to them, one conversation is not sufficient to understand all the information. Moreover, the defence lawyers and probation officers assess the child defendants' understanding of the information provided.

Parents and other holders of parental responsibility are informed in a similar way as the child defendants, meaning at the same time, using the same methods, and about the same aspects. The national authorities (police) do not assess whether the parents of the child can be informed or whether there are any reasons for not doing so. Only if the parents are accused of criminal offences too, the parents are not informed. Apart from that, there are no reasons for not informing them. If parents are not traceable, defence lawyers take over the parental rights. If parents cannot come to the police interrogation, another person of trust may be nominated by the child upon their parents' consent. The investigative authorities (police, prosecutor) are obliged to inform the child defendants' probation officers about all procedural steps.

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<sup>1</sup> Austria, Juvenile Court Act 1988 ([Bundesgesetz vom 20. Oktober 1988 über die Rechtspflege bei Straftaten Jugendlicher und junger Erwachsener, Jugendgerichtsgesetz 1988 – JGG](#)), Federal Law Gazette Nr. 599/1988.

<sup>2</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

Police interrogations are audio-visually recorded if they involve child defendants who remain at liberty and are unaccompanied during the police interrogation. This means that the police interrogation of a child must be recorded if no defence lawyer, no holders of parental responsibility, or no support persons are physically present. According to interviewees, there has never been a need for an audio-visual recording of a police interrogation. Child defendants were always accompanied during the police interrogations by the relevant actors. The audio-visual recording may ensure transparency and protect the implementation of the procedural safeguards during the police interrogation. At the same time, it may have an intimidating effect on children.

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

The physical presence of defence lawyers is mandatory for all investigative acts concerning children, who are accused of a crime (> 3 years imprisonment) or, alternatively, who are deprived of liberty. This mandatory physical presence is ensured by the on-call legal service, which is available 24/7. The on-call legal service sends defence lawyers for immediate police interrogations of arrested child defendants. These lawyers are specialised in criminal law in general, but not necessarily in juvenile criminal law. This service is available cost-free for all who cannot afford legal representation. Later during the proceedings, meaning within up to five days after the first contact with the police, a legal aid lawyer is provided. This is usually a different lawyer, who takes over the case from the on-call lawyer. The findings indicate that the child defendants' right to cost-free legal representation is practically secured from the accusation onwards. However, the interviewees report the following challenges: It takes the on-call lawyers some time to arrive at the police station. The police are obliged to wait and start the interrogation only upon arrival of the lawyer. The waiting period, in particular in rural areas and in cases involving more child defendants, extends the criminal investigations and the child defendants' deprivation of liberty. Moreover, legal aid lawyers are not necessarily specialised or even experienced in defending accused children in criminal proceedings. Any lawyer who is a member of the Austrian Bar Association is obliged to carry out legal aid based on a schedule.

#### **The right to an individual assessment:**

The individual assessment is carried out *ex officio* upon the prosecutor's or the judge's order. The Juvenile Court Assistance (JCA), who have expertise in juvenile justice proceedings and social work, are responsible for the individual assessment. The individual assessment is carried out prior to the court trial, as its result will be used there. The child defendants, their parents, and other important support actors (probation officer, youth welfare authority) are involved in the individual assessment. The assessment considers the specific situation, vulnerabilities, concerns, and needs of the child defendant. The results of the individual assessment are used during the court trial to determine the sentences and impose support measures. An individual assessment is not carried out if the child defendants and their parents do not cooperate or the criminal proceedings are terminated at an early stage. There are no group-specific obstacles. However, the individual assessment becomes more difficult if language barriers require the services of interpreters and the child has no social network in Austria.

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

The interviewed police officers, judges, and prosecutors generally state that the deprivation of liberty is applied as a measure of last resort. Lawyers and non-legal experts generally doubt this view and refer to the high number of children in detention. The Social Network Conference (SONECO) is offered by the probation services to children in pre-trial detention. It aims to develop and implement alternative measures to pre-trial detention. The SONECO is a tool employed to reduce the time spent in pre-trial detention. However, it cannot prevent it entirely. The SONECO's success is significantly based on the children's cooperation, and their social and family network. Thus, children who are

unaccompanied in Austria or without a social network are disadvantaged. In general, children are held separately from adults and young adults in pre-trial and criminal detention. Children, who are in police custody, are held in single cells. Criminal detention facilities provide child defendants with education, leisure activities, sports, and measures for re-integration into society. Further, during pre-trial detention, these children are offered educational activities, social work, sports, and other activities, e.g. guitar courses or painting. However, these offers are not sufficient. During both types of deprivation of liberty, health care services are adequately provided.

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

The following specific modifications are applied to facilitate the effective participation of child defendants in court trials: juvenile criminal justice judges, who are experienced in considering the concerns and needs of children, are available. These judges are specialised in the legal provisions of juvenile criminal justice, as well as in the soft skills of dealing with children and considering their social environment. These judges support child defendants in achieving the best solution for their future life, prevent reoffending, and re-integrate them into society. The individual assessment is read out aloud or summarised during the court trial and considered when determining the sentence and imposing support services. The children may express themselves during questioning and by commenting on evidence. They are always allowed to talk to their lawyers confidentially before, during, and after the court trial. The parents have the right to be present during the trial. Further, they have the right to speak and express their views. The authorities are rather reluctant in excluding the public from court trials against children. In line with the rule of law, the public has a right to access court trials. The public is excluded only from cases touching upon sensitive or sexual matters in relation to the child defendants.

## **PART B. INTRODUCTION**

In total, **20 eligible interviews** were carried out within the period from 3 March to 2 July 2021. All interviews were conducted via electronic means of communication due to the Covid-19 pandemic and the existing restrictions/curfews during the fieldwork period.

All interviews were audio-recorded using a separate device and not the virtual platforms' recording-functions. During the course of some interviews, there occurred some connectivity problems and a lack of voice quality. All interviewees were patient in case such barriers and problems occurred.

### **○ PREPARATION OF FIELDWORK, IDENTIFICATION AND RECRUITMENT OF PARTICIPANTS**

No interviewer training was carried out, as the expert on social fieldwork research did all the fieldwork. For the identification of interviewees, at first, the contractor's existing contacts in the area of criminal proceedings were accessed. These contacts were asked to identify and recommend colleagues, who are specialised in the juvenile criminal justice system and have practical experience in dealing with child defendants.

This strategy worked well for police officers in Graz. Other contacts, who have previously supported social fieldwork with expert interviews, were reluctant to nominate and ask their colleagues with the required expertise to support the study. Thus, in a second step, online research was conducted to find individuals with the required expertise. This strategy worked well in accessing interviews with non-legal experts and defence lawyers. Non-legal experts (probation service, Juvenile Court Assistance, child and youth welfare office) were ready to support the study. Even though lawyers with the requested expertise could be easily identified via the internet, they were reluctant to participate in the study. Lawyers refused actively due to a lack of resources or passively by not responding to any attempt made to contact them. The third step consisted of contacting gatekeepers and proved to be successful in accessing interviews with lawyers, prosecutors, and police officers in Vienna, as well as judges. Gatekeepers are professional associations and media departments of institutions. The following gatekeepers were asked: the media department of the criminal courts in Vienna and Graz to identify prosecutors and judges with the required expertise; the media department of the Police of Vienna to identify police officers with the required expertise; the Austrian Bar Association to identify lawyers with the required expertise in Vienna and Graz. Moreover, the Council of Bars and Law Societies of Europe (CCBE) kindly provided access to defence lawyers with the required experience upon request of the FRA.

Although the identification and access to interviewees was not easy in the beginning of the fieldwork, the vast majority of interviewees showed the required experience and expertise.

### **○ 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) Experts:

Requested: 6, completed: 6

*[In three of these six interviews, two interviewees were present and participated in the respective interview. Thus, actually 9 (non-legal) experts shared their views and experiences.]*

Table 2: Sample professionals

Code	Group	Expertise in juvenile criminal justice	Gender
1	Police officer	Investigation area burglary, which practically involves children	M
2	Police officer	Investigation area robbery, which practically involves children (gangs)	M
3	Police officer	Member of the group juvenile delinquency	F
4	Police officer	Head of the group juvenile delinquency	M
5	Defence lawyer	Legal aid lawyer, representing minor defendants	M
6	Defence lawyer	Legal aid lawyer, representing minor defendants	M
7	Defence lawyer	Represents minor defendants as privately paid lawyer	F
8	Defence lawyer	Represents minor defendants as privately paid lawyer	M
9	Defence lawyer	Represents minor defendants as privately paid lawyer	M
10	Prosecutor/Judge	Prosecutor, specially trained and responsible for juvenile criminal justice	F
11	Prosecutor/Judge	Prosecutor, specially trained and responsible for juvenile criminal justice	F
12	Prosecutor/Judge	Judge, specially trained and responsible for juvenile criminal justice	M
13	Prosecutor/Judge	Judge, specially trained and responsible for juvenile criminal justice	M
14	Prosecutor/Judge	Judge, specially trained and responsible for juvenile criminal justice	M
15	(Non-legal) Specialist	Social workers, responsible for individual assessments	F, F
16	(Non-legal) Specialist	Social workers, responsible for individual assessments	F, F
17	(Non-legal) Specialist	Probation office, supports juvenile defendants	M
18	(Non-legal) Specialist	Ombudsman, represents the rights and interests of children also in case of being suspect / accused of crime	M
19	(Non-legal) Specialist	Probation office, support juvenile defendants	F, M
20	(Non-legal) Specialist	Youth Welfare Authority, guardianships for child defendants in criminal proceedings	F

Almost all interviews exceeded the planned length of one hour. In particular, the interviews with the non-legal experts had a long duration and took up to two hours.

A pleasant atmosphere and high level of trust characterised the vast majority of interviews. The interviewees were motivated to share their experiences, and dedicated to the field of juvenile criminal justice. Only in two cases the interviews were a bit difficult to conduct for the interviewer, as these interviewees could not deal with some of the questions or were unable to share information about their practices.

The level of trust between interviewee and interviewer, and the pleasant atmosphere during the interview procedure were not affected by the connectivity problems, that occurred, and the prolonged length of the interview.

- **DATA ANALYSIS**

The data, on which this report is based, consists of 20 written interview reports and 20 corresponding audio files. The data analysis was carried out by intense listening, reading the data, and compiling it along the coherent structure, that was provided for both the fieldwork and the analysis.

The views were compiled and compared within and between professional groups, as well as section per section. The analysis was driven by the detection of similarities and differences among and between professional groups. Moreover, the analysis aimed at identifying any regional differences in the views and practices.

The fact that only one person conducted all interviews, drafted all interview reports, and is the author of the present fieldwork report fostered an effective data analysis. Bias in the sample and in the process of data gathering is considered and pointed out during the report. By making the bias transparent, the research findings can be contextualised accordingly.

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

The present report provides insights into the implementation of the Directive (EU) 2016/800 in Austria. The report draws attention to both the legal provisions and the practices concerning the procedural safeguards for children who are suspects or accused persons in criminal proceedings. The report is based on a legal analysis and social fieldwork. The social fieldwork consists of 20 interviews with professionals in the field of juvenile criminal justice.

The expertise gathered during the fieldwork covers the different stages of the criminal proceedings, as well as accompanying support measures, such as legal representation, probation services, or the individual assessment.

The analysis is structured along the following topics: general overview on the implementation of the Directive; age assessment; the right to information and the participation of holders of parental responsibility; the right to be assisted by a lawyer; the right to an individual assessment; the deprivation of liberty as a measure of last resort, and the right to effectively participate in the trial. The report ends with a general assessment, reflections, and conclusions.

## PART C. RESEARCH FINDINGS

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

#### a. General overview

The Juvenile Courts Act<sup>3</sup> includes the main provisions for implementing the standards provided for in Directive (EU) 2016/800. The EU Criminal Law Amendment Act 2020,<sup>4</sup> which largely entered into force on 1 June 2020, recently introduced important amendments to the Juvenile Courts Act with the aim to fully implement the Directive. The Juvenile Courts Act and the amendments introduced by the EU Criminal Law Amendment Act 2020 are therefore described below along the structure provided by FRA. The explanatory report to the EU Criminal Law Amendment Act 2020<sup>5</sup> constitutes a further important source and was consulted and is cited below where relevant. The opinions of the public review process (*Begutachtungsverfahren*) of the EU Criminal Law Amendment Act 2020 reflect the main discussion that took place in Austria and were also consulted and reported where relevant. Additionally, explanations from the legal commentary<sup>6</sup> are included. A search for relevant case law on the provisions implementing Directive (EU) 2016/800 has been conducted for all relevant provisions, but yielded only very limited results, which is also due to the very recent introduction and amendment of relevant provisions.

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

Directive (EU) 2016/800 applies to the criminal proceedings against juvenile defendants in Austria. § 1 (2) Juvenile Court Act defines juveniles ("*Jugendliche*") as persons who have reached the age of 14 but are below the age of 18. Minors ("*Unmündige*"), defined as anyone who has not reached the age of 14 yet, are not liable to prosecution. Proceedings against children who are suspected or accused of a crime are considered 'criminal'. The main laws relevant for the standards included in Directive (EU) 2016/800 are the Criminal Code<sup>7</sup>, the Criminal Procedure Code 1975<sup>8</sup>, and the Juvenile Court Act<sup>9</sup>. The Juvenile Court Act is a *lex specialis*, as it lays down the special rules for the procedure and punishment of juvenile offenders.

#### c. Special training

##### i. Legal overview

§ 30 Juvenile Court Act stipulates that the judges and public prosecutors in all instances, as well as district attorneys entrusted with juvenile criminal cases shall have the necessary pedagogical understanding, and appropriate knowledge in the fields of social work, psychology, psychiatry, and criminology. The Federal Minister of Justice shall ensure that further training corresponding to these criteria is offered. § 30 Juvenile Court Act thus specifies in more detail the general obligation foreseen in § 57 (1) Judges and Public Prosecutors Service Act to provide further training.<sup>10</sup>

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<sup>3</sup> Austria, Juvenile Court Act 1988 ([Bundesgesetz vom 20. Oktober 1988 über die Rechtspflege bei Straftaten Jugendlicher und junger Erwachsener, Jugendgerichtsgesetz 1988 – JGG](#)), Federal Law Gazette Nr. 599/1988.

<sup>4</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

<sup>5</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

<sup>6</sup> Schroll H. V., JGG, in: Höpfel F. and Ratz E., Wiener Kommentar zum Strafgesetzbuch.

<sup>7</sup> Austria, Criminal Code ([Bundesgesetz vom 23. Jänner 1974 über die mit gerichtlicher Strafe bedrohten Handlungen, Strafgesetzbuch – StGB](#)), Federal Law Gazette No. 60/1974.

<sup>8</sup> Austria, Criminal Procedure Code 1975 ([Strafprozeßordnung 1975, StPO](#)), Federal Law Gazette No. 631/1975.

<sup>9</sup> Austria, Juvenile Court Act 1988 ([Bundesgesetz vom 20. Oktober 1988 über die Rechtspflege bei Straftaten Jugendlicher und junger Erwachsener, Jugendgerichtsgesetz 1988 – JGG](#)), Federal Law Gazette Nr. 599/1988.

<sup>10</sup> Austria, Judges and Public Prosecutors Service Act ([Bundesgesetz über das Dienstverhältnis der Richterinnen und Richter, Staatsanwältinnen und Staatsanwälte und Richteramtswärterinnen und Richteramtswärter, Richter- und Staatsanwaltschaftsdienstgesetz – RStDG](#)), Federal Law Gazette No. 305/1961.

The explanatory remarks to the EU Criminal Law Amendment Act 2020<sup>11</sup> explain that this obligation to conduct training in line with Article 20 of Directive (EU) 2016/800 applies to public prosecutors and judges in all instances. Therefore, it also applies to district attorneys as personnel with decision-making authority, as well as all personnel in the juvenile penal system. The listing of fields of knowledge laid down in § 30 Juvenile Court Act serves as a clarification of the already existing provision in § 16 Judges and Public Prosecutors Service Act.<sup>12</sup>

The explanatory remarks to the EU Criminal Law Amendment Act 2020<sup>13</sup> further clarify that the compliance with the obligation under § 30 Juvenile Court Act has to be checked in the framework of supervision (*Dienstaufsicht*). Moreover, participation in further training must take place at least every two years according to the explanatory remarks to the EU Criminal Law Amendment Act 2020.<sup>14</sup>

Due to the independence of the legal professions, an obligation for training for lawyers is not foreseen by law. However, the Austrian Bar Association is encouraged to offer internal training courses and encourage the participation of lawyers who deal with juvenile criminal cases.<sup>15</sup>

#### ii. Special training received by interviewees

The information provided by the interviewees corresponds to the above-named legal provisions. The interviewed judges and one prosecutor state that they are obliged to participate in regular trainings on the legal provisions in the area of juvenile criminal justice and the “soft skills” in dealing with child defendants. The Association of Judges offers such regular trainings, which are called ‘Curriculum for Juvenile Judges and Prosecutors’ and take place biannually. Moreover, interviewed judges participated in events organised by the Juvenile Criminal Law Section of the Judges’ Association, and in regular exchange with professionals in the area of juvenile criminal justice, as well as attended an annual conference on juvenile criminal justice. However, one interviewed prosecutor stated that no such trainings took place.

The interviewed police officers homogenously state that they did not participate in any special training on the legal provisions in juvenile criminal justice or the procedural rights and safeguards for suspected or accused children. The two interviewed police officers from Styria explain that they received the amendment of the Juvenile Court Act in 2020, and the application of the new regulations works via “learning by doing”. Due to the pandemic, an exchange of experiences among police officers is severely restricted and legal uncertainty among police officers is observed by one respondent. The two interviewed police officers from Vienna state that they never received any such trainings.

As the legal analysis shows, an obligation for training for lawyers is not foreseen by law. Correspondingly, four out of five interviewed defence lawyers have not attended such trainings on dealing with child defendants or on juvenile criminal justice. Only one interviewed lawyer, on her own initiative, attended trainings on the amendment of the Juvenile Court Act in June 2020. The trainings mainly dealt with the new regulations, in particular with the mandatory presence of a defence lawyer during the police interrogation, and the services of an interpreter for child defendants who do not speak / understand German.

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<sup>11</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

<sup>12</sup> Austria, Judges and Public Prosecutors Service Act ([Bundesgesetz über das Dienstverhältnis der Richterinnen und Richter, Staatsanwältinnen und Staatsanwälte und Richteramtswärterinnen und Richteramtswärter, Richter- und Staatsanwaltschaftsdienstgesetz – RStDG](#)), Federal Law Gazette No. 305/1961.

<sup>13</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

<sup>14</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

<sup>15</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

Other interviewed lawyers rely on the law and opinions to the law provided by the Bar Association. They write such comments together with colleagues and judges or refer to their basic education as lawyers.

With regard to the trainings for non-legal experts, findings are heterogenous. Some experts refer to their basic education at the university. The experts from the Juvenile Court Assistance receive a 2.5 weeks training on the functioning of the prison system. This training is not specially dedicated to the rights of child defendants. It is offered by the prison administration to new staff and new staff members are obliged to participate. In addition, the Juvenile Court Assistance staff is obliged to regular trainings, without specifying the content of these trainings. The training is practically oriented and deals with individual cases. Usually, it comprises the participation in criminal proceedings, which is currently not possible due to the COVID-19 pandemic restrictions. The training works via tandem-systems, whereby newcomers are trained by experienced employees. The training involves the Juvenile Court Act but does not specifically consider the rights of the children. An overview on the Criminal Procedure Code is provided. The probation services have a legal department which offers comprehensive trainings to employees as soon as there is a relevant legal amendment. The trainings are offered following a top-down approach, meaning the legal department informs all heads of departments about the legal amendments and the heads of departments in turn inform their employees.

The Ombudsperson for Children and the Child and Youth Welfare Office have not participated in such trainings.

#### d. Effectiveness of measures / Monitoring

There is no information publicly available on how Austria assesses and/or monitors the effectiveness of the rights of and measures imposed on children specifically in view of the Directive's obligations. No such monitoring reports have been published by the Federal Ministry of the Interior, the Federal Ministry of Justice, or the Juvenile Court Assistance.

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

### a. Legal overview

§ 1 (2) Juvenile Court Act defines juveniles as persons who have reached the age of 14 but have not reached the age of 18 yet and, thus, complies with Article 3 (1) of Directive (EU) 2016/800. In line with Article 3 (2) of Directive (EU) 2016/800, § 1 (2) Juvenile Court Act lays down the obligation to regard a person as a juvenile if there is doubt as to whether he or she has reached the age of 18.

§ 1 (2) Juvenile Court Act was introduced by the EU Criminal Law Amendment Act 2020. The explanatory remarks to the EU Criminal Law Amendment Act 2020<sup>16</sup> explain that this rule applies only if an age determination is not possible after an attempt has been made to determine the age, in particular by assessing the juvenile's statements (*Bewertung der Aussagen*), checking the juvenile's status in the civil registry (*Überprüfungen des Personenstands des Jugendlichen*), conducting documentary research (*dokumentarische Recherchen*), examining other evidence (*sonstige Belege*) and, if all these measures are insufficient, conducting a medical examination.

§ 37a (1) Juvenile Court Act provides for supplementary procedural provisions in respect to the age assessments and stipulates that a physical examination is permissible only if the age determination as described above would be considerably less promising or considerably more time-consuming by other means. Moreover, the physical examination must not be disproportionate to the importance of the case or to the punishment to be expected in case of a conviction. According to explanatory remarks

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<sup>16</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

to the EU Criminal Law Amendment Act 2020,<sup>17</sup> this provision establishes the use of the medical examination as *ultima ratio*.

In an opinion on the draft of the EU Criminal Law Amendment Act 2020, the NGO *Asylkoordination Österreich*<sup>18</sup> criticised the medical age assessment. According to this NGO, the provision is mainly aimed at juveniles who fled from different countries and who are often unable to state their exact date of birth, or do not have any documents with them to prove their age.

If a right enshrined in the above-mentioned provisions is violated, an objection for the violation of rights (*Einspruch wegen Rechtsverletzung*) may be filed according to § 106 Criminal Procedure Code 1975<sup>19</sup>. If the violation of the right had an impact on the proceedings (e.g., wrong composition of the court), this may constitute a ground for nullity.

A relevant article<sup>20</sup> analyses the admissibility requirements for radiological examinations for age assessments. The author explains that imaging procedures of all kinds are physical examinations within the meaning of § 117 Z 4 Criminal Procedure Code. § 37a Juvenile Court Act, as a *lex specialis* to § 123 (1) Z 3 Criminal Procedure Code, also clarifies that the assessment of the age of the defendant on the basis of physical examinations is permissible as a last and proportionate measure. The paragraph also emphasizes the need for the person concerned to cooperate in the conduct of such examinations. The question of whether these examinations may be ordered without the consent of the person concerned is still not conclusively clarified, although this article argues in favour of an order that is not dependent on consent for several reasons.

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

Interviewed judges, lawyers, and prosecutors homogeneously say that criminal judges are responsible for the age assessment. The judges determine the age based on the evidence. Thus, the age assessment is a matter of the judge's assessment of evidence. An interviewed judge reports that they cannot seriously distinguish between a 17 years old person and adults. It would be easier if someone, who displays obvious physical signs of older age, claims to be a minor. In case of no or conflicting evidence, prosecutors or judges will order a medical examination using methods like x-raying the carpus, collarbone, and the root of the teeth. According to an interviewed judge, the child defendants cannot be "forced" to cooperate in the age assessment. They need to give their consent.

Findings indicate that, in criminal proceedings, the age assessment takes place prior to the main trial. Thus, besides determining the criminal liability, the outcome of the age assessment should serve the determination of the applicable law, either general criminal law or juvenile criminal law, and, thus, the appropriate composition of the court. In a second step and indirectly, the age assessment's results are used for the determination of the sentence, as the sentence will be based on either juvenile criminal law or general criminal law. Interviewed prosecutors state that the need for an age assessment based on a medical examination must be balanced, because it is an interference into the child's body. Moreover, interviewees state that the age assessment cannot provide an exact age; it

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<sup>17</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

<sup>18</sup> Asylkoordination Österreich, [Stellungnahme von asylkoordination österreich zum Entwurf des Strafprozessund Jugendstrafrechtsänderungsgesetz 2019 BMVRDJ –S884.066/0006-IV 3/2019 \(162/ME\)](#).

<sup>19</sup> Austria, Criminal Procedure Code 1975 ([Strafprozeßordnung 1975, StPO](#)), Federal Law Gazette No. 631/1975.

<sup>20</sup> Kaiser, N., *Der neue § 37a JGG und die Zulässigkeit radiologischer Untersuchungen zur Altersfeststellung in Jugendstrafverfahren* (The new § 37a JGG and the admissibility of radiological examinations for age determination in juvenile criminal proceedings), in: *Österreichische Richterzeitung*, 2021, volume 1-2, p. 15.

can only provide an age range or an approximate minimum age. An interviewed prosecutor states that the age assessment is only carried out in case of severe offences:

*A: The age is only determined when it comes to really serious offences. When it comes to misdemeanours, the age will not be determined and, in case of doubt, they will decide in favor of the accused and say: we can't clear it up any further. (Austria, Prosecutor)*

*A: Da wird das Alter nur bestimmt, wenn es um wirklich schwere Delikte geht. Wenn es um Kleinigkeiten geht, wird man das Alter nicht bestimmen und im Zweifel zugunsten des Beschuldigten entscheiden und sagen: wir können es nicht weiter aufklären. (Österreich, StaatsanwältIn)*

Since the amendment of the Juvenile Court Act, the age assessment has also been legally regulated, meaning that physical examinations are permissible for determining the age in criminal proceedings against children. However, the age assessment is mainly conducted in asylum proceedings and only rarely in criminal proceedings. If it is carried out during criminal proceedings, then only at a very late stage, but prior to the main trial. Thus, interviewed police officers, and members of the Juvenile Court Assistance do not have practical experiences with the age assessment. If the age of a suspect or an accused person cannot be determined (in the early stage of the proceedings), the younger age, which is mostly the claimed age, is assumed. A police officer reports:

*Q: When does the age assessment take place: before or after the interrogation?*

*A: It is done before the interrogation. If the interrogation must take place beforehand, then the person will be asked according to his/her stated age. If s/he says, for example, that s/he is under 14, then there is no interrogation, but only a questioning with all the rights that an under-14-year-old has. So, if s/he says s/he is not yet 14, then we assume that s/he is. (Austria, Police Officer)*

*Q: Wann erfolgt die Altersbestimmung: vor oder nach der Vernehmung?*

*A: Die erfolgt vor der Vernehmung. Wenn die Vernehmung vorher stattfinden muss, dann wird der/die nach seinem/ihrer angegebenen Alter befragt. Wenn der/die z. B. sagt, er/sie ist unter 14, dann erfolgt keine Einvernahme, sondern nur eine Befragung und mit den ganzen Rechten, die ein/e unter 14-Jährige/r hat. Also wenn er/sie sagt, er/sie ist noch nicht 14, dann gehen wir einmal davon aus. (Österreich, Polizeibeamter/in)*

Other interviewed police officers confirm this way of dealing with defendants whose age cannot be verified at the investigative stage of the proceedings. The police carry out the interrogation immediately; they do not wait for the outcome of the age assessment. However, during the interrogation, they implement the specific procedural rights of child defendants – even if they doubt this young age.

The interviewed lawyers either confirm these findings, or share no information, because the age of their clients (child defendants) was never doubted or assessed by the national authorities.

### c. Discussion of findings

The interview findings indicate that the legal provisions on the age assessment are applied in practice: the age assessment is only carried out if it is relevant for the criminal proceedings, the determination of the criminal responsibility, as well as the applicable law (general criminal law or juvenile criminal law). Relevance is assumed by authorities when the age of criminal responsibility is at stake, and in case of more severe offences. In all other cases of doubt, the younger (claimed) age is assumed and the corresponding procedural rights are provided to the defendants.

The age assessment is carried out prior to the trial. Thus, its outcome is mainly considered in the determination of the applicable law (general criminal law or juvenile criminal law), and not as much for the provision on procedural safeguards for children. Still, the child defendants are provided with

their specific rights as children during the investigative proceedings. This practice is in line with the legal provisions stipulating that, in case of doubt, the minor age is assumed.

The interview findings also indicate that a medical examination is conducted in practice as an *ultima ratio*. In particular, the interviewed prosecutors are aware that the x-rays constitute an interference with the child's body. The other experts state that the medical methods of an age assessment are controversial and do not provide exact findings. Only one interviewee out of 20 states that the child has to give consent to the medical age assessment.

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

#### a. The right to information

##### i. Legal overview

The right to information of children who are suspected or accused of a crime are anchored in the Code of Criminal Procedure, e.g. through § 50 (1) in conjunction with § 49 Criminal Procedure Code. Further provisions are laid down in § 32a Juvenile Court Act, which provides that juvenile defendants have to be informed about:

- the right to notification of the legal representative and to be accompanied by the legal representative to court hearings (§ 38 Juvenile Court Act),
- the right to a necessary defence<sup>21</sup> and to procedural assistance<sup>22</sup> (§ 39 Juvenile Court Act),
- the right to possible exclusion of the public in the main hearing (§ 42 Juvenile Court Act) and to restrictions on the dissemination of sound and image recordings (*Bild- und Tonaufnahmen*);
- the right to have the juvenile's living situation and family situation determined (individual assessment<sup>23</sup> - §§ 43, 48 Z 1),
- the right to a medical examination (§ 37a (2) Juvenile Court Act),
- the right to the restriction of the deprivation of liberty (*Recht auf Begrenzung des Freiheitsentzugs*) and to the use of less severe means (§§ 35, 35a, and §173 (5) Criminal Procedure Code),
- the right to be present at the main hearing (§ 32 (1) Juvenile Court Act),
- the right to special treatment in custody (§§ 36, 58 Juvenile Court Act).

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<sup>21</sup> This is the translation of the German term "Notwendige Verteidigung" and denotes the cases in which the (juvenile) defendant has to be represented by a defence lawyer.

<sup>22</sup> Procedural assistance essentially means that, the juvenile defendant must be assigned a public aid lawyer (*Verfahrenshilfeverteidiger*) free of charge, if the obligation to pay the defence costs would impede the financial livelihood of the juvenile.

<sup>23</sup> Individual assessments take account of the living and family circumstances of the child defendant, including the economic and social background, his development, degree of maturity, as well as all other circumstances that may serve to assess the person and his/her physical, mental, and psychological characteristics (§ 43 (1a) Juvenile Court Act). Social workers of the Juvenile Court Assistance interview the child defendant and the parents or legal guardians to determine the person's living and family circumstances, personal development, and all other circumstances relevant to the assessment. In particular, the aptitudes, abilities, needs, interests, opportunities of development, as well as the entire living conditions are considered. If necessary, psychologists are consulted during the assessment. The assessments by the Juvenile Court Assistance also show which measures are necessary and required to avert dangers or eliminate existing problems.

§ 32a (2) Juvenile Court Act defines in more detail what information has to be provided at which stage of the proceedings.

§ 32a (3) Juvenile Court Act provides that the courts shall check from the first official act whether the information pursuant to § 32a (1) Juvenile Court Act has actually been provided and, if necessary, inform the juvenile accordingly.

§ 36a (1) Juvenile Court Act stipulates that the questioning of a juvenile shall be conducted in a manner that takes into account his or her age, as well as level of development and education. This provision was introduced by the EU Criminal Law Amendment Act 2020 to implement Article 4 (2) of Directive (EU) 2016/800.

If a right enshrined in the above-mentioned provisions is violated, an objection for the violation of rights (*Einspruch wegen Rechtsverletzung*) may be filed according to § 106 Criminal Procedure Code 1975<sup>24</sup>. If the violation of the right to information had an impact on the proceedings, this may constitute a ground for nullity.

ii. Information about procedural rights and safeguards in practice

Children suspected or accused of a crime are informed about their procedural rights by the police prior to the police interrogation. The way of informing them depends on whether they remain at liberty or are deprived of liberty. Children, who remain at liberty, are summoned to the police interrogation in writing. The written summons contains information about the child's procedural rights including the right to legal representation. Children, who are deprived of liberty, are informed immediately upon arrest about the suspicion, the mandatory assistance by a lawyer, and the right to have a person of trust present.

The procedure of informing child defendants is standardised at the police. The legal instructions of defendants of all ages are assisted by a computer programme. This programme ensures for standardised legal instructions prior to the police interrogation. The police draw up a protocol that has to be worked through and the child defendant has to respond point by point to their needs, e.g. for an interpreter or for a legal aid lawyer. According to interviewed police officers, the amended Juvenile Court Act is already implemented in the police system. If the police enter a date of birth, which suggests minor age, the system automatically provides for the specific rights of child defendants. The information on procedural rights is worked through point by point and only after, the form for the interrogation may be opened. According to the interviewed police officers, the children are informed about all their procedural rights. This is ensured by the standardised, computer-assisted system (CCP/AT/P1-4).

*Q: How are juvenile defendants informed of their rights? In writing? Do you explain it to them? What does that look like in practice?*

*A: In practice, we have a computer programme. So, when I have an arrest, I inform him/her right on the spot about his/her rights, what s/he is accused of, and regarding the lawyer, defence lawyer, and confidant. Then, s/he comes here with us and we draw up a protocol that has to be worked through selectively. And the new Juvenile Court Act is already in the system. The [information on procedural rights] is worked through point by point, because otherwise you can't even open the form [for the interrogation]. (Austria, Police Officer)*

*Q: Wie werden die jugendlichen Beschuldigten über ihre Rechte informiert? Schriftlich? Erklären Sie es ihnen? Wie schaut das in der Praxis aus?*

*A: In der Praxis ist es so, dass wir ein Computerprogramm haben. Also wenn ich eine Festnahme habe, dann informiere ich ihn/sie gleich vor Ort, was seine/ihre Rechte sind, was ihm/ihr vorgeworfen wird und bezüglich Rechtsanwalt, Verteidiger und Vertrauensperson. Dann fährt er/sie mit uns her und dann machen wir ein Protokoll auf, das dann punktuell abzuarbeiten ist.*

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<sup>24</sup> Austria, Criminal Procedure Code 1975 ([Strafprozeßordnung 1975, StPO](#)), Federal Law Gazette No. 631/1975.

*Und das neue Jugendgerichtsgesetz ist schon im System drinnen. Das [über die Verfahrensrechte informieren] wird Punkt für Punkt abgearbeitet, weil du ansonsten das Formular [für die Einvernahme] gar nicht aufmachen kannst. (Österreich, Polizeibeamter/in)*

The interviewed police officers also state that they ask the child defendant if they understand the information provided. In case, they do not understand, the police repeat the information using an easier language. As soon as the child defendant says that s/he has understood each right, they decide whether they want to testify or not. Then, the police write down what was being said, print it out, and hand it out to the defendant to read it and pose questions, if necessary. If there are no questions, the defendant signs the written record of the information about their rights and the interrogation starts.

With regard to the specific needs of children, language barriers are dealt with by means of interpretation services. The need for interpreters is clarified at the beginning and an interpreter is provided. If an interpreter is present, s/he receives the instructions on the procedural rights in writing. One interviewee emphasises that the police have an interest that the defendants understand what is going on and their rights.

The police adapt the language applied during the information about their rights: the police talk differently to a 17 years old person than to a 15 years old person, and also consider their specific needs. The police officers notice by observing the reactions of the child defendant if they understand what is being said. Interviewed police officers had only few experiences with mentally disabled child defendants or defendants with delayed maturity. Whenever they doubt that a child defendant has the capacity to follow the legal instructions, they inform the prosecutors and request them to order an expert opinion. The police do not assess the criminal responsibility of a suspect. For children with learning difficulties, the mandatory presence of the defence lawyer is a safeguard.

The child specific additional procedural rights compared to adult defendants are related to the mandatory presence of actors during the police interrogation, i.e. defence lawyers, persons with parental responsibility, and persons of trust (e.g. probation officers). These specific rights and safeguards ensure the understanding and implementation of the children's procedural rights. Lawyers are available for any questions of the child defendant. Defence lawyers may explain slowly and in easy language. Interviewed police officers emphasise that – since the amendment of the Juvenile Court Act that implemented Directive (EU) 2016/800 – no child is interrogated unaccompanied at the police. Thus, the presence of a defence lawyer, person with parental responsibility or a person of trust, ensures the implementation of the procedural safeguards and the understanding of their rights.

Simultaneously, it takes time to access these actors (parents, person of trust, lawyer) and to have them present during the police interrogation. This waiting for the arrival of these delays the interrogation and entails challenges for the police. Despite these delays, the police will in particular wait for the presence of “official persons”, like the defence lawyer or the probation officer. Otherwise, the police would face legal consequences, namely the fact that the interrogation would be nullified. However, if the child defendant's parents cannot attend or are not available, the police will not delay the interrogation.

While the information provided by the interviewed police officers suggest that informing child defendants about procedural rights and safeguards works well, some interviewed lawyers oppose this view. Interviewed lawyers indeed acknowledge the standardised, computer-assisted procedure of informing about procedural rights. However, lawyers doubt that the child defendants may effectively understand and use the information provided. The following reasons are given for this assessment: child defendants are incriminated and nervous when they are at the police, particularly if it is the first time they get in contact with the police. Moreover, police officers apply a highly formalised, computer-assisted approach when informing children and the officers lack understanding of specific needs and concerns of child defendants. Other interviewed lawyers emphasise that the police indeed care that

child defendants understand their procedural rights, explain them in easy language, and ask if the children have any questions.

One interviewed lawyer observes differences in the behaviour of the police with regard to the social background of a child. Children of middle-class families, who have a strong social network and attend school, are treated better than children, who live on the streets and are addicted to drugs. A similar view is shared by an interviewed probation officer. He observes racial / ethnic profiling among police officers. He experienced that when informing child defendants with a migration background about their rights, the police was a little bit impatient when these children did not immediately understand the provided information. The police rather pushed the migrant child defendants to sign that they had understood their rights. Thus, the child defendants with a migration background need to pro-actively take their time to read the written record of the police interrogation in detail and ask questions in case they do not understand parts of it. This view is also supported by an interviewed member of the Juvenile Court Assistance (JCA). She says:

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

*A: [...] Wir haben schon generelle Erfahrungen und sehen Unterschiede wie von der Polizei mit den Jugendlichen umgegangen wird [wie sie informiert werden], also das haben wir schon. Es gibt schon immer wieder – das ist punktuell, aber das merkt man sich aufgrund der Heftigkeit – schon, dass die Jugendlichen über rassistische Beschimpfungen berichten, von deutlich abwertenden Verhalten ihnen gegenüber. Das berichten sehr häufig Jugendliche mit Migrationshintergrund. Die Jugendlichen berichten auch oft von oft sehr traumatisierenden Erlebnissen mit der Polizei, vor allem wenn die Cobra involviert ist. Aber man muss dazu sagen, dass das dann meistens Delikte sind, wo es auch um Waffen geht und so Sachen, also es ist ein Stück weit auch nicht verwunderlich. Aber die Interventionen der Cobra sind schon auch sehr heftig, ja? Also wir haben dann schon Jugendliche da, die wirklich deutliche Folgen davon tragen. (Österreich, JugendgerichtshelferIn)*

All five interviewed judges, prosecutors, and three interviewed non-legal experts (-6) do not have experience on how the police inform children about their procedural rights. Thus, they could not provide information on this.

### iii. Information about the general conduct of the proceedings

According to two interviewed police officers, the police do not inform the child defendants about the general conduct of the proceedings. The police only inform about the accusation and the procedural rights. The police inform children who are deprived of liberty about the next procedural steps in relation to the arrest. Moreover, children are informed about their right to appeal and request (exculpatory) evidence. Children are only informed that a truthful and comprehensive confession is a mitigating factor for the sentences. In this vein, the police inform the defendants, that they are not responsible for punishing / sentencing them but may rather help them in the proceedings. Thus, the police inform the child defendants about their own role in the criminal proceedings – investigating crimes and clarifying what has happened.

Information about the general conduct of the proceedings is provided by defence lawyers, probation officers, and the Juvenile Court Assistance (JCA). These actors inform the child defendants in detail about the conduct of and the defendants' role during the proceedings. The lawyers and experts inform the child defendants orally in the course of a talk. The concrete procedures differ depending on the actors involved. The Juvenile Court Assistance, who carry out the individual assessment (see C.5), inform the child defendants about their own tasks during the criminal proceedings, i.e. the purpose of the individual assessment, its conduct, and the usage of the its findings at the court trial. Moreover, the JCA inform the children, that the individual assessment will not be used for the criminal investigations but for the determination of the sentences and the provision of support measures. However, anything they tell the JCA will be documented and forwarded to the judge. Moreover, the children are informed that the support of the JCA ends with the individual assessment. The JCA do not actively check if the child defendants understand what they are being told. They rely on their "feeling": if the child defendant appears lost or if they notice that the child defendant cannot follow them anymore, the experts explain it in more detail. Moreover, in case of language barriers, the individual assessment is interrupted and postponed to another date to assure the presence of an interpreter. Everything is documented for reasons of transparency.

The probation services apply a similar procedure. The probation officers explain to the defendants the reason for the criminal proceedings (accusation), the current stage of the proceedings, and their procedural rights. Moreover, the child defendants receive folders about the probation services, which contain information in easy language and in the most commonly spoken foreign languages. If necessary, the probation office seeks support from interpreters. Video-interpretation services are available in all languages and on demand. Moreover, the probation officers go through the legal texts with the child defendants and explain their meaning to them in a more colloquial and easier to understand commentary. Thus, the conduct of the proceedings, as well as the child defendants' duties and rights are explained to child defendants orally, in writing, and in the framework of repeated meetings. Experience shows that one meeting is rarely enough to assure the understanding of the conduct of criminal proceedings. An interviewed probation officer explains:

*Q: How do you check whether the young people - when they are with you - have understood their rights and the general procedure?*

*A: By discussing it with them routinely, so even if they say they have understood everything, we discuss it again. And it often turns out that they as well as their caregivers, parents, have not understood it. So, the conversation is always the first part, so to say, no matter if it is about the mediation of community service, or compensation for crimes, or someone has ordered probation assistance, diversion or, in the majority of cases, it is a court order. At the beginning, we always clarify the young people's understanding of what is at stake, whether they understand their rights and obligations and what is possible on the part of the probation service. (Austria, Probation Officer)*

*Q: Wie überprüfen Sie, ob die Jugendlichen – wenn sie dann bei Ihnen sind – ihre Rechte und den allgemeinen Verfahrensablauf verstanden haben?*

*A: In dem wir es mit ihnen besprechen und zwar routinemäßig, also auch wenn sie sagen, sie haben alles verstanden, besprechen wir es noch einmal. Und es stellt sich häufig heraus, dass sowohl sie selber als auch ihre Bezugspersonen, Eltern es eben nicht verstanden haben. Also das Gespräch ist sozusagen immer der erste Teil, egal ob es um die Vermittlung gemeinnütziger Leistungen geht oder Tausgleich oder jemand Bewährungshilfe angeordnet hat, diversionell oder in der überwiegenden Anzahl ist es ja eine gerichtliche Anordnung. Wir klären da am Anfang immer das Verständnis der Jugendlichen ab, worum es geht, ob sie ihre Rechte und Pflichten verstehen und was von Seiten der Bewährungshilfe möglich ist. (Österreich, BewährungshelferIn)*

Apart from this general information on the conduct of the proceedings, the children are also informed in detail about the probation services, and the mutual rights and duties. In this regard, the most important duties of child defendants are cooperating with and meeting the conditions of probation officers. The probation officers also inform the children about the consequences of disobeying these rules.

One interviewed member of the Youth Welfare Authority states that the process of informing children about the general conduct of criminal proceedings is in the responsibility of defence lawyers.

The defence lawyers' way of informing child defendants about the general conduct of the proceedings depends on several factors. First, it depends on the beginning of their mandates, e.g. which procedural acts are at stake during the beginning of their mandate. If the mandate starts early in the proceedings, meaning prior to the police interrogation, the defence lawyers are the children's entry point to the criminal proceedings. This means that the defence lawyer is the first person to inform the child defendant in detail about the accusation and his/her procedural rights. Contrary, if the mandate starts only during the police interrogation, an interviewed lawyer states that the client's behaviour is observed while being informed by the police about their procedural rights. When the interviewee assumes that the client does not comprehend the provided information, s/he assesses the relevance of the information for the current stage of the proceedings. If the interviewee considers the information provided by the police but not understood by the child as relevant to the police interrogation, the interviewee interferes and explains to the child that this particular right is very important, because it means X and Y. Moreover, the way how defence lawyers inform their child clients depends on the clients' level of interest. Interviewed defence lawyers notice that children are not so much interested in receiving information about the general conduct of the proceedings. They are more interested in receiving information about the sentences and if they remain at liberty or not. In these cases, the defence lawyers rather inform the children's parents (holders of parental responsibility). The presence of a parent or person of trust is also an important safeguard for defence lawyers to ensure that the general conduct of the proceedings is understood. Even if the children are not open to receive information about their procedural rights, the parents usually are and explain it to the child defendants later on. Thus, it is important to ensure that at least the parents or persons of trust understand the procedural rights. This defence lawyer explains:

*Q: Do you feel that young people understand the information about their procedural rights?*

*A: Well, a 14 or 15-year-old is usually not thinking about their procedural rights. That's why I explain them to the person of trust and I assume that they also talk about it with their children. But I doubt that a 14-year-old fully understands the Criminal Procedure Code and the Juvenile Court Act. (Austria, Defence Lawyer)*

*Q: Haben Sie das Gefühl, dass die Jugendlichen die Informationen verstehen über ihre Verfahrensrechte?*

*A: Na ja, so ein 14, 15-jähriger macht sich in der Regel andere Gedanken als über ihre Verfahrensrechte. Deshalb werden sie ja auch eindringlich der Vertrauensperson erklärt und ich gehe davon aus, dass die dann auch mit ihren Kindern darüber reden. Aber dass jetzt der 14-jährige die Strafprozessordnung und das Jugendgerichtsgesetz vollinhaltlich versteht, bezweifle ich. (Österreich, StrafverteidigerIn)*

Another interviewed lawyer observes that children do not want to have their parents present during their talk with the lawyer. Thus, this lawyer does not force the child to have the parents present. The defence lawyer is a stranger to the child client, so building a relationship of trust between defence lawyer and client is very important for this whole process. Further, the client has to talk about very personal issues. The interviewee knows that the child defendants tend to talk more openly if the parents are not present. However, it depends on the relationship between the children and their parents. According to the interviewee, usually the relationships are not that good.

Defence lawyers apply the following means to verify the child's understanding: role play, meaning the lawyer "plays" a police officer and they simulate an interrogation; letting the child defendants repeat the information provided in their own words. However, even if the child defendants state that they understand all the information, defence lawyers can never completely verify if the child actually understands all aspects:

*Q: Do you check if the young people have understood the information you have given them?*

*A: That is a difficult question, because of course you ask if they have understood it. But the reaction of the young people is usually 'yes, of course I understood it', and I can't actually check the content. We recently had one, who certainly also had certain psychological limitations. Of course, he always answered each of these questions with: yes, yes, he understood. But testing the young person: what does the public prosecutor do now? Of course I don't do that. (Austria, Defence Lawyer)*

*Q: Überprüfen Sie ob die Jugendlichen die Informationen, die Sie ihnen gegeben haben, verstanden haben?*

*A: Das ist eine schwierige Frage, weil natürlich fragt man ob sie es verstanden haben. Aber die Reaktion der Jugendlichen ist dann meistens: ja, natürlich habe ich es verstanden und ich kann das eigentlich nicht inhaltlich prüfen. Wir haben gerade vor Kurzem einen gehabt, der sicherlich auch gewisse psychische Einschränkungen hatte. Der hat natürlich auf jede dieser Fragen immer mit: ja, ja geantwortet, dass er es verstanden hat. Aber eine Prüfung des Jugendlichen: was macht jetzt der Staatsanwalt? Das mache ich natürlich nicht. (Österreich, StrafverteidigerIn)*

It has to be said that the interviewed defence lawyers are mainly privately paid for defence lawyers. Only one interviewed lawyer works as a legal aid lawyer who is paid by the state. As will be shown later on in this report, privately paid for defence lawyers tend to be more engaged and committed than legal aid lawyers. This is due to the comparably weak remuneration of legal aid lawyers and the fact that legal aid representation is assigned to lawyers by the Bar Association. Thus, these lawyers cannot select clients / cases; they are obliged to legally represent a certain number of defendants per year.

b. Right to have the holder of parental responsibility informed

i. Legal overview

The Juvenile Court Act lays down the participation rights and possibilities of the legal representative, including the right to be informed in § 38. In order to implement Article 5 of Directive (EU) 2016/800, the EU Criminal Law Amendment Act 2020 introduced § 38 (1a) JGG, which now provides that the information received by the juvenile pursuant to § 32a Juvenile Court Act must also be brought to the attention of the legal representative as soon as possible. For the individual rights of the juvenile defendant to information, see above (T3 - Right to information).

If a right enshrined in the abovementioned provisions is violated, an objection for the violation of rights (*Einspruch wegen Rechtsverletzung*) may be filed according to § 106 Criminal Procedure Code 1975<sup>25</sup>.

ii. Informing the holders of parental responsibility

The findings indicate that the police inform the holders of parental responsibility prior to the police interrogation. In case the children remain at liberty, they and their parents are summoned to the police interrogation. The summons in writing contain information about the procedural rights of the child defendants. Thus, the holders of parental responsibility receive the summons and the information about the procedural rights.

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<sup>25</sup> Austria, Criminal Procedure Code 1975 ([Strafprozeßordnung 1975, StPO](#)), Federal Law Gazette No. 631/1975.

If the children are deprived of liberty, the police inform the holders of parental responsibility via telephone about the accusation, the arrest, and the reasons for the arrest. Moreover, the police request the holders of parental responsibility to come to the police station and be present during the police interrogation.

At times, the police visit the child defendants at the home of their parents and bring the prosecutor's arrest warrant with them. They usually come early in the morning, so that the parents are at home. Then, the police explain to the parents the accusation and the reasons for arrest, and inform them about the need for an interrogation at the police station. The parents are told that the police interrogation is scheduled in two hours. The police will not start conducting the interrogation until the parents or the lawyer have arrived.

*A: If we apply for an arrest order and get it from the court, then we arrest that person. Of course, the parent is informed, this has to be so. Because most of the time we are at home, we pick up the person from their home and, then, the parents are informed, also about the fact that a lawyer has to be involved. I say, 99% of the time the parents have their own lawyer, then s/he is also informed. Then they are arrested and before anything is started - if it takes a long time for the lawyer to come - we start with the personal data. But we don't get down to the offence until the lawyer arrives. And the legal guardian is always allowed to be present. (Austria, Police Officer)*

*A: Wenn wir eine Festnahmeanordnung beantragen und vom Gericht bekommen, dann wird diese Person von uns festgenommen. Es wird natürlich das Elternteil verständigt, muss ja sein. Weil meistens sind wir dann zu Hause, wir holen den/die von zu Hause ab und dann werden die Eltern informiert, auch darüber, dass ein Rechtsanwalt beizuziehen ist. Ich sage, zu 99% haben die Eltern einen Hausrechtsanwalt, dann wird der/die auch verständigt. Dann wird der/die festgenommen und bevor mit irgendwas begonnen wird – wenn das sehr lange dauert, bis der Anwalt/die Anwältin kommt – dann fangen wir mit den persönlichen Daten an. Aber zur Sache geht es erst, wenn der Rechtsanwalt/die Rechtsanwältin da ist. Und der Erziehungsberechtigte darf immer dabei sein. (Österreich, Polizeibeamter/in)*

An interviewed ombudsman for children states that the police is obliged to inform the individuals holding parental responsibility about the child's rights as suspects or accused, but they do it only poorly. The police inform them but do not explain it to them. Interpretation services are available for the police interrogation of the child defendant, but the interviewee does not believe that they are available for informing the parents. According to the interviewee's experience, parents receive information indeed, but they sometimes do not understand the language employed or the meaning. The interviewee demands to simplify the official language, in particular because the percentage of migrants living in Vienna is high. Multilingual information in simple language is helpful, so that people understand what it is all about. This holds true for the information about the child's rights and the remedies.

Interviewed judges state that the participation of the child's guardian is regulated by the Juvenile Court Act. The participation of the guardians at the later stages of the proceedings, namely after the investigations are finished, means the following: Guardians receive a copy of the indictment in combination with information on remedies. There are formal templates available for the information about the rights and remedies, which are sent as an annex to the indictment. If it is only a criminal complaint, then the parents / guardians will receive a copy of the criminal complaint together with the summons to a main trial. Further, formal templates for the summons to a main trial are available, containing all relevant procedural safeguards. These formal templates are ready to use for the judges. Thus, they ensure standardised information about procedural rights and remedies.

- iii. Having a nominated/designated person informed

If the parents can be identified, but cannot come to the interrogation, it is acceptable to have an older (adult) sibling present. However, this person of trust must be approved by the person with parental responsibility. As soon as the parents approve the person of trust, the police do not care whether the person of trust is a relative or not. In case the child defendant is already supported by the probation services, the probation officer may be present as a person of trust too. According to the probation services, the police is obliged to assess if a defendant needs to be supported by the probation services. If yes, the probation services must be informed by the police too.

According to the interviewees, there are usually no barriers for the police to identify the holders of parental responsibility – even if these are not the parents. However, the exception are instances where child defendants' parents do not live in the city where they were accused of having committed a crime, meaning that the parents live in another EU country or have no regular place of residence. Interviewees from Vienna state that, sometimes, children from Lower Austria or the Czech Republic commit crimes in Vienna. In these cases, the identification of holders of parental responsibility is challenging. If the child cannot name a person of parental responsibility or a person of trust, the police call the Youth Welfare Authority. A representative of the Youth Welfare Authority is obliged to represent the child defendant in case the parents cannot fulfil this function. Thus, a member of the youth welfare office is nominated and designated by the authorities (the guardianship court) to perform the task of parental responsibility.

An interviewed member of the Youth Welfare Authority, who is holder of parental responsibility for children accused in criminal proceedings states that the Youth Welfare Office is informed about a police record. A social worker of the Youth Welfare Authority accompanies the child defendant to the police interrogation. The interviewee is informed about the offence the child defendant is accused of and current stage of the investigative proceedings. Shortly after being informed, s/he receives the summons to the main trial. The interviewee then assesses whether a defence lawyer is involved and the child is legally represented. The interviewee does not receive information on whether and how the child defendant was informed about their rights.

Interviewed prosecutors say that, in emergency cases, the police may interrogate the child defendant without the presence of the holders of parental responsibility or a person of trust. However, then, the parental responsibility is taken over by a defence lawyer. In practice, a lawyer on call would then have to be summoned. The amendment of the Juvenile Court Act (JCA) has the objective to avoid the child defendant being alone at a police interrogation. A 15-year-old person should not be alone with an adult police officer. Thus, the law provides for the presence of parents or a person of trust. Further, if this is not possible, a defence lawyer needs to be present. If there is also no defence lawyer available, the interrogation needs to be audio-visually recorded. This view is supported by an interviewed defence lawyer and two judges.

An interviewed probation officer identifies reaching the person having parental responsibility during the night as a challenge. Often, an accused person gets caught during night hours and official acts (interviews) need to take place during the night. It is more difficult to reach the Youth Welfare Authority during the night. The interviewee observes that the police indeed call the responsible Youth Welfare Authority but for example not the accommodation, where the child lives. The child might have a person of trust in the accommodation. However, the police do not inform the accommodation, even if they know where the accommodation is. Still, the interviewee notices that the social workers in accommodations for unaccompanied minors take preventive measures by providing the minors with their contact details cards. The social workers recommend the children to forward their contact details to the police in case they get into trouble. The interviewee says:

*[...] what I always see is that the police call the competent authority but not the competent accommodation. If it's an unaccompanied minor, they don't automatically try to reach someone in their accommodation who might be a person of trust and inform them, not even if they know*

*where the accommodation is. However, the social workers in the accommodations for unaccompanied minors often provide legal information as a preventive measure. They say to the unaccompanied minors: if there is something with the police, you have my business card, you give it to the police and they should call me. (Austria, Probation Officer)*

*[...] das was ich dann schon immer sehe ist, dass die Polizei zwar die zuständige Behörde anruft, aber nicht die zuständige Unterkunft. Wenn es ein unbegleiteter Minderjähriger ist, dann bemüht man sich nicht automatisiert darum, in seiner Unterkunft tatsächlich jemanden zu erreichen, der vielleicht eine Vertrauensperson ist und zu informieren, auch nicht, wenn man weiß wo die Unterkunft ist. Wobei hier oft von Seiten der Sozialpädagogen in den Unterkünften für unbegleitete Minderjährige schon präventiv eine Rechtsauskunft durchgeführt wird. Die sagen zu den unbegleiteten Minderjährigen dann: wenn es etwas gibt mit der Polizei, da hast du meine Visitenkarte, die gibst du dann der Polizei und die sollen mich dann anrufen. (Österreich, BewährungshelferIn)*

Moreover, the interviewee says that children are usually under shock when they are at the police station. The child defendants are glad if the situation is over quickly. If the Youth Welfare Office is the holder of parental responsibility and not the parents themselves, the parents are not informed about the events. Moreover, if the parents are divorced or live separately, only the parent with whom the child lives is informed by the police. Interviewed lawyers have no experience with instances, in which the holders of parental responsibility could not be reached.

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

The interviewees say that the authorities are obliged to inform the holders of parental responsibility in the same way that they are obliged to inform the child defendants. Thus, the holders of parental responsibility have the right to receive all information the child receives. Moreover, the holders of parental responsibility have a right to be present during the procedural acts, such as police interrogation or court trial. According to the findings, the police seem to care the most for the actual implementation of these rights. The police never talk alone with a child defendant. Even if the child defendant prefers talking alone and confidentially with the police. Police officers observe that some child defendants are ashamed of what they have done. They want to make a confession without anybody else hearing it. However, there is no exception made by the police, because, if the police interrogated a child defendant without the presence of the parents or a lawyer, the court would not recognise it or the interrogation would have to be audio-visually recorded.

Apart from the police interrogation, the practical involvement of parents or a designated person differs and depends on various factors related to the social background of the child defendants and their families. Interviewees observe that, in some cases, there is a strong involvement of the parents, and parents and their children communicate a lot, while in other cases, the parents do not appear even if they are summoned. Thus, it strongly depends on the parents' level of engagement.

An interviewed probation officer identifies several factors, influencing the involvement of parents or persons of trust in the criminal proceedings: If the person is an unaccompanied asylum seeker, the parents are not at all involved in the overall proceedings. These child defendants have other persons of trust or persons with parental responsibility involved. In case the parents are residents in Austria, the interviewee would estimate that two thirds of them come and get involved. Still, there are also parents, who are residents in Austria, but do not at all engage themselves in the proceedings. These are usually parents, who have several social problems, e.g. a criminal record, abuse drugs or alcohol, the Youth Welfare Authority is already involved, etc. Moreover, some parents do not access their post mails. Some persons do not pick up their paper mail, they rather organise their lives online. Some child defendants would expect summons to be delivered per SMS or WhatsApp. Thus, the interviewee's organisation is currently developing an app to facilitate the communication between the child defendants and the authorities via the probation services by virtual means, rather than post mails.

This experience with overwhelmed parents is supported by an interviewed police officer and an interviewed prosecutor. Both state that some parents take little interest in the children, whether they go to school or to the park. Moreover, these parents also have little means of dealing with their children. They simply do not know where their children are. Some parents cannot even name their children's school.

Interviewees mention that the parents' participation is most important during the court trial. The presence of the parents is important for several reasons: first, the child defendant feels more comfortable when the parents or another person of trust is present; second, it is easier for the judge to impose alternative measures to detention if s/he observes a strong family network behind the child defendant. Moreover, the presence of parents (holders of parental responsibility) at the court trial is important, as guardians may use remedies also against the will of their children. However, interviewed judges observe that parents show only a low level of involvement in the overall proceedings and the court trial. One judge states that it is more likely that parents are absent during court trials than present. If they are present, they do not really actively participate. Another judge traces this passive presence of parents during the court trial back to language barriers. Interpreters are only available for the child defendants and not for their parents. Thus, parents, who do not understand a word of the criminal proceedings, cannot effectively participate. The same interviewee acknowledges that the Youth Welfare Authority in Vienna is very well equipped for dealing with unaccompanied minors and representing them as holders of parental responsibility in criminal proceedings. The authority has implemented a separate department for unaccompanied minors. The members of this department are very engaged and participate in the criminal proceedings conducted against their clients. According to the interviewee, they also show up at the court trials.

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

§ 36a (2) Juvenile Court Act provides that the questioning of the juvenile defendant by the criminal police of the public prosecutor's office shall – in addition to a protocol record pursuant to § 96 Criminal Procedure Code – also be recorded in audio and visual form if the juvenile defendant does not have a defence lawyer, legal representative or other person of trust present.

§ 36a (3) Juvenile Court Act deals with situations in which audio and video recording is not possible due to an insurmountable technical problem. In such cases the questioning may be documented exclusively in minutes (§ 96 Criminal Procedure Code), provided reasonable efforts have been made to remedy the problem and a postponement of the questioning would be unfeasible due to the urgency of the investigation.

According to § 36a (4) Juvenile Court Act, the data of an audio and video recording shall be kept only as long as necessary for the purposes of the criminal proceedings. They shall be deleted immediately after the proceedings have been discontinued or after the judgement has become final, but, in any case, five years after the day of the recording. If the criminal police have made the recordings, the data shall be deleted at the criminal police after their transmission to the public prosecutor's office.

The explanatory remarks to the EU Criminal Law Amendment Act 2020<sup>26</sup> explain that the overall aim of such an approach is a practicable solution, which ensures that, on the one hand, there is no risk of a legal protection deficit and, on the other hand, long-term and expensive data storage is prevented.

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<sup>26</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

If a right enshrined in the abovementioned provisions is violated, an objection for the violation of rights (*Einspruch wegen Rechtsverletzung*) may be filed according to §106 Criminal Procedure Code 1975<sup>27</sup>.

ii. Implementation in practice

The interviewees state that police interrogations may be audio-visually recorded if no defence lawyer and no person of trust is present. However, the findings of the research clearly indicate that the possibility to audio-visually record police interrogations is hardly ever made use of in practice. Police officers justify this by reporting that there has not been any need for the audio-visual recording yet, as there have always been other actors (lawyer, parents, person of trust) present during the police interrogation. Moreover, the interviewed police officers state that the police stations will receive the equipment for the audio-visual recordings only in April 2021. Trainings of police officers on the usage of this equipment will take place in April/May 2021.

The interviewed non-legal experts are aware of the legal provisions concerning the recording of the police interrogations. Also, these experts state that they have never heard that it was applied in practice.

The interviewees' views on the audio-visual recording of police interrogations are heterogenous. Some are in favour of it, while others are not. Those in favour elaborate that the recordings secure the implementation of the child defendants' procedural rights during the police interrogation, even if no support person is present. The audio-visual recording is a safeguard against misunderstandings or misbehaviour. The audio-visual recording fosters an immediate police interrogation, even if neither a defence lawyer nor a person of trust or parent can be physically present and the child defendant wants to testify / confess. Moreover, the recording of police interrogations would relieve (on-call) lawyers of the burden to be physically present during this investigative act.

An interviewed lawyer argues against the audio-visual recording of police interrogations involving child defendants. S/He refers to the intimidating effect of the audio-visual recording, in particular on a child. The interviewee says:

*Q: Is the presence of a defence lawyer mandatory at the first police interrogation?*

*A: It is for crimes, but not for misdemeanours. We have this differentiation. What I don't understand is that the questioning can be recorded audio-visually in the case of misdemeanours if no person of trust and no lawyer are present. This ensures that the rights of the juvenile are protected. In my opinion, however, this is counterproductive when I think that I am now recording a 14- or 15-year-old without a person of trust and without a defence lawyer for an offence with a sentence of less than three years. Although I am basically in favour of sound and visual recording, especially in the case of adults, in the presence of a defence lawyer. That makes sense, because it also ensures that the legal instruction has taken place properly. [...] But in the case of a juvenile who has stolen a roll with sausage in the supermarket, an audio and visual recording is completely excessive, only intimidates the juvenile, and there is a possibility that s/he will talk too much, which s/he would otherwise not do. So, I think that's just intimidation if there's no person of trust and no defence lawyer present during the interrogation. So, I don't support that. (Austria, Defence Lawyer)*

*Q: Ist die Anwesenheit eines Rechtsbeistandes bei der ersten polizeilichen Einvernahme verpflichtend?*

*A: Bei Verbrechen schon, bei Vergehen nicht. Wir haben da diese Differenzierung. Was mir nicht eingeht, ist dass die Einvernahme audio-visuell aufgenommen werden kann bei Vergehen, wenn keine Vertrauensperson und kein Rechtsanwalt anwesend sind. So wird sichergestellt, dass die Rechte des Jugendlichen gewahrt werden. Das ist meiner Ansicht nach aber kontraproduktiv,*

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<sup>27</sup> Austria, Criminal Procedure Code 1975 ([Strafprozeßordnung 1975, StPO](#)), Federal Law Gazette No. 631/1975.

*wenn ich daran denke, dass ich jetzt eine/n 14, 15 jährige/n ohne Vertrauensperson, ohne Verteidiger/in bei einem Vergehen in einem Strafraum unter drei Jahren, da jetzt aufzeichne. Obwohl ich grundsätzlich Ton- und Bildaufnahme befürworte, insbesondere bei Erwachsenen, also in Anwesenheit eines Verteidigers. Das macht schon Sinn, weil dadurch ja auch gewahrt wird, dass die Rechtsbelehrung ordnungsgemäß stattgefunden hat. [...] Aber bei einem/einer Jugendlichen, der/die im Supermarkt eine Wurstsemmel gestohlen hat, ist eine Ton- und Bildaufnahme völlig überzogen, schüchtert den/die Jugendliche/n nur ein und es besteht die Möglichkeit, dass er/sie sich irgendwo nur reinredet, was er/sie sonst nicht machen würde. Also ich glaube, das ist nur eine Einschüchterung, wenn keine Vertrauensperson und kein Verteidiger da ist. Also befürworte ich das nicht. (Österreich, StrafverteidigerIn)*

The police officers appear to be reluctant with regard to the audio-visual recording of interrogations. They do not perceive the audio-visual recording as a safeguard against accusations for the violation of procedural rights. It rather appears that there is an uncertainty among them on how to use the equipment. Moreover, they may feel as if their work is monitored.

#### d. Discussion of findings

The findings indicate that the child defendants' right to information is implemented by means of a standardised, computer-assisted procedure, which takes place prior to the police interrogation. The police inform the child defendants orally and in writing about each procedural right. This process works right by right and the child defendants must state for each right whether and how they use it. This is again documented by the police. Thus, the implementation of the right to information is a formalised procedure at the police. The findings also indicate that the police inform the child defendants about their procedural rights and the accusation. They do not inform the children about the general conduct of the proceedings. There are additional actors in place, who implement the child's right to information about the procedural rights and the general conduct of the proceedings. These are defence lawyers, probation officers, and the Juvenile Court Assistance. Defence lawyers and probation officers inform children in the course of a detailed talk about their rights and the general conduct of the proceedings. They explain these aspects in a child-friendly manner and involve the children's holders of parental responsibility – also in the sense of a safeguard to ensure understanding. The Juvenile Court Assistance's way of informing children is more formalised than the defence lawyers' approach, but less formalised than the one used at the police. The Juvenile Court Assistance informs the child defendants in detail about its mandate, as well as the purpose and content of the individual assessment. Moreover, they explain the usage of the assessment's findings to the child defendants. The Juvenile Court Assistance informs the child defendants orally and in writing in the framework of the summons to the individual assessment. The authorities of the criminal justice system, in particular the police officers and judges, tend to believe that the children understand the information provided. The interviewed defence lawyers, non-legal experts, and prosecutors tend to doubt this.

The holders of parental responsibility receive the same information as the child defendants. The holders of parental responsibility receive the information about the accusation, the reasons for arrest, if relevant, and the child's procedural rights and remedies. They are summoned in writing or orally to the police interrogation and have the right to be physically present during the police interrogation. Moreover, the holder of parental responsibility is involved and informed by the defence lawyers of their children. The participation of the holders of parental responsibility during the individual assessment is also crucial, as they may provide detailed information about the child's socio-economic background. Moreover, the presence of the parents during the main trial is perceived as important by several interviewees, as it shows the judge that the child defendant is well supported.

Thus, the findings indicate that the authorities indeed act in line with their obligation to inform the holders of parental responsibility. In practice, the involvement of holders of parental responsibility –

in particular of parents – depends on themselves. According to the interviewees, some parents really care about their children and are strongly engaged. For some interviewed lawyers this is even annoying, as it entails a lot of work for them to calm these parents down. Also interviewed police officers report that parents sometimes interfere with the investigations, as they face difficulties to believe that their children are suspected of crime. On the other hand, there are parents who do not get involved at all. They do not show up at procedural acts, even if they are summoned. Interviewed experts explain this behaviour referring to problematic circumstances in the lives of these parents, e.g. drug abuse, having care obligations towards many children. Other experts explain that some parents have already given up on their children.

In situations, in which the holders of parental responsibility cannot be identified or are accused of a crime too, the interviewee's information differs: some interviewees say that the Youth Welfare Authority takes over the rights of parents, while others say that defence lawyers do. In case a child defendant is already receiving probation assistance, the police are obliged to inform the probation services. The probation officers are then involved in the proceedings as support persons. In case the parents cannot participate in procedural acts, other persons of trust may be nominated by the child, e.g. a sibling or any other person. However, the parents first need to give their consent.

With regard to the audio-visual recording of the questioning, the interviewees are aware of its preconditions: Police interrogations are audio-visually recorded in case the child remains at liberty and neither a defence lawyer, nor a holder of parental responsibility or a person of trust is present. However, there has not yet been a need for an audio-visual recording, as these actors were always present. Moreover, at the time of the fieldwork, the police stations were just equipped with the relevant devices and instructions in the framework of trainings. Interviewees mention the following benefits of the audio-visual recording: It is a safeguard for the implementation of the child defendant's procedural rights. It is also a safeguard for the police officers against accusations for violating the defendant's procedural rights. It enables immediate police interrogations in cases, in which the mandatory presence of lawyers and support persons cannot be achieved and, consequently, it relieves defence lawyers of the burden to be present. Counterarguments comprise the incriminating effect of an audio-visual recording on child defendants and an increased workload for judges, who must watch the whole interrogation within the framework of evaluating the evidence. The interviewed police officers show reluctance and uncertainty towards employing audio-visual recordings.

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

##### **a. Legal overview**

A juvenile must be represented by a defence lawyer during his or her questioning according to §37 (1) Juvenile Courts Act, if he/she has been arrested or immediately brought before a court, if a reconstruction of the scene of the crime takes place, or if an identity parade is carried out. According to § 37 Juvenile Courts Act, the involvement of a defence lawyer is necessary also for a confrontation. § 37 (1) Juvenile Courts Act makes clear that juvenile defendants should never be exposed to a questioning situation alone in such cases. § 37 (1) Juvenile Courts Act is to be understood as a provision further specifying § 164 Criminal Procedure Code according to the explanatory remarks to the EU Criminal Law Amendment Act 2020<sup>28</sup>. In the other cases of questioning, e.g. when no deprivation of liberty takes place, the juvenile must be accompanied either by a defence lawyer or a person of trust (as defined in § 37 (2) Juvenile Courts Act). Finally, in cases where the support of a juvenile during his/her questioning by the criminal police or the public prosecutor's office cannot be achieved by a physically present person (defence lawyer or person of trust), the questioning has to be audio-visually recorded.

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<sup>28</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

The EU Criminal Law Amendment Act 2020<sup>29</sup> also amended §39 Juvenile Court Act to implement Article 6 of the Directive. § 39 (1) Juvenile Court Act now enumerates all cases of necessary defence (*notwendige Verteidigung*). Moreover, § 61 (1) Criminal Procedure Code contains further cases of necessary defence (namely in case of pre-trial detention, in proceedings for a placement in an institution for mentally disturbed offenders under § 21 Criminal Code, in certain main trial cases and for certain appeal proceedings). § 39 Juvenile Court Act builds on the differentiation between crimes (*Verbrechen*, intentional acts punishable by life imprisonment or imprisonment for more than three years) and misdemeanours (*Vergehen*, all other punishable acts) as laid down in § 17 Criminal Code. This is to prevent that the police officer has to decide on the spot whether or not a serious factual or difficult legal situation exists (according to Article 6 (6) of Directive 2016/800).

In juvenile criminal proceedings for a crime (§ 39 (1) Z1 Juvenile Court Act), necessary defence shall be provided throughout the entire proceedings. This includes the preliminary proceedings (*Ermittlungsverfahren*) and, thus, also the first police questioning. As soon as a defendant is to be informed about the preliminary proceedings against him/her for a crime or about the suspicion of a crime, as well as about his/her rights in the proceedings (§ 50 Criminal Procedure Code), a defence lawyer has to be provided.

In juvenile criminal proceedings for a misdemeanour, a differentiation is made for reasons of practicability according to the explanatory remarks to the EU Criminal Law Amendment Act 2020.<sup>30</sup> In the majority of all criminal proceedings for a misdemeanour, the preliminary proceedings already end with the first report of the criminal police. Since § 37 (1) Juvenile Court Act already ensures that a juvenile defendant may not be questioned by the criminal police and the public prosecutor's office without accompaniment, having a defence lawyer as a requirement does not appear to be proportionate in these cases according to the explanatory remarks to the EU Criminal Law Amendment Act 2020.<sup>31</sup> However, if further investigations are initiated after receipt of a report by the criminal police, complex proceedings are assumed and a defence lawyer has to be provided according to § 39 (1) Z1 Juvenile Court Act.

§ 5 Z12 Juvenile Court Act further provides that a custodial sentence or measure involving deprivation of liberty may only be imposed on a juvenile, if the person was represented by a defence lawyer during the main hearing.

§ 39 (2) Juvenile Court Act stipulates that, if a defence lawyer is not otherwise provided for, the juvenile defendant shall be assigned a defence lawyer *ex officio*, which has to be paid by him/her (public defender, *Amtsverteidiger* according to § 61 (3) second sentence Criminal Procedure Code); if the obligation to pay the defence costs would impede the financial livelihood of the juvenile or if the prerequisites of § 61 (2) first sentence of the Criminal Procedure Code are met, the juvenile defendant must be assigned a legal aid lawyer (*Verfahrenshilfeverteidiger*) *ex officio*.

If the juvenile is not represented by a defence lawyer in the main hearing, this constitutes a ground for nullity according to §39 (1) Z4 Juvenile Court Act. If other subjective procedural rights of the juvenile defendant are violated, an objection for the violation of rights (*Einspruch wegen Rechtsverletzung*) may be filed according to §106 Criminal Procedure Code 1975<sup>32</sup>.

Case law: At the District Court of Leopoldstadt, a main hearing was held on 28 July 2020, in which the juvenile defendant was not represented by a lawyer. The Supreme Court ruled in [12Os118/20z](#) that

<sup>29</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

<sup>30</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

<sup>31</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

<sup>32</sup> Austria, Criminal Procedure Code 1975 ([Strafprozeßordnung 1975, StPO](#)), Federal Law Gazette No. 631/1975.

the conduct of the main hearing against the juvenile defendant without representation by a defence lawyer violated § 39 (1) Z4 Juvenile Court Act. The Supreme Court set aside the judgement and referred the case to the Leopoldstadt District Court for a new hearing and decision.

An article<sup>33</sup> explains these newly introduced provisions on "necessary defence".

b. Assistance by a lawyer and legal aid

According to interviewees, the EU Directive 2016/800 was implemented restrictively in Austria. According to them, the Directive requests the assistance by a lawyer even in misdemeanours, e.g. stealing a chewing gum. However, this information is not true. Recitals 14 and 16 of Directive (EU) 2016/800 stipulate that this Directive should not apply in respect to certain misdemeanours – only in case the suspected or accused child is deprived of liberty. In line with this provision, in Austria, only in the case of crimes or if the prosecution takes investigative measures after a misdemeanour, the physical presence of a defence lawyer is mandatory. The provision of legal assistance and legal aid in practice differs depending on the fact that the child is or is not deprived of liberty.

i. Children, who are arrested by the police

The police may immediately arrest a child defendant upon an order of the prosecution, which takes up to 48 hours. Moreover, the police may deprive child defendants of their liberty for an immediate interrogation. Taking the child defendant for an immediate interrogation is an alternative measure to arrest, as the deprivation of liberty only lasts as long as the interrogation (2-3 hours).

As already pointed out in the legal overview (section C.4 a.), the **physical presence** of a defence lawyer during the police interrogation is mandatory in these two cases of deprivation of liberty. This is practically implemented as follows: the police drive to the child's place of residence and take the arrest order from the public prosecutor's office with them. Usually, the parents open the door and the police inform them about the arrest or the immediate interrogation and, at the same time, about the need for a defence lawyer. The police thereby usually ask whether or not there is a lawyer of choice, who needs to be paid by the child defendant / their parents. According to the interviewed police officers, the families generally do not have a lawyer and cannot afford one. Then, the police take the child defendant to the police station and call the emergency number for defence lawyers. Consequently, the on-call legal service provides a defence lawyer, who comes to the police station to be physically present during the police interrogation.

ii. Children, who remain at liberty

For children, who remain at liberty, but need to be interrogated by the police, **legal representation is mandatory**, but not the physical presence of a defence lawyer during the interrogation. In these cases, the police summon the child and their parents to an interrogation also by visiting them in their place of residence. Thereby, the child defendant and parents are informed that they need either a lawyer of choice or a legal aid lawyer. According to the interviewed police officers' experience, a legal aid lawyer is needed in most of these cases. It would be the parents' task to apply to the prosecutor for a legal aid lawyer. However, interviewed police officers state that the parents usually do not apply for a legal aid lawyer. Thus, in practice, the police apply to the prosecutor for the provision of a defence lawyer. The prosecutor appoints a legal aid lawyer, forwards the lawyer's contact details to the police, and, then, the police contact him or her to arrange an appointment with the child defendant. If the defence lawyer had a meeting with the child defendant before the interrogation, no physical presence of the defence lawyer is needed during the interrogation.

iii. Challenges

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<sup>33</sup> Schwaighofer, K., Neuerungen bei der Verteidigung durch das Strafrechtliche EU-Anpassungsgesetz 2020, in: Anwaltsblatt 1/2021, p.19.

The mandatory physical presence of defence lawyers during police interrogations **entails challenges for the police investigations** and extends the duration of the deprivation of liberty for child defendants. Particularly cost-free lawyers from the on-call legal service cannot come immediately. Thus, the police must wait with the interrogation and keep the child defendant deprived of liberty until the lawyers arrive. Moreover, police officers mention challenges in relation to cases involving more than one child defendant, e.g. robbery is a crime that often involves more defendants, who need to be immediately interrogated by the police. Each of the child defendants needs a different lawyer - to avoid any conflict of interest. In most cases, cost-free lawyers need to be organised via the on-call legal service. However, at least in Styria, there are only two on-call lawyers available for the whole province. Thus, if the police catch three child defendants at 11pm and need to interrogate them, they must wait for the arrival of one of the two lawyers, otherwise the interrogation must not start. Due to the conflict of interest, the other child defendants need to be interrogated at a later point in time, when a different on-call lawyer is available for each of them. This entails a huge workload for the police, and it also hinders the police investigations, as the interrogations are delayed. It may also hinder the immediate release of some of these child defendants, including those who were rather bystanders than involved in the act, as this would only become evident during the interrogations.

*Q: Approximately how long does it take until the on-call lawyer arrives?*

*A: Oh, it varies a lot. Often lawyers from out of town are on duty, so that's where we have the problem [with the journey]. Then it also depends on the time: if you want to have a lawyer at 11 p.m., it's very difficult. We have already received refusals, like: he can't come now. Then of course the investigation stops, which is very unfortunate for us, because then we have to wait until the next day; we can't question anyone from the juveniles and we can't investigate.*

*Q: Wie lange dauert es ungefähr, bis dieser Journaldienst da ist? (Austria, Police Officer)*

*A: Oh, das ist sehr unterschiedlich. Oft haben auswärtige Anwälte Journaldienst, die gar nicht in unserer Stadt sind, da haben wir das Problem [mit der Anreise]. Dann kommt es auch auf die Uhrzeit an: wenn du einen Anwalt um 23 Uhr haben willst, ist es sehr schwierig. Da haben wir auch schon Absagen bekommen, so auf die Art: er kann jetzt nicht kommen. Dann stehen die Ermittlungen natürlich, was für uns sehr ungut ist, weil dann müssen wir bis auf den nächsten Tag warten, wir können niemanden von den Jugendlichen befragen und wir können nicht ermitteln. (Österreich, Polizeibeamter/in)*

The mandatory presence of a lawyer during identity parades (i.e. confrontation between victim/witness and more suspected offenders) entails similar challenges for the police and their investigations. In case no lawyer is available immediately, the police investigations are blocked. Postponed identity parades are even more challenging for the police investigations because the victim's/witness's memory starts to fade. A victim gets confronted not only with the suspected offender during an identity parade, but also with other persons of a similar physical appearance and the victim needs to identify the offender out of those. If there is too much time in between the act and the identity parade (until the lawyer arrives) and the child defendant went home and has changed clothes in the meantime, it is almost impossible for the victim/witness to identify them.

*Q: Does the lawyer have to be present at actions like an identity parade?*

*A: Yes, according to the new law, s/he must be present. But this is also a problem for me, because such a victim-offender confrontation should actually be done as quickly as possible. You will know yourself: when you [as a victim/witness] see someone, the memory of him/her fades relatively quickly and if the confrontation is blocked, because no lawyer has time, e.g. at 11 p.m., a robbery, a difficult matter, and the lawyer only comes the next day at 10 a.m., then of course the circumstance can arise that the victim is no longer completely sure. (Austria, Police Officer)*

*Q: Muss der Anwalt auch bei so Handlungen wie eine polizeiliche Gegenüberstellung dabei sein?*

*A: Ja, nach dem neuen Gesetz muss der/die dabei sein. Ist aber auch für mich wieder ein Problem, weil so eine Opfer-Täter-Gegenüberstellung sollte eigentlich so schnell wie möglich gemacht*

*werden. Sie werden selber wissen: wenn Sie jemanden sehen, die Erinnerung daran verblasst relativ schnell und wenn jetzt die Gegenüberstellung blockiert ist, weil kein Anwalt Zeit hat, z. B. um 23h, ein Raub, eine schwierige Sache, und der Anwalt kommt erst am nächsten Tag um 10h, dann kann natürlich der Umstand eintreten, dass sich das Opfer nicht mehr ganz sicher ist. (Österreich, Polizeibeamter/in)*

Interviewed lawyers critically discuss the use of the on-call legal service for the mandatory physical presence of a defence lawyer during police interrogations of child defendants. According to an interviewed lawyer, the **on-call legal service is implemented for an initial telephone counselling** of defendants, who are arrested by the police. However, since the implementation of Directive (EU) 2016/800, this service has been used for the right of the child defendants to the presence of a lawyer during the police interrogation. According to the interviewee, it makes a great difference for defence lawyers on on-call duty if they “only” counsel a defendant via telephone or if they must drive to the police station to be physically present. Thus, lawyers on on-call duty cannot plan their day. The interviewee has signed off from the on-call legal service, among others, for exactly this reason.

*Q: Compared to adult defendants, do the authorities use special measures to ensure that juveniles are represented by a lawyer from the very beginning, before the interview?*

*A: Yes, they call the legal journal service. There are some possibilities, but they are not per se aimed at guaranteeing the presence of a lawyer during the questioning of juvenile suspects. The Bar Association said: this is coming [the mandatory presence of lawyers during police questioning of juvenile suspects] and the colleagues will cooperate. Colleagues are on call and if the investigating authorities have arrested someone, they have the possibility to contact a lawyer. A preliminary assessment of the case was then made by telephone, and it was determined whether the lawyer should come by or not. And this service has been used for the right of the juvenile accused to a lawyer at the initial interview. And now the police call the on-call lawyer and say: I have a [minor]; you have to go there. And the colleagues thought to themselves: oh dear, oh dear, if I continue to be on on-call duty, then someone will call me, and I will have to go there. And that makes a difference, because I have to be able to plan my day and if I can give the accused information by phone, then it makes it easier, and I don't have to drive somewhere. And that was one of the reasons why I even signed off myself from the on-call service. (Austria, Defence Lawyer)*

*Q: Im Vergleich zu erwachsenen Beschuldigten, wenden die Behörden besondere Maßnahmen an, um sicherzustellen, dass die jugendlichen von Anfang an, also vor der Einvernahme, von einem Anwalt vertreten sind?*

*A: Ja, die rufen den rechtsanwaltlichen Journaldienst an. Da gibt es einige Möglichkeiten, die aber nicht per se darauf ausgerichtet sind, die Anwesenheit eines Rechtsanwaltes bei einer Einvernahme von jugendlichen Beschuldigten zu garantieren. Da hat man halt [von Seiten der Rechtsanwaltskammer] gesagt: das kommt jetzt [die verpflichtende Anwesenheit von Rechtsanwälten bei polizeilichen Einvernahmen von jugendlichen Beschuldigten] und die Kollegen werden schon mitmachen. Da haben Kollegen Bereitschaftsdienst und wenn die Ermittlungsbehörden jemanden festgenommen haben, dann hat es die Möglichkeit gegeben, dass die einen Anwalt kontaktieren. Da wurde dann eine telefonische Vorab einschätzung des Falles vorgenommen und eruiert, ob der Rechtsanwalt vorbeikommen soll oder nicht. Und diese Dienstleistung ist für das Recht der jugendlichen Beschuldigten auf einen Anwalt bei der Ersteinvernahme herangezogen worden. Und jetzt ruft die Polizei den Rechtsanwalt in Bereitschaftsdienst an und sagt: ich habe da eine/n [Jugendliche/n], du musst hinfahren. Und da haben sich die Kollegen gedacht: oje, oje, wenn ich jetzt bei diesem Journaldienst weiter dabei bin, dann ruft mich einer an und ich muss dort hinfahren. Und das macht schon einen Unterschied, weil ich muss ja meinen Tag planen können und wenn ich dem Beschuldigten telefonisch Auskunft geben kann, dann macht es das natürlich einfacher und muss nicht mit dem*

*Auto irgendwo hin düsen. Und das ist ein Mitgrund dafür gewesen, warum ich mich selbst sogar abgemeldet habe, vom anwaltlichen Bereitschaftsdienst. (Österreich, StrafverteidigerIn)*

Thus, according to the interviewed lawyers, cost-free legal assistance during the police interrogation is secured for child defendants. However, due to the use of the on-call legal service, which is conceptualised as telephone counselling to secure the immediate presence of a defence lawyer, there are challenges for defence lawyers on on-call duty. Another interviewed lawyer – also from Vienna – opposes this assessment. According to the respondent, the on-call legal service works well in Vienna. Thus, the lacking availability of defence lawyers for immediate interrogations is no excuse for the police in Vienna. However, the interviewee is not sure whether or not this is also true for the other Austrian provinces.

Moreover, the current system of legal aid lawyers works as follows: each lawyer, who is a member of the Bar Association, has the duty to represent defendants (children and adults), who cannot afford a defence lawyer in criminal proceedings. This mandatory representation as legal aid lawyer takes place regularly in the framework of a schedule and applies independently from the field of specialisation of the lawyer. Thus, knowledge and experience with criminal law is not necessarily required for legal aid representation in criminal proceedings. A lawyer who is specialised in property law is equally obliged to regular legal representation in criminal proceedings as a lawyer who is specialised in criminal law. Moreover, the remuneration for this assigned legal representation in criminal proceedings is low. Thus, the current system of legal aid lawyers is based on solidarity among all members of the Bar Association. According to an interviewed probation officer, this system of solidarity among members does not work well in practice. Law firms rather tend to instruct their trainees to take over the requested legal aid representation. The quality of the defence then depends on the commitment of the individual trainee. If the trainee is not motivated, the legal aid will be generally fulfilled, but the participation of the lawyer and the representation of the child defendant will not be effective.

iv. Access to cost-free legal assistance

The mandatory legal representation starts as soon as the child is to be informed about the accusation and its role as accused in criminal proceedings. Despite the challenges for authorities and defence lawyers, the mandatory presence of defence lawyers during the police interrogation is secured in practice. Defence lawyers must be physically present in case the child defendant is accused of a crime that is sanctioned with more than three years imprisonment or if they are deprived of liberty. According to an interviewed prosecutor, the law provides for exceptions, whereby interrogating children without a lawyer is possible in very urgent cases. This applies only if there is imminent danger (kidnapping, someone placed a bomb) or if there are investigative tactical considerations (e.g. to prevent the destruction of large quantities of narcotic drugs). In such cases, the police may interrogate the child defendant in the street without a lawyer and without audio-visual recording. However, then, the police have to prove that it was an urgent case and the interviewees cannot remember any case, in which this has actually happened yet.

According to the findings, **no challenges are related to the provision of cost-free legal assistance for child defendants**. For children, who cannot afford a lawyer themselves, cost-free legal assistance is provided by the state. Thereby, a distinction must be made between on-call lawyers, who immediately come to the police interrogation, and legal aid lawyers – both are cost-free for the child defendant. On-call lawyers are available immediately, but only for the initial police interrogation. The provision of legal aid lawyers takes some days. However, these lawyers then represent the children throughout the remainder of the proceedings. In terms of the costs for the on-call defence lawyers, on-call defence lawyers themselves assess whether the child defendants or their families can pay for this immediate service. If this is not the case, the Bar Association pays an hourly rate, which is lower than the “normal hourly rate” of defence lawyers. While the entitlement of adult defendants to legal aid is assessed before legal aid is provided, this is not the case with child defendants. The authorities rather

immediately organise and provide a legal aid lawyer. The authorities thus assume that children cannot afford defence lawyers themselves. If it turns out at a later stage of the proceedings, that the child defendant's family could indeed afford a lawyer, the state will reclaim the money.

Thus, child defendants who cannot afford a defence lawyer are in practice represented by different lawyers. The on-call lawyer represents them at the immediate police interrogation and the legal aid lawyer at the later stages of the proceedings.

### c. Effective participation of a lawyer

Basically, the interviewees mention two features of an effective participation of a lawyer. The first is access to information about the case in time, orally, and in writing. Thus, lawyers need to be informed timely, orally by the investigative authorities, and in writing by access to the case file. The second is being physically present during all procedural acts, starting from a private and confidential talk with the child defendant prior to the first questioning and continuing until the conclusion of the main trial. The interviewed lawyers mention additional aspects of an effective participation. These are access to application rights (access to information, access to the case file, to request the taking of evidence, request interpretation services, raise an objection for violation of the law). For another interviewed lawyer, an effective participation of a lawyer also encompasses and necessitates that the lawyer is allowed to intervene during questionings at the police or hearings at the court.

Interviewed non-legal experts consider the perspective of children when thinking about their understanding of an effective participation of lawyers. They point out that the appointed lawyers should arrive in time, inform the child defendant in detail about the reasons for the accusation, and consider the needs of the child defendant. The lawyers should offer realistic perspectives in terms of the proceedings and the expected outcome, instead of promising too much. The lawyers should inform the child in detention about when they will come and visit again, which should be at least prior to all appointments with a judge. The lawyers should inform the child defendants about any changes in the proceedings, which are due to the police investigations. Prior to pre-trial detention, the lawyers should inform the child defendant about what will happen there, where they will be placed, etc.

All interviewees of all professional groups confirm that a defence lawyer can actually participate effectively in the proceedings. According to the interviewed authorities, lawyers receive information about the case, have access to the case file, and are present in all stages of the proceedings, including the investigative process, as well as the court hearings.

However, lawyers are not allowed to intervene during police interrogations. They are only allowed to pose additional questions after the police posed their questions. Thus, for defence lawyers, who want to effectively participate, it needs tact to achieve a discussion in the interrogation situation, to talk to the police, and to intervene in the interrogation situation itself. But such intervention is not provided for by law and, in the view of one lawyer, this impedes effective participation. Effective participation of defence lawyers is easier to achieve during later stages of the proceedings – in particular during the main trial. During the main trial, defence lawyers may pose questions at any time, they may apply for evidence and witnesses, and they may intervene.

An interviewed probation officer mentions that an effective participation of a lawyer requires receiving information about the allegations in writing before the police interrogation starts. Moreover, the information about the allegations need to be discussed confidentially with the client before the questioning. According to the interviewee, this is rarely the case. When the lawyer arrives at a questioning of a child defendant, the questioning is started right away. If the police have already waited for the lawyer and the lawyer has finally arrived, the police do not want to wait any longer. Thus, lawyers need to insist to read the allegations and to talk to the child confidentially before the interrogation. According to the interviewee's experience, on-call lawyers are more likely to not insist on reading the allegations than privately paid for and assigned lawyers. Lawyers on on-call duty are more likely to want to have the interrogation and the meeting done as soon as possible. In these

situations, both the defence lawyer and the police have an interest to finish the interrogation as quickly as possible. Due to the on-call duty and the low remuneration, the lawyers are less likely to request reading the allegation. Due to the challenges for the criminal investigations that are caused by the mandatory physical presence of defence lawyers during the police interrogation, the police do not want to wait any longer with starting the interrogation.

*Q: As an expert, what do you understand by effective participation of a lawyer in the context of criminal proceedings against juveniles?*

*A: To be able to get information in advance, to be informed about the allegations before the questioning and to have the possibility to discuss them with the client confidentially. But also, to be able to see the allegations in writing beforehand.*

*Q: In your opinion, is this the case with juveniles at the moment?*

*A: Rarely. When the lawyer comes, they [the police] start with the questioning right away. If you have already waited so long for the lawyer, you don't want to wait any longer with the questioning when the lawyer arrives. But that also depends on the personality of the lawyers. If they say: ok, I insist that I hear the allegations and that I can talk to the client confidentially before the questioning, then of course that will be done. If the lawyers do not insist on it and want it to be over as quickly as possible, because it is not very attractive for them economically, then both sides - the police and the lawyers - have an interest in doing it as quickly as possible. (Austria Defence Lawyer)*

*Q: Was verstehen Sie als Experte unter einer effizienten Teilnahme eines Anwalts im Kontext von Strafverfahren gegen Jugendliche?*

*A: Dass man sich vorab informieren kann, aufgeklärt zu werden was es für Vorhaltungen gibt vor der Einvernahme und die Möglichkeit, sich mit dem Mandanten vertraulich zu besprechen. Aber auch die Vorhaltungen vorweg schriftlich einsehen zu können.*

*Q: ist das aus Ihrer Sicht zur Zeit in der Praxis gegeben bei Jugendlichen?*

*A: Selten. Wenn der Anwalt kommt, dann wird gleich gestartet. Hat man jetzt eh schon so lang auf den Anwalt gewartet, da mag man nicht mehr warten mit der Einvernahme, wenn der Anwalt dann da ist. Aber auch das hängt wieder von der Persönlichkeit der Anwälte ab. Wenn die sagen: ok, ich bestehe darauf, dass ich die Vorhaltungen erfahre und mit dem Mandanten vor der Einvernahme vertraulich reden kann, dann wird das natürlich gemacht. Wenn die Anwälte das nicht einfordern und eh selber auch wollen, dass das möglichst schnell wieder vorbei ist, weil das jetzt für sie auch ökonomisch nicht wahnsinnig attraktiv ist, dann haben beide Seiten – die Polizei und die Anwälte – ein Interesse, das möglichst schnell zu machen. (Österreich, StrafverteidigerIn)*

Interviewed judges, prosecutors, and non-legal experts support the view that some state-paid legal aid lawyers are not as committed to effectively participate in the criminal proceedings as privately paid lawyers. However, the interviewees emphasise that this view does not apply to all state-paid legal aid lawyers – some of them are indeed very committed.

An interviewed member of the Youth Welfare Authority opposes this assessment and shares a personal positive experience with legal aid lawyers:

*Q: How do legal aid lawyers participate in the proceedings?*

*A: If a legal aid lawyer is appointed, the juveniles are very well accompanied, because I have already had very good legal aid lawyers who have really been extremely committed, who have also brought appeals against the decisions and where the sentence was then lifted. And we had a case, in which a conditional sentence was pronounced and then changed into a diversion with community service, and I really have to say that some of them are very committed. (Austria, Social Worker, Youth Welfare Authority)*

*Q: Wie nehmen Verfahrenshilfverteidiger am Verfahren teil?*

*A: Wenn ein Verfahrenshilfeverteidiger bestellt wird, dann sind die Jugendlichen schon sehr gut begleitet, weil ich hab wirklich schon sehr gute Verfahrenshilfeanwälte gehabt, die sich wirklich extrem eingesetzt haben, auch Rechtsmittel eingebracht haben, gegen die Entscheidungen und wo das Strafausmaß dann aufgehoben wurde. Und wir hatten da einen Fall, wo eine bedingte Strafe ausgesprochen wurde und das ist dann abgeändert worden in eine Diversion mit Sozialstunden und ich muss wirklich sagen, die sind teilweise sehr engagiert. (Österreich, SozialarbeiterIn, Kinder- und Jugendhilfe)*

Even if good experiences with committed legal aid lawyers were made, there exist negative experiences, rumors, and assumptions, according to which legal aid lawyers would not provide an effective legal representation. Thus, some parents of child defendants organise a privately paid lawyer of choice, as they assume that their children are only well represented by them. According to an interviewed probation officer, these are high financial costs, especially for families with a low socio-economic background:

*Q: Would you like to report any challenges related to the effective participation of lawyers?*

*A: What is sometimes a burden are young people who come from poor financial backgrounds and that the parents then - in the hope that a self-chosen defence lawyer will increase the chances to get better sentences or no sentences at all - are financially burdened by this. This is something that comes up again and again in the discussions, these feelings of guilt that the young people then have. I believe that this is a challenge for many young people. But, on the other hand, I think there is also concern, because there is often this myth: if I don't have a star lawyer of my own choosing, my chances of being treated well in court decrease. (Austria, Probation Officer)*

*Q: Möchten Sie irgendwelche Herausforderungen im Zusammenhang mit der effektiven Partizipation von Anwälten berichten?*

*A: Was schon manchmal eine Belastung ist, sind Jugendliche, die aus schlechteren finanziellen Verhältnissen kommen und dass die Eltern dann – in der Hoffnung, dass ein selbstgewählter Verteidiger dann doch die Chancen erhöht, bessere oder gar keine Strafen zu bekommen - dadurch finanziell belastet werden. Das kommt schon immer wieder in den Gesprächen, also diese Schuldgefühle, die die Jugendlichen dann haben. Ich glaube, dass das eine Herausforderung für viele Jugendliche ist. Aber ich glaube dann schon auch auf der anderen Seite schon auch die Sorge, weil oft dieser Mythos herrscht: wenn ich keinen selbstgewählten Staranwalt habe, sinken meine Chancen, dass ich eine gute Behandlung vor Gericht erfahre. (Österreich, BewährungshelferIn)*

However, experts suggest a higher remuneration and a different system of legal aid to ensure an effective participation of defence lawyers, who are cost-free, for child defendants. The current system obliges all lawyers – independent from their specialization – to take over a certain amount of legal aid cases. Thus, an effective participation and legal representation depends on the lawyer's individual experience with criminal law and motivation. Thus, interviewees suggest the establishment of a pool of highly motivated, committed, and specialised defence lawyers, who are nominated for legal aid cases and remunerated appropriately.

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

The interviewees emphasise the importance of applying an easy language and explaining the children the proceedings in a child-friendly manner. This is in conflict with applying an academic juristic language. Some child defendants have difficulties to accept adults as authorities, others face difficulties in understanding that they committed a criminal offence (e.g. being a bystander of a criminal act and supporting the offender). An interviewed judge gives an example of how s/he communicates with child defendants during the trial:

*Q: Are there any special measures for young people to ensure that they can participate effectively in the process? That their views are heard.*

*A: Basically, there is no difference to adults. Adults also have to be instructed, have to understand what is at stake. Of course, it can be a little bit youth-friendly language to translate words like forced, which we know from legal jargon, by saying: 'did you take away his/her mobile phone?' A typical situation is, for example, three young people circling another young person in the park and saying: 'give me the mobile phone'. And s/he gives the mobile phone and then they take the mobile phone and leave. Then, the accused tells me in court: 's/he gave it to me, I didn't do anything'. An adult is more likely to understand that s/he did something wrong. To a young person you have to explain: 'Yes, why do you think s/he gave it to you?' And then s/he says: 'S/he was probably a bit scared'. And then I ask: 'Why do you think s/he was afraid? Probably because there were three of us. And then I say: and that's the point, that you scared him/her'. And that's how you explain it to a young person. (Austria, Judge)*

*Q: Gibt es irgendwelche besonderen Maßnahmen für Jugendliche, die sicherstellen, dass sie effektiv am Verfahren teilnehmen können? Dass ihre Sichtweisen gehört werden.*

*A: Also grundsätzlich gibt es da keinen Unterschied zu Erwachsenen. Auch Erwachsene sind zu belehren, haben zu verstehen worum es da geht. Ein bisschen kann es natürlich jugendgerechte Sprache sein, dass man – ja – Worte, wie abgenötigt, die man aus dem juristischen Jargon halt kennt, übersetzt, indem man sagt: hast du ihm das Handy weggenommen. So eine typische Situation ist z. B. drei Jugendliche umkreisen im Park einen anderen Jugendlichen und sagen: gib mir das Handy. Und der gibt das Handy her und dann nehmen sie das Handy und gehen wieder. Dann sagt der Beschuldigte mir vor Gericht: Er hat es mir ja gegeben, ich habe ja nichts gemacht. Ein Erwachsener versteht das eher, dass er da was Falsches gemacht hat. Einem Jugendlichen muss man dann halt erklären: Ja warum glaubst du, dass er es dir gegeben hat? Und dann sagt er: Wahrscheinlich hatte er ein bisschen Angst. Und dann frage ich: Was glaubst du warum er Angst hatte? Wahrscheinlich, weil wir zu Dritt waren. Und dann sage ich: und darum geht es, dass ihr ihm Angst gemacht habt. Und so erklärt man das halt bei einem Jugendlichen. (Österreich, RichterIn)*

Furthermore, a relationship of trust has to be established between defence lawyers and children who need representation in criminal proceedings. While some interviewed lawyers observe that the presence of the parents may hinder this relationship of trust, others explicitly include the parents in the building of a trustworthy relationship. In practice, it may strongly depend on the relationship between the child and the parents.

With regard to informing children about their procedural rights and the general conduct of the proceedings, interviewed lawyers adapt themselves to the individual information needs of child defendants. According to the interviewees' experiences, not all child defendants want to be informed in detail. Child defendants are mainly interested in receiving information about the consequences they have to expect (penalty, deprivation of liberty), but not about all procedural steps and the actors involved.

Another interviewee mentions that defence lawyers must not be judgemental with child defendants. They need to apply a solution-oriented approach and develop the best way out of the criminal proceedings. This interviewee additionally emphasises the advantage of using support services already in the pre-trial proceedings. If a child for instance is in therapy or goes to drug counselling sessions, it is easier to convince judges that the child will not commit a crime again.

#### e. Confidential and private consultations and meetings

The findings suggest that confidential and private consultations and meetings are provided by the police prior to the interrogation of arrested defendants. However, according to the experiences of interviewed lawyers and probation officers, the police do not offer these talks, the lawyers must rather

request them and, sometimes, even insist on them. As already reported, usually lawyers from the on-call legal service represent children at this stage of the proceedings. These lawyers usually represent the children only in this early procedural stage, as, later on, legal aid lawyers will be provided for the children. Moreover, the on-call legal service is not well remunerated. Thus, it is rather unlikely that lawyers from the on-call legal service will request the confidential and private consultation with arrested defendants prior to the first police interrogation. The information provided by the interviewed police officers contradicts this finding. According to them, defence lawyers are offered an up to 15 minutes private talk with child defendants who are deprived of liberty before the police interrogation starts. The police officers state that they are obliged by law to offer this private talk. Police officers report that the criminal investigations do not benefit from this right of child defendants to a private talk with the defence lawyer prior to the interrogation. Usually, the defence lawyers advise the clients to make use of their right to remain silent.

*Q: So, do I understand correctly, the biggest challenges for the police with access to legal aid lawyers are related to child defendants, who remain at liberty, because the proceedings are so protracted until the defence lawyer comes?*

*A: Yes, because it drags on and, in the case of arrests, this change in the law is not an advantage for the police, because most of the child defendants sit there with a lawyer and say they won't say anything. From the police's point of view, it's bad, I say, because we also talk to them reasonably when there's no lawyer, we're not inhumane. In the past, we often talked to the accused. At first, they said they didn't want to say anything. Then you talk about trivial things and, then, you say again: Hey, believe me, I have this, this, this [evidence] and it's really better for you if you testify, because it can have a mitigating effect on the sentence. Then, usually, they came out with: ok, I want to say: so, and so it was. Now, as a rule, especially in the case of arrests, the legal journal service comes, they don't have access to the files. They come, they see the files lying there, they come and say: we won't say anything. (Austria, Police Officer)*

*Q: Also verstehe ich das Recht, die größten Herausforderungen für die Polizei mit dem Zugang zu Pflichtverteidigern liegen im Freifussbereich, weil sich die Verfahren so in die Länge ziehen, bis der Verteidiger kommt?*

*A: Ja, weil es sich in die Länge zieht und bei Festnahmen ist es halt aus der Polizeiwarte kein Vorteil, diese Gesetzesänderung, weil die meisten dann mit Anwalt dasitzen und sagen, sie sagen nichts. Für die Polizei, aus der Sicht heraus gesehen, ist es schlecht, sage ich jetzt einmal, denn wir reden ja auch mit denen vernünftig, wenn kein Anwalt da ist, wir sind ja keine Unmenschen, und früher haben wir halt oft mit den Beschuldigten geredet. Zuerst sagten sie, sie wollen nichts sagen. Dann redet man halt über belanglose Dinge und dann sagt man noch einmal: Hey, glaub mir, ich habe das, das, das [Beweise] und es ist echt besser für dich, wenn du aussagst, denn es kann sich strafmildernd auswirken. Dann ist in der Regel gekommen: ok, ich möchte sagen: so und so war es. Jetzt ist es in der Regel, besonders bei Festnahmen, weil dann der rechtsanwaltliche Journaldienst kommt, der hat ja keinen Akteneinblick. Der kommt, der sieht die Aktenordner da liegen, der kommt und sagt: wir sagen nichts. (Österreich, Polizeibeamter/in)*

The strategy to make use of the right to remain silent during this initial procedural stage is confirmed by some interviewed lawyers.

Children who are transferred to pre-trial detention are assigned a legal aid lawyer, who replaces the on-call lawyer. The legal aid lawyers visit the children in the detention facility, and may talk in private. According to an interviewed member of the Juvenile Court Assistance, the equipment in the visiting rooms would allow for audio surveillance. However, it must not be used during child defendants' talks with their defence lawyers. The defence lawyers may always visit the defendants, e.g. before any investigative act or questioning is conducted. Thus, it depends on the defence lawyer's engagement whether or not such meetings take place. The only interviewed legal aid lawyer reports that children deprived of their liberty in pending trials excessively make use of their possibility to contact their

lawyers. The interviewee, as a legal aid lawyer, visits his/her clients in prison prior to the main trial. If the interviewee has no access to his/her client's file, s/he only sees him/her during the main trial. However, at least the client's readiness to testify is documented in the pre-trial detention document. If the defendant testifies, the interviewee asks the judge about the threatened sentence. If the defendant remains silent, the interviewee formally requests the release from detention, but also meets the defendant before the detention review hearing. Apart from that, the interviewee has regular contact with his/her clients via telephone. S/He has never heard about challenges or restrictions for juveniles in detention when it comes to meeting their defence lawyer.

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

The reported experiences and approaches to the cooperation with the child's holder of parental responsibility are heterogenous. Some interviewed lawyers extensively communicate and cooperate with the parents, as the parents are the safeguards for understanding the information about the accusation, the conduct of the proceedings, and the next procedural steps. Children are more unlikely to be as cooperative and interested in these aspects as their parents. Another interviewed lawyer reports that s/he tailors the cooperation with the child defendant's parents along their concerns and needs. According to the respondent, some parents do not get engaged with the criminal proceedings or are not reachable at all. Others participate intensely.

Finally, other interviewed lawyers are reluctant to include the parents of their clients. As they are obliged by law, they inform the parents about the case, the proceedings, and their right to be present during all meetings. These lawyers do not encourage parents to be present during the meetings. They know from practice that children talk more openly without their parents present. Moreover, parents tend to dominate the talk, if they are present, while their children remain silent. According to the experiences of some lawyers, parents raise a lot of concerns and questions. Even though the lawyers' mandates entail representing the child, in particular these worried parents demand high communicative efforts of lawyers (CCP/AT/L1-2).

An interviewed lawyer additionally mentions that the presence of parents during the court trial is important for the defence of clients, who misbehave during the trial.

g. Discussion of findings

The right to mandatory legal assistance already at the first police interrogation is one of the core elements of the amendment of the Juvenile Court Act in June 2020. Previously, children who remained at liberty had mandatory legal representation only at the main trial. Children who were deprived of liberty could waive their right to legal representation during the police interrogation and police officers encouraged them to do so. Since the amendment of the Juvenile Court Act in June 2020, legal representation is mandatory for children at the first police interrogation. For children deprived of liberty not only legal representation, but also the physical presence of a defence lawyer is mandatory during the police interrogation.

The cost-free legal representation is implemented by two services: the on-call legal service and the legal aid lawyers. The on-call legal service sends lawyers to police stations for immediate interrogations of children, who are deprived of liberty. The findings suggest that this system works well in Vienna, but not in the rural areas, as the number of available on-call lawyers is limited. Moreover, this system does not work well in case of crimes involving more than one defendant. The immediate arrival of on-call defence lawyers for all the defendants involved is challenging, especially during night hours. The interviewed police officers complain slightly about the mandatory presence of defence lawyers during the police interrogation. It extends the criminal investigations by waiting for the lawyer and it complicates the investigations, as the defence lawyers usually advise their clients to remain silent during the police interrogation. However, the findings indicate that children are in practice provided with a cost-free defence lawyer during the police interrogation. In this regard, the

practice is in line with the law. The lawyers from the on-call legal service usually only represent the child defendant during the act of the police interrogation; they do not take over the full mandate. For all procedural stages after the police interrogation, a legal aid lawyer is assigned to children who cannot afford a defence lawyer themselves. The legal aid lawyers are provided within around five days and they enter the proceedings after the police interrogation. Findings show that the legal aid lawyers are assigned to children by the authorities without assessing their entitlement to legal aid and, often, also without informing the children about this right.

The results show that the authorities do not stand in the way of effective participation of lawyers when lawyers request it. The defence lawyers are physically present during all investigative acts, e.g. interrogation, cross-examination of witnesses, reconstruction of the crime scene. However, the lawyers must remain passive during these procedural acts. Only committed and specialised defence lawyers, who have experienced communication skills, may achieve a more active participation in these investigative acts. Some interviewees doubt that legal aid lawyers meet these requirements. However, these interviewees do not blame the legal aid lawyers for this, but rather the system of legal aid, which is not attractive for lawyers. Lawyers, who are members of the Bar Association, are – independently from their specialisation – obliged to take over a certain amount of legal aid cases. Thus, the lawyers do not take over these cases on their own initiative and are not necessarily specialised or experienced with criminal law and criminal proceedings. Moreover, the remuneration of legal aid representation is weak. Still, some interviewees have experienced very engaged and committed legal aid lawyers.

The interviewed lawyers mention the following important aspects of the legal representation of child defendants in criminal proceedings:

- building a relationship of trust to allow the child to talk openly on what has actually happened
- treating the children respectfully and applying an easy language when informing them about their procedural rights and the general conduct of the proceedings to ensure their understanding. Children are not as capable as adults to fully comprehend the concepts of injustice and crime on their own. Defence lawyers need to make children aware of the fact that they actually committed a crime.
- considering the social background and circumstances of the life of the child in the defence strategy. If a child is e.g. accused of a drug crime, participation in drug counselling already in the pre-trial stage of the proceedings might convince the judge to impose a milder sentence. In general, in criminal proceedings involving child defendants, it is more important to prevent reoffending and bring the child “back on track” than in criminal cases involving adults.

With regard to the cooperation with the child clients’ holders of parental responsibility, the findings are heterogenous. For some interviewed lawyers, the parents are a safeguard to ensure the understanding of the information provided and an important factor in the defence strategy. For other interviewed lawyers, the involvement of the parents interferes with the relationship of trust between the lawyer and the child, and demands more communication efforts of lawyers. However, all interviewed lawyers report that they inform the parents of their clients and involve them upon request and adapt the cooperation according to the needs and concerns of the parents.

Findings indicate that police officers offer lawyers a confidential and private talk with their arrested clients prior to the police interrogation. The interviewed police officers are aware that they are legally obliged to offer this talk – even if their work does not benefit from it as defence lawyers usually advise their clients to remain silent during the police interrogation. Some interviewed non-legal experts and defence lawyers doubt that lawyers from the on-call legal service request this private talk and, thus, effectively use the right to the confidential talk. When the children are in pre-trial detention, they may call their defence lawyers, but they have to pay for it themselves. Moreover, the defence lawyers may

visit their clients in the detention facility. There is visual, but not audio surveillance during these visits. Again, some interviewees believe that legal aid lawyers are not that committed to visit their clients in detention regularly. Interviewees thus state that the authorities provide for these visits and private talks and that it thus depends on the defence lawyers themselves on how they make use of this opportunity. The interviewed legal aid lawyer observes a high need of his/her clients to communicate with him/her.

With regard to the implementation of the right to be assisted by a lawyer, the following challenges are identified by the interviewees of different professions:

- Waiting for a lawyer from the on-call legal service to be present in immediate interrogations of children deprived of liberty extends the duration of the criminal investigations for the police and the deprivation of liberty for the child defendants; this challenge is more evident in rural areas than in the City of Vienna, because more on-call lawyers are available in urban areas. Moreover, this challenge is more evident in cases involving more than one child defendant (as each of them needs their own defence lawyer).
- The (commitment to an) effective participation of lawyers is reduced by a low remuneration, an involuntary taking over of these cases, and a lack of specialisation in criminal law. All law-firms, independently from their specialisation, are obliged to take over legal aid in criminal proceedings. Interviewed police officers, prosecutors, and judges have already had experiences with low qualified and low motivated legal aid lawyers, who do not effectively participate in the proceedings.

Interviewed probation officers and lawyers recommend an amendment of the system of legal aid and better remuneration for on-call lawyers. Interviewed judges and prosecutors state that these challenges in relation with the remuneration of on-call lawyers have been solved in the meantime. The number of on-call lawyers as well as their remuneration increased.

## **C.5 The right to an individual assessment**

### **a. Legal overview**

§ 43 (1) Juvenile Court Act stipulates that the public prosecutor's office or the court shall commission the Juvenile Court Assistance (*Jugendgerichtshilfe*) with the individual assessment (*Jugenderhebung*, § 48 (1) Juvenile Court Act) as soon as possible. In exceptional cases, an individual assessment may be omitted if a more detailed examination of the defendant appears to be dispensable due to planned alternative proceedings (*Diversion*).<sup>34</sup>

§ 43 (1a) Juvenile Court Act stipulates that the individual assessment shall be conducted by qualified personnel from the fields of social work, psychology, and pedagogy within the framework of a multidisciplinary approach and, as far as possible, with the involvement of the defendant, his/her legal representative, and, for example, his/her teacher. In cases of doubt, the assessment of the defendant may be done by a doctor, clinical psychologist, or psychotherapist.

If no individual assessment has been conducted at the time of the indictment (*Zeitpunkt der Anklageeinbringung*), the indictment may be filed only on an exceptional basis, if this does not entail any disadvantages for the juvenile's personality development (§ 43 (1a) Juvenile Court Act). In any case, the main hearing may only be held when the individual assessment is available. The explanatory

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<sup>34</sup> This proceedings (*Diversion*) end/replace the formal criminal proceedings. Diversion is the option of the public prosecutor's office or the court to refrain from conducting formal criminal proceedings if the facts of the case have been sufficiently clarified. If proceedings are terminated by means of diversion, there is no verdict of guilt and no formal conviction.

remarks to the EU Criminal Law Amendment Act 2020<sup>35</sup> clarify that the main cause of such a delay is that juvenile defendants do not attend the appointments with the Juvenile Court Assistance (where the individual assessments are made). Thus, the requirement to accelerate proceedings and the requirement to conduct the individual assessment must be weighed against each other. According to the explanatory remarks to the EU Criminal Law Amendment Act 2020<sup>36</sup>, it has to be decided on an individual basis whether the best interests of the child would be better served by fast-track main proceedings.

§ 43 (3) Juvenile Court Act stipulates that individual assessments have to be supplemented *ex officio* in case of substantial changes of the circumstances on which the individual assessment was based. According to the explanatory remarks to the EU Criminal Law Amendment Act 2020<sup>37</sup>, this might for instance be the case, if a longer period of time passes by between the beginning of the preliminary proceedings (including the quick commissioning of the Juvenile Court Assistance to conduct an individual assessment) and the main hearing.

If the obligation to conduct such an assessment is disregarded, the defendant may counter this procedural deficiency by filing a corresponding motion (*Antrag*). If this request is rejected, this may be subject to an appeal (*Berufung*). If, however, the requested assessment serves to prove a circumstance relevant to the guilt of the juvenile defendant (e.g. proof of being unable to understand the injustice of the act committed according to § 4 (2) 1 Juvenile Court Act), this can constitute a ground for nullity (§ 281 (1) 4 Criminal Procedure Code<sup>3839</sup>

#### b. Individual assessment and exceptions in practice

In Austria, the individual assessment is carried out by the Juvenile Court Assistance (JCA), which is implemented in the capitals of all nine provinces. The individual assessment has already been carried out before the amendment of the Juvenile Court Act, which implemented the Directive (EU) 2016/800 in June 2020.

The individual assessment takes place upon request of the prosecutor or the judge. Thus, it is usually conducted during the investigative stage of the proceedings, when the charges are already pressed. When the main trial takes place, the individual assessment must have already been conducted and the respective report must be available as the assessment's findings are used in the main trial.

*Q: When does an individual assessment take place?*

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

*Q: Wann findet eine Jugenderhebung statt?*

*A: Die findet immer dann statt, wenn man merkt, es wird zu einer Anklage kommen. Dann wird in der Regel schon von der Staatsanwaltschaft der Auftrag zu einer Jugenderhebung erteilt. Das ist deshalb auch notwendig, weil das ein bisschen ein längerer Prozess ist, das dauert ein*

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<sup>35</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

<sup>36</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

<sup>37</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

<sup>38</sup> Austria, Criminal Procedure Code 1975 ([Strafprozeßordnung 1975, StPO](#)), Federal Law Gazette No. 631/1975.

<sup>39</sup> Schroll H. V., § 43 JGG, in: Höpfel F. and Ratz E., Wiener Kommentar zum Strafgesetzbuch.

*bisschen, denn Sie können sich sicher vorstellen: der Jugendliche kommt das erste Mal vielleicht nicht dorthin und die Eltern vielleicht auch nicht – das dauert immer wieder. Und in der Regel versuchen wir auch die Hauptverhandlung schneller abzuwickeln als bei Erwachsenen. Ein schnelles Ende des Verfahrens ist meistens eher von Erfolg gekrönt als wenn es dauert und sich über Jahre hinzieht. (Österreich, RichterIn)*

Apart from these general rules, there are regional differences for the implementation of the individual assessment. In Styria, the court also orders the individual assessment for its decision if either pre-trial detention or alternative measures should be applied. In Vienna, the individual assessment is not mandatory for the decision on pre-trial detention. However, the Viennese JCA automatically conduct the assessment without the prosecution's or the court's request/order. There is no legal ground for this practice but the interviewees emphasise that this practice is done upon an informal agreement with the detention and legal protection judges. Only in Vienna, the JCA is located directly in the pre-trial detention facility; they are mandated with supporting children in pre-trial detention. This specific mandate of the Viennese JCA, as well as the spatial proximity enable the implementation of an individual assessment for the decision on pre-trial detention.

The staff of the JCA, who carry out the individual assessment, are social workers and psychologists. They receive mandatory training on the functioning of the criminal justice system and the law enforcement system. The social workers are trained to analyse the social system behind each child defendant, and they are qualified to talk to children. Additionally, for certain types of offences (e.g. sexual offences, arson, cruelty to animals) other professionals are involved, mainly psychologists and psychiatrists. These cases are dealt with by two professionals – a four eyes principle is applied. Moreover, newcomers carry out the individual assessment together with a more experienced colleague. The staff of the JCA receives regular supervision.

The assessments include: psychological status, psychosocial assessment, socio economic data, socialisation, and financial conditions. The participation of the child is crucial in the individual assessment. Moreover, the parents, the social environment or the Youth Welfare Authority are contacted and involved in the assessment if the child gives his/her consent.

Interviewees of various professions, who have experience with and knowledge of the individual assessment, mention that it covers the needs and vulnerabilities, personality, maturity, as well as the social and family background of the children to a high degree.

The JCA applies a transparent approach in informing the child defendant about the individual assessment – its purpose, its content, and the usage of its findings. There is a detailed and in-depth talk with the child defendant and their social environment. The authorities at the JCA spend a lot of time with the child defendants who are in detention. All assessments and the outcomes are discussed with the child – the authorities apply a very transparent approach. The outcome of the individual assessment covers the individual needs of the child defendant, in order to avoid risk factors for future involvement in crimes, and includes recommendations on how to proceed in the individual case. Sometimes, an expert assessment (*Sachverständigenmeinung*) is requested by the JCA.

Basically, the interviewees homogenously say that an individual assessment is carried out *ex officio* in all cases involving child defendants. It is not carried out upon request of the children, their holders of parental responsibility, or their lawyers. With regard to cases in which no individual assessment is conducted, the information differs. The interviewed members of the JCA state that individual assessments take place in all cases, even in case of out of court settlements. An individual assessment does not take place, only if the child defendant who remains at liberty does not show up.

Other interviewed experts oppose this view. According to them, no individual assessment takes place if the proceedings are terminated at an early stage because of innocence or because of a diversional settlement.

The assessment is not updated, as it takes place closely before the main trial. The assessment is updated in case a child has reoffended, even within a short time after the last conviction, and in case of long criminal proceedings – which are rare in juvenile court cases.

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

The results of the individual assessment are used in the court trial to determine the sentence and impose supportive measures. Findings of the fieldwork indicate that the sentencing of child defendants in criminal proceedings is more dedicated to the prevention of reoffending than to severe punishment.

First, the defendants, witnesses, or victims are heard. Next, the reports of the police and the juvenile court actors, as well as expert opinions are read out aloud, and, then, the individual assessment and recommendations by the JCA are read out aloud. The individual assessment is useful for the judge, as it provides background information on the social environment and social resources of the child defendant. Moreover, the individual assessment includes recommendations for supportive measures, such as psychotherapy, diversion, out of court solutions, labour market integration, support by the youth welfare office, etc. The judge uses the individual assessment for the determination of the sentence and for the decision on whether either criminal detention or alternative measures should be applied. An interviewed judge states:

*Q: What is the result of an individual assessment?*

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

*Q: Was ist das Ergebnis einer Jugenderhebung?*

*A: Das sind wirklich ausführliche und umfangreiche Berichte, das ist oft mühsam zu lesen, aber es zahlt sich aus, weil dadurch wirklich ein umfassendes Bild des/der Jugendlichen entsteht. Einerseits sieht man, wo das entwicklungsstadium des/der Jugendlichen ist, wie er/sie im sozialen Umfeld integriert ist, wo seine/ihre Mankos oder Schwierigkeiten liegen und wo Gefahren auftauchen könnten. Wenn das vorliegt, dann ist das in der Regel schon sehr, sehr gut erarbeitet. (Österreich, RichterIn)*

The individual assessment is the only additional possibility for the judge to access information about the needs of the juvenile (e.g. anti-aggression training, drug therapy, coaching to find a job or occupational orientation). Otherwise, the judge can only rely on the statement of the child defendant, which s/he can choose to believe or not. Thus, according to an interviewee, the individual assessment is a very effective means to assess (and cover) the individual needs of child defendants.

Moreover, in Vienna, the assessments are used to decide on the imposition of pre-trial detention. However, according to interviewed judges, no beneficial measures are applied based on the individual assessment in the pre-trial stage, as the individual assessment and the respective report are conducted and available only shortly before the main trial takes place. An interviewed defence lawyer opposes this view and names the following pre-trial protection measures: The Juvenile Court Assistance conducts an assessment talk with defendants, who are in pre-trial detention. Based on this assessment, the Juvenile Court Assistance may recommend a Social Network Conference. The Social Network Conference is offered by the probation service and aims at developing alternative measures to pre-trial detention. Moreover, measures to avoid confrontation with accomplices are applied based on the individual assessment in case the child defendant is afraid of them and would not testify otherwise.

#### d. Challenges

The majority of interviewees do not see any challenges for certain groups of children. They argue that the social workers and psychologists are well trained in dealing with marginalised groups, all types of vulnerabilities, and specific situations. An interviewed lawyer mentions:

*Q: Would you say that there are hurdles in the individual assessment for certain groups of young people, e.g. with low socio-economic status, migrants?*

*A: No, I don't assume that for the individual assessment, because they are social workers. That is a different approach. Also the probation service, that usually works [without disadvantages for certain groups], because social work is a different profession and a different approach. (Austria, Defence Lawyer)*

*Q: Würden Sie sagen, dass es bei der Jugenderhebung Hürden für bestimmte Gruppen von Jugendlichen gibt, z. B. mit niedrigem sozioökonomischem Status, Migranten?*

*A: Nein, bei der Jugenderhebung gehe ich nicht davon aus, weil es ja Sozialarbeiter sind. Das ist ein anderer Zugang. Auch die Bewährungshilfe, das funktioniert in der Regel [ohne Benachteiligung bestimmter Gruppen], weil die Sozialarbeit ist ein anderes Berufsbild und ein anderer Zugang. (Österreich, StrafverteidigerIn)*

Some judges mention that individual assessments are more difficult if interpreters are needed. Only an interviewed ombudsperson for children mentions severe challenges for unaccompanied child defendants, who are in asylum proceedings. They have no chance to receive a Social Network Conference (*Sozialnetzkonferenz*, see in the section C6) to prevent pre-trial detention. Moreover, they have no family networks here. If these children or young adults become delinquent, their residence permits are revoked, and pre-trial detention is more likely. An interviewed non-legal professional refers to a recently published study according to which the prevalence rates of violence in prison is higher among young people. Thus, deprivation of liberty (which is more likely imposed for those without long-term residence status in Austria) is a risk factor for becoming a victim of violence, especially for young defendants.

*Q: Can the individual assessment address individual needs, difficult situations?*

*A: Difficult cases are where the young people do not have the necessary family support, where there is no social network. Without a social network, it is very difficult for young people to find their way in such times. When it comes to detention, the probability of becoming delinquent again after release from prison is of course even higher than with young people who have a stable family. The lack of family caregivers is often a problem, or caregivers who are not a help to the young people, but an obstacle, or people who have led to traumatising. (Austria, Ombudsperson)*

*Q: Kann die Jugenderhebung auf individuelle Bedürfnisse, schwierige Situationen eingehen?*

*A: Schwierige Fälle sind da, wo die Jugendlichen nicht den notwendigen familiären Rückhalt haben, wo kein soziales Netz da ist. Ohne soziales Netz ist es sehr schwierig, dass sich die Jugendlichen in solchen Zeiten zurechtfinden. Wenn es zu einer Haft kommt, ist die Rückfallwahrscheinlichkeit nach der Haftentlassung natürlich noch höher, als bei Jugendlichen, die eine stabile Familie haben. Das Fehlen von familiären Bezugspersonen ist oft ein Problem oder Bezugspersonen, die nicht eine Hilfe für die Jugendlichen sind, sondern ein Hindernis oder Personen, die zu Traumatisierungen geführt haben. (Österreich, Ombudsperson)*

An interviewed prosecutor confirms challenges in relation to a missing social network or parents, who are not ready to participate in the individual assessment. Thus, the socio-economic status may play a role, but migration background or ethnic minority do not play a role – according to him/her. S/He emphasizes that the child defendants from a problematic socio-economic situation, e.g. the parents are alcoholics or drug abusers, are not disadvantaged in the criminal proceedings. The prosecutor and the judge are sensitive to the difficult situation of the child defendant and acknowledge it. The

interviewee emphasises that it is not an advantage for child defendants if their parents are rich or well educated.

The interviewees who are responsible for the individual assessment report that the whole individual assessment is a challenge. The state provides not enough time for the individual assessment and – also due to the acceleration principle in juvenile court cases – it has to be done quickly. An interviewee reports:

*Q: Do you yourself see challenges with certain groups of young people? Are there certain needs of young people that you find more difficult to assess?*

*A: I mean, it is the whole individual assessment that is the challenge. The deadlines are very short, and we have one talk with the young person, yes? That's the challenge. Sometimes, it would make sense to just be able to stay on that longer. Maybe to talk to the young person two or three times, to think it through and work on the measures a little more closely. So, I think the challenge lies in the dynamics and brief period of time, but not in the contact with the young people themselves. (Austria, Juvenile Court Assistant)*

*Q: Sehen Sie selbst Herausforderungen mit bestimmten Gruppen von Jugendlichen? Gibt es bestimmte Bedürfnisse von Jugendlichen, die Sie selbst schwerer erheben können?*

*A: Ich meine, es ist die gesamte Jugenderhebung eine Herausforderung. Die Fristen sind sehr kurz und wir haben mit dem Jugendlichen ein Gespräch, ja? Das ist die Herausforderung. Manchmal würde es Sinn machen, da einfach länger dran bleiben zu können. Vielleicht auch zwei-, dreimal diesen Jugendlichen zu sprechen, die Maßnahmenableitung ein bisschen genauer durchzudenken, zu bearbeiten. Also ich glaube die Herausforderung liegt in der Dynamik und in der Kürze, aber nicht im Kontakt mit den Jugendlichen selbst. (Österreich, JugendgerichtshelferIn)*

Due to the Covid-19 pandemic, the individual assessments are carried out via telephone – not via video conferences. An interviewed lawyer believes that the quality of the individual assessments may slightly suffer from this but, in the end, it is an effective tool.

#### e. Discussion of findings

The findings show that the individual assessment takes place *ex officio* upon an order of the prosecution or the judge. The majority of interviewees from different professional groups state that the assessment is ordered as soon as the prosecution presses charges. The individual assessment must be completed before the main trial, as its findings will be used for it.

The individual assessment is carried out by the Juvenile Court Assistance, which are located in every province and consist of social workers and psychologists. The individual assessments strongly involve the child defendants in the framework of talks. Moreover, upon the child's consent, the social environment (parents, youth welfare office, probationary office) is involved. If needed, also other actors, such as experts or psychiatrists, may be involved. The individual assessment considers the specific situation of the child and its family, as well as the financial background and family relations. Specific concerns, needs, and vulnerabilities can be considered. Interpreters are available for all kinds of language barriers. The interviewed judges state that they benefit a lot from the individual assessment when determining the sentences. The individual assessment is an important tool to determine the sentences in order to prevent reoffending and to support the child in coming back on track again.

The following general challenges are mentioned by interviewees in relation to the individual assessment: there is not enough time dedicated to the assessment. Sometimes, it is ordered by the judge only shortly before the main trial takes place. However, it must be completed before the main trial takes place. Some child defendants who remain at liberty are not reliable and do not show up to the first individual assessment meeting. Moreover, the JCA mentions that they would like to have

more time for the child defendants. They would like to be able to offer longer-term support to them, not only one or two talks.

The following group-specific hurdles are mentioned by interviewees: individual assessments with interpreters are more time-consuming and complicated. Child defendants, who have no social network in Austria and are unaccompanied, have barriers in accessing the individual assessment. Moreover, children, who are not supported by their parents and social network, may have disadvantages relating to the individual assessment. Thus, unaccompanied children, children with weak language skills and children who have holders of parental responsibility with low parental commitment may have challenges to effectively benefit from the individual assessment. The individual assessment assumes the child's support by parents and social network as most important factor for the prevention of reoffending. The court assumes that a child, who is supported by the parents and the social network, less likely reoffends than a child, who is alone or has weak family support and social network. Thus, unaccompanied children and children with weak family support and social network are disadvantaged in effectively use the individual assessment.

## **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**

The standards provided for in Article 10, 11, and 12 of Directive (EU) 2016/800 are fully implemented in §§ 35, 35a, and 36 Juvenile Court Act. §§ 172 (2) and 173 (5) Criminal Procedure Code 1975<sup>40</sup> and § 35a (2) Juvenile Court Act lay down the detailed provisions on measures alternative to detention. Juveniles are not to be arrested, and pre-trial detention is not to be imposed or maintained on them, if their purpose can be achieved or has already been achieved by other means, possibly in combination with a family law order within the meaning of § 172 (2) and § 173 (5) Criminal Procedure Code 1975. This includes, for example, placement in a home, accommodation in an assisted living facility, or a change of guardianship, if necessary, together with temporary probation assistance. §35 Juvenile Court Act lays down provisions ensuring that the deprivation of liberty is limited to the shortest appropriate period of time, that the age, the individual situation of the child and the particular circumstances of the case are duly considered, and that detention is used as a measure of last resort.

Remedies available are the objection (*Beschwerde*) according to § 87 (1) Criminal Procedure Code<sup>41</sup> and a request for discharge (*Enthftungsantrag*) according to § 176 (1) Z 2 Criminal Procedure Code<sup>42</sup>.

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

Four interviewed judges, two non-legal experts, and two lawyers state that, in practice, a deprivation of liberty is applied as measure of last resort for children. Mainly children, who commit severe crimes or repeatedly commit crimes, are deprived of liberty. Juveniles who are taken into custody are very delinquent and have already undergone many main trials before, in which they received many graduated sentences: usually, the first sentencing starts with diversion, probation, or community service; then, the severity of the sentencing increases to a conditional custodial sentence with instructions, and, if the child fails to meet the conditions and does not stop delinquent behaviour, they are taken into custody.

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<sup>40</sup> Austria, Criminal Procedure Code 1975 ([Strafprozeßordnung 1975, StPO](#)), Federal Law Gazette No. 631/1975.

<sup>41</sup> Austria, Criminal Procedure Code 1975 ([Strafprozeßordnung 1975, StPO](#)), Federal Law Gazette No. 631/1975.

<sup>42</sup> Austria, Criminal Procedure Code 1975 ([Strafprozeßordnung 1975, StPO](#)), Federal Law Gazette No. 631/1975.

*Q: Based on your experience, is deprivation of liberty used as a last resort for children or rather juveniles?*

*A: Well, as I started here, in 2008, let's start like this: between 2008 and now there have been a lot of amendments to the criminal procedure and a lot has happened. And it is already noticeable that far fewer juveniles are taken into custody. The juveniles who are taken into custody are to some extent very problematic juveniles, who are very delinquent, who have already had many main hearings before, where there have been many graduated sentences: so, it usually starts with diversion, probation, community service, then, it increases to a conditional custodial sentence with instructions and then another conditional sentence and, at some point, if s/he does not stop delinquent behaviour, s/he is taken into custody. Especially if it moves very quickly in time. (Austria, Prosecutor)*

*Q: Basierend auf ihrer Erfahrung: Wird der Freiheitsentzug als letztes Mittel für Kinder oder besser gesagt Jugendliche eingesetzt?*

*A: Also wie ich hier begonnen hab, 2008, fangen wir einmal so an: also zwischen 2008 und jetzt gab es sehr viele Strafprozessnovellen und es hat sich sehr viel getan. Und was man schon merkt, ist das viel weniger Jugendliche in Haft genommen werden. Die Jugendlichen, die in Haft genommen werden, sind ein Stück weit sehr problematische Jugendliche, die sehr massiv delinquent sind, die im Vorfeld schon viele Hauptverhandlungen gehabt haben, wo es viele abgestufte Verurteilungen gegeben hat: also es fängt meistens an mit Diversion, Probezeit, gemeinnützige Leistungen, dann steigert es sich zu einer bedingten Freiheitsstrafe mit Weisungen und dann noch einmal eine bedingte und irgendwann, wenn er/sie nicht aufhört zu delinquiren, wird er/sie halt in Haft genommen. Besonders wenn sich das zeitlich sehr schnell bewegt. (Österreich, StaatsanwältIn)*

Interviewees also notice that the Covid-19 pandemic decreases the number of children in prison. Moreover, interviewees notice regional differences in applying deprivation of liberty as a measure of last resort. Courts in the Western provinces, like Vorarlberg or Tyrol, more likely apply deprivation as a last resort for children, while this is less likely in Eastern provinces.

Two interviewed non-legal experts and two defence lawyers as well as one interviewed prosecutor doubt that pre-trial detention is applied as a last resort measure.

*Q: In your experience, is deprivation of liberty used as a last resort with juveniles?*

*A: From a defence lawyer's point of view, of course, juveniles are always kept in custody for too long. But nevertheless, in my experience, the courts put too little emphasis on alternative measures to deprivation of liberty [pre-trial]. That is my opinion as a defence lawyer. (Austria, Defence Lawyer)*

*Q: Wird, Ihrer Erfahrung nach, der Freiheitsentzug als letztes Mittel bei Jugendlichen eingesetzt?*

*A: Aus Verteidigersicht sind natürlich die Jugendlichen immer zu lange in Untersuchungshaft. Aber trotzdem ist es meiner Erfahrung nach so, dass die Gerichte zu wenig auf alternative Maßnahmen zum Freiheitsentzug setzen. Das ist meine Verteidigereinschätzung. (Österreich, StrafverteidigerIn)*

Interviewees did not mention any alternative measures to pre-trial detention, i.e. measures that prevent the imposition of pre-trial detention. The Social Network Conference (*Sozialnetzkonferenz*, SONECO) is the most important instrument to reduce the time of child defendants in pre-trial detention. However, it is only available to children, who are already in pre-trial detention. The SONECO is offered and coordinated by the probation services. The probation service NEUSTART is established all over Austria.<sup>43</sup> The SONECO is a meeting between crucial members of the child defendant's personal social network (parents, neighbours, friends, football trainer, priest, etc.) and professionals (job coaching, residential facility, therapist, Youth Welfare Authority). The purpose of the meeting is

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<sup>43</sup> For more information, see the organisation's webpage on [NEUSTART – probation services](#).

to develop alternative measures to pre-trial detention. These are obligations, conditions, and support structures a child needs to not become delinquent again. The SONECO is only carried out if the child gives his/her consent. The child's involvement in the SONECO is of utmost importance, as it will otherwise not make sense. A child who is "forced" to participate in the SONECO will hardly obey the conditions and obligations, and make use of the offered support measures.

*Q: Do you also have experience with young people who are or have been deprived of their freedom?*

*A: [...] So, as far as we have ascertained, we see that something essential is missing, that the family system cannot provide that. That is one of the reasons why the young person is now in pre-trial detention and that is why we employ someone from the professional system, so to speak, and, usually, there is already experience with the Youth Welfare Office, where the help is also invited, flexible help or so. And, within the framework of this social network conference, a plan is developed of how this young person can be supported in the best possible way, but also controlled by his/her entire system, so that s/he can better manage to live his/her everyday life without reoffending. This exact plan is then presented to the judge, and contains written down information such: the mother or father commits to waking him/her up every day in the morning, the brother takes him/her to school or the big brother takes him/her to the gym. (Austria, Probation Officer)*

*Q: Haben Sie auch Erfahrungen mit Jugendlichen, denen die Freiheit entzogen wird oder wurde?*

*A: [...] Also, wo wir sehen, soweit wir das erhoben haben, da fehlt etwas wesentliches, das kann das Familiensystem nicht leisten, das ist einer der Gründe, warum der Jugendliche jetzt eben in Haft ist und deswegen installieren wir da quasi jemanden aus dem Profisystem und meistens gibt es da auch schon Jugendamts Erfahrung, wo dann die Hilfen auch eingeladen werden, flexible Hilfen oder so. Und im Rahmen dieser Sozialnetzkonferenz wird dann ein Plan erarbeitet, wie diese/r Jugendliche bestmöglich unterstützt, aber auch kontrolliert werden kann, von seinem/ihrer gesamten System, so dass er/sie es besser schafft, seinen/ihren Alltag zu leben, ohne dass er/sie wieder straffällig wird. Dieser genaue Plan wird dann dem Richter vorgelegt, wo dann Dinge drinnen stehen, wie: die Mutter oder der Vater verpflichtet sich, dass sie/er ihn/sie jeden Tag in der Früh aufweckt, der Bruder nimmt ihn/sie mit in die Schule oder der große Bruder nimmt ihn/sie mit in das Fitnessstudio. (Österreich, BewährungshelferIn)*

Within the framework of the Social Network Conference, a plan is developed on how juveniles can be supported in the best way possible, but also controlled by their entire social system, so that they can better manage to live their everyday lives without reoffending. This exact plan contains suggestions like: the mother or father commits to waking them up every day in the morning, the brother takes them to school or the big brother takes them to the gym. Thus, the plan consists of very simple practical steps for everyday life. Additionally, the child defendant has to have two or three meetings with a probation officer a week. This plan thus contains the conditions, under which the probation office could imagine releasing the defendant from prison. The plan is established together with the child defendant, meaning the child defendants suggest such development measures. As soon as the plan for the alternative support structures and conditions is developed, the probation service submit it to the detention and legal protection judge. Then, a detention hearing takes place, whereby the child defendant, the probation officer, and the defence lawyer are present. In the course of the hearing, the judge decides on releasing the child from pre-trial detention or keeping them in custody.

The interviewed probation officers, but also other experts, who know about the SONECO, are really in favour of it. The interviewed probation officers say that the recidivism rates are very low if children are released from pre-trial detention earlier because of the SONECO. Thus, the SONECO is an important instrument to avoid damages of children, who are deprived of liberty, to foster re-integration into society, and to prevent future crime.

An interviewed probation officer states that the SONECO most effectively prevents future violent crime. Particularly, the reconciliation of offences works preventive in cases of violent crimes. Thereby, the defendant has to deal with the perspective of the victim and actively participate in restoration. According to the interviewees' experience, reconciliation and restoration change the child defendants' basic views and prevent repeated violent crimes. The SONECO and the imposed measures do not work as effectively in case of drug offences or theft. However, even in case of these criminal offences, the imposition of pre-trial detention is not proportional to the application of alternative measures. Moreover, the accompanying conditions (going to school, monitoring by probation offices) at least prevent heavy drug abuse and the resulting social decline and drop-out. Therefore, relapses tend to refer to light drug use and small theft. When it comes to the judgement and sentencing, alternative measures to pre-trial detention are often continued as alternatives to criminal detention, in particular if they prove to be effective - e.g. juvenile drug abusers may continue to use drugs, but they also continue going to school, meaning they do not get deeper involved with drug problems and do not become massive offenders.

The SONECO is usually conducted at the same time as the individual assessment (see C.5). Usually, the JCA, who carry out the individual assessment, recommend the application of a SONECO. While the SONECO primarily aims at developing alternative measures to pre-trial detention, the individual assessment primarily aims at developing alternative measures to criminal detention. An interviewed probation officer explains the relation between the SONECO and the individual assessment:

*Q: How does the Social Network Conference relate to the individual assessment?*

*A: Well, the Social Network Conference happens at the same time as the individual assessment. When a young person is taken into pre-trial detention, the Juvenile Court Assistance is informed, and it is written in the decree: and the judge can commission a Social Network Conference or at least has to ask the Juvenile Court Assistance whether a Social Network Conference would be useful. Due to the high-pressure situation, because you have to reach many people at the Social Network Conference, we have the agreement in [Province] that this happens at the same time, e.g. we start with the Social Network Conference and the Juvenile Court Assistance starts with the individual assessment and we coordinate by telephone, so that not everyone does the same. But the first detention hearing date is already after two weeks and, by then, this Conference should possibly have already taken place and the plan should already be there, so that the young person can already go home on the day of the detention hearing. (Austria, Probation Officer)*

*Q: Wie steht die Sozialnetzkonferenz in Verbindung mit der Jugenderhebung?*

*A: Also die Sozialnetzkonferenz passiert zeitgleich mit der Jugenderhebung. Wenn ein Jugendlicher in Untersuchungshaft genommen wird, dann wird sowohl die Jugendgerichtshilfe verständigt, und es steht im Erlass drinnen: und der Richter kann eine Sozialnetzkonferenz beauftragen oder muss zumindest die Jugendgerichtshilfe darum fragen ob nicht eine Sozialnetzkonferenz sinnvoll wäre. Aufgrund der hohen Drucksituation, weil man muss ja viele Menschen erreichen bei der Sozialnetzkonferenz, haben wir in [Bundesland] das Agreement, dass das zeitgleich passiert, d.h. wir fangen mit der Sozialnetzkonferenz an und die Jugendgerichtshilfe fangt mit der Jugenderhebung an und wir stimmen uns telefonisch ab, damit nicht jeder das gleiche tut. Aber der erste Haftprüfungstermin ist schon nach zwei Wochen und da sollte ja möglicherweise schon diese Konferenz stattgefunden haben und der Plan schon da sein, damit der Jugendliche am Tag der Haftprüfungsverhandlung schon heim gehen kann. (Österreich, BewährungshelferIn)*

For children, who remain at liberty throughout the proceedings or whose proceedings end with diversion, the imposition of community services works effectively for the prevention of reoffences. By doing community services, the child defendants reflect about their offences and give something back to society as reparations. Independent from the kind of offence and the reasons for the criminal act,

an intense dealing with and reflecting on the offence helps the child defendant to understand the injustice of their actions. Consequently, this has a preventive effect.

Interviewees also identify factors, where child defendants are more likely to be deprived of liberty. There are offence-related factors, such as:

- the severity of the crime the child is accused of
- reoffending and failure to obey conditions for remaining at liberty
- a lack of or no cooperation with the authorities and probation services.

There are other factors related to the personal and socio-economic characteristics of a child defendant. These are:

- low socio-economic background of the child
- no or weak social network and weak family relations (e.g. unaccompanied children, parents have parental responsibility but are challenged with parental duties)
- children without residence or with an uncertain status of residence (permit), as the danger of flight is assumed by the authorities
- children with a problematic mental health condition and a high criminal energy.

Finally, interviewees mention that some judges and other decision-makers simply lack experience with and specialised knowledge of juvenile justice. These judges and decision-makers more likely impose (pre-trial) detention on children than others with excellent knowledge and experience.

Interviewees mention that, even if there is a need to deprive child defendants of liberty, it should not be a prison or a detention facility in which they are placed. Interviewees make the case for other forms of closed facilities, e.g. monitored shared flats. Such closed facilities endanger the defendants' (re-)integration into society to a lesser degree, as e.g. visiting a "normal school" is always better than receiving education in prison. Interviewees refer to good practices from Switzerland in this regard. However, such "closed facilities" for child defendants are not implemented in Austria.

#### b. Medical examination

##### i. Legal overview

§§ 132 (5) and 154 (1) Penitentiary Act<sup>44</sup>, as well as § 182 (4) Criminal Procedure Code 1975<sup>45</sup> provide that an examination by a doctor must take place upon admission to pre-trial detention. In order to implement Article 8 of Directive (EU) 2016/800, the EU Criminal Law Amendment Act 2020<sup>46</sup> introduced the possibility of an examination also upon request in §§ 37a (2) and (3) Juvenile Court Act. The explanatory remarks to the EU Criminal Law Amendment Act 2020<sup>47</sup> explain that upon admission to the penitentiary, a medical examination is to be carried out to determine whether imprisonment

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<sup>44</sup> Austria, Penitentiary Act ([Bundesgesetz vom 26. März 1969 über den Vollzug der Freiheitsstrafen und der mit Freiheitsentziehung verbundenen vorbeugenden Maßnahmen, Strafvollzugsgesetz - StVG](#)), Federal Law Gazette No. 144/1969.

<sup>45</sup> Austria, Criminal Procedure Code 1975 ([Strafprozeßordnung 1975, StPO](#)), Federal Law Gazette No. 631/1975.

<sup>46</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

<sup>47</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

would overstrain the juvenile defendant. The results of the medical examination shall also serve to assess whether the detained juvenile is able to participate in questionings, other investigative or evidence-gathering actions or measures taken or planned.

ii. The medical examination in practice

Three interviewed police officers refer to medical care in police custody and one officer does not want to talk about the deprivation of liberty as the police is not involved. According to the other interviewees of different professions, the medical officer (*Amtsarzt*) carries out a medical examination *ex officio*. Further, adults in police custody are examined by a doctor. The examination is carried out immediately after the defendants are brought to police custody. The police inform the medical officer about each new arrest and, then, the examination is initiated. The medical examination is carried out as non-invasive as possible. It is merely an appointment with a doctor, rather than a medical examination. During this talk, previous diseases, the usage of medicine, and other healthcare needs are clarified.

One interviewed police officer mentions that the medical examination in **police custody** is not carried out *ex officio*. Child defendants in police custody only have a medical examination if they have healthcare needs, use drugs or need any other medicine. These needs are clarified within the framework of a talk between the police and the child defendant. If it turns out that the child defendant is a user of heavy drugs, the doctor is notified to assess the criminal responsibility and capacity to be questioned – but only in these cases, not *ex officio*. However, if the child defendants are sober and state that they do not have any healthcare needs, they will never see the doctor during police custody. If children in police custody have additional healthcare needs or want to request an additional medical examination, there is a button in the cells that they can press in case they need a doctor or have health complaints. Then they are taken to the hospital by the police ambulance. The accused can also have the examination done by a doctor of their choice, but, then, they have to pay for it themselves.

The outcome of the medical examination is used to assess whether the child can bear the detention. Moreover, it may be used to assess if the child is criminally responsible or if s/he is capable to understand what s/he is accused of

Some interviewees are not aware of an *ex officio* medical examination upon **pre-trial detention**. An interviewed probation officer, lawyer, judge, and an interviewed prosecutor report that children or their defence lawyers or their holders of parental responsibility may request such a medical examination, but it is not carried out *ex officio*.

*Q: Does the juvenile or their defence lawyers have the right to request and trigger a medical examination?*

*A: Yes, that is now also regulated by law. The juvenile, their legal representative or defence lawyer can request such an examination in the detention situation. It is about an immediate examination of the mental and physical condition of the juvenile. This hardly ever happens in practice, it happens when the legal representative, who of course knows the juvenile, or the juvenile's defence lawyer have the feeling: s/he cannot testify now. Or when the juveniles themselves say: I am not in a condition to testify now, I want to talk to a doctor, that they then have the right to be examined in the custody situation, if necessary before the interrogation. It must be said, however, that there is no examination of the person's ability to be detained. This means that this medical examination cannot prevent pre-trial detention. This is different from criminal detention, where it can be said that the person is unfit for detention, and, then, s/he does not have to go to prison for a certain period of time. (Austria, Prosecutor)*

*Q: Hat der Jugendliche oder sein Verteidiger das Recht, eine medizinische Untersuchung zu verlangen?*

*A: Ja, das ist jetzt auch gesetzlich geregelt. Der Jugendliche, seine gesetzliche Vertretung oder sein Verteidiger kann in der Haftsituation so eine Untersuchung beantragen. Da geht es um eine*

*unverzögliche Untersuchung des geistigen und körperlichen Zustandes des Jugendlichen. Das kommt in der Praxis kaum vor, passiert dann, wenn der gesetzliche Vertreter, die kennen den Jugendlichen natürlich, oder der Verteidiger des Jugendlichen das Gefühl haben: der kann jetzt gar nicht aussagen. Oder wenn der Jugendliche selber sagt: ich bin jetzt nicht in der Lage auszusagen, ich will mit einem Arzt sprechen, dass er dann das Recht hat, dass er in der Haftsituation, gegebenenfalls vor der Vernehmung, das Recht auf die Untersuchung hat. Man muss aber dazu sagen, dass eine Haftfähigkeitsprüfung nicht erfolgt. Das heißt, diese medizinische Untersuchung kann eine Haft nicht verhindern. Das ist anders als bei der Strafhaft, da kann man sagen: der ist haftunfähig, dann muss er für eine bestimmte Zeit die Haft nicht antreten. (Österreich, StaatsanwältIn)*

An interviewed lawyer opposes this view. According to him/her, all juveniles, who come to pre-trial detention are medically examined *ex officio*, but there is no option for the defence lawyer to request it. The only option for the defence lawyer to request and trigger a medical examination is if it is necessary for the criminal proceedings (e.g. evidence for injuries, evidence for a certain mental condition). In case, the medical examination is needed because of certain (mental) health problems, the prison administration and the Juvenile Court Assistance have to be notified by the defence lawyer or the child. Further, other interviewees report that also in pre-trial detention such an examination is carried out *ex officio* immediately after admission to prison or the consequent working day. In addition, defence lawyers could request the examination, but since it is conducted anyway, this is not necessary. Thus, the doctor assesses if the child defendant shows suicidal tendencies, or self-harming behaviour, and if s/he is in a mental state in which s/he is capable to bear the detention. The assessment of the mental condition is regularly updated. While some interviewees say that the medical examination is merely a meeting with a doctor within the framework of which they only talk and fill out a questionnaire, others say that an examination of the body takes place too.

*Q: Is the examination done in the least invasive way possible? You said, it is a physical examination.*

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

*Q: Is it always a male or female doctor of the same sex?*

*A: Well, I don't think so, because yes - I have never paid attention to that. I can't say that. (Austria, Judge)*

*Q: Wird die Untersuchung so wenig invasiv wie möglich durchgeführt? Sie haben ja gesagt, es ist eine körperliche Untersuchung.*

*A: Das kann ich Ihnen nicht sagen. Ich glaube aber schon, dass sie sich entkleiden müssen, denn ich habe oft die Erfahrung gemacht, dass beim Amtsarzt Verletzungen festgestellt wurden, die ansonsten unter der Kleidung verborgen sind. Also ich denke schon, dass die unbekleidet, zumindest von außen untersucht werden.*

*Q: ist das dann immer ein Arzt oder eine Ärztin des gleichen Geschlechts?*

*A: Also das glaube ich nicht, weil ja – da habe ich noch nie darauf geachtet. Das kann ich nicht sagen. (Österreich, RichterIn)*

The interviewees homogeneously report that the mental and physical health condition is assessed by a doctor. The interviewed members of the Viennese JCA state that the Viennese detention facility has a child and youth psychiatrist at the institution. This is an advantage, because the psychiatrist also works at the general hospital and might already know juveniles suffering from mental illnesses from previous contacts in the hospital. Moreover, there is a police station doctor for child defendants in police custody, who show a problematic behaviour. The child's behaviour is documented, and the documentation is sent to the juvenile prison, so that they can react accordingly, e.g. by bringing the children to a psychiatric institution to stabilise them before they are admitted to prison.

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

Those interviewees, who have knowledge of or experience with the medical examination, state that the results are used for determining the child's criminal responsibility and ability to bear the detention mentally without displaying auto-aggression or committing suicide. Moreover, the child's capacity to participate in the proceedings and to be questioned is determined based on the medical examination. The results of the medical assessment cannot prevent pre-trial detention. Also, criminal detention cannot be prevented by the results of the medical assessment; it may only be postponed. The interviewed members of the investigative authority state that, in case the results of the medical examination indicate that a child cannot be interrogated, also the interrogation will be postponed. For children, who abuse drugs, substitutes are provided based on the medical assessment. Moreover, the results of the medical examination are used to provide healthcare as needed.

- c. Special treatment in detention

- i. Legal overview

The standards provided for in Article 10, 11, and 12 of Directive (EU) 2016/800 are fully implemented in §§ 35, 35a, and 36 Juvenile Court Act. Standards relating to the specific treatment of children in case of deprivation of liberty are laid down in § 36 Juvenile Court Act. § 36 (1) Juvenile Court Act stipulates that juveniles shall be detained in a special section of the prison, if possible. §36 (2) Juvenile Court Act stipulates that a change of the place of detention is only permissible if the juvenile is to be transferred to a special prison for juveniles. §36 (3) Juvenile Court Act stipulates that juveniles, as a general rule, shall be separated from adult detainees from whom a harmful influence is to be feared. Detention in solitary confinement shall be dispensed for juveniles if this would be detrimental to the detainee and if s/he can be detained together with other detainees without danger to these other detainees. According to § 36 (4) Juvenile Court Act, juveniles are to be occupied and also to be taught during pre-trial detention to the extent possible and if feasible (e.g. in the absence of a school-leaving certificate and if a prison teacher is available).

Remedies available are the objection (*Beschwerde*) according to § 87 (1) Criminal Procedure Code<sup>48</sup>, and a request for discharge (*Enthäftungsantrag*) according to § 176 (1) Z 2 Criminal Procedure Code.<sup>49</sup>

- ii. The special treatment in practice

The interviewees homogenously report that **male children are held separately from male adults** in all types of deprivation of liberty. Children are held in single cells in police custody, in youth departments in the pre-trial detention facility, and in separate juvenile detention facilities when they are in criminal detention. Female defendants are the minority among defendants. Thus, female children and female adults are held together in prison.

Generally, the interviewees do not observe major barriers in accessing **healthcare** in prison. In case of severe healthcare needs during police custody, the police drive to the hospital with the child defendant. In case of less severe healthcare needs, the police doctor comes to the child defendant. The pre-trial detention and criminal detention facilities are equipped with an infirmary and a social service. According to the interviewed judges, children in pre-trial detention may always ask to see a doctor. Child defendants, who use addictive substances, see the doctor regularly anyway.

*Q: Do the juveniles have the right to request a medical examination when they come into custody, or do their defence lawyers?*

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<sup>48</sup> Austria, Criminal Procedure Code 1975 ([Strafprozeßordnung 1975, StPO](#)), Federal Law Gazette No. 631/1975.

<sup>49</sup> Austria, Criminal Procedure Code 1975 ([Strafprozeßordnung 1975, StPO](#)), Federal Law Gazette No. 631/1975.

*A: Basically, when they come into custody, they come for a medical check-up anyway. They are checked once, that applies to all prisoners, regardless of whether they are juveniles or adults. They can also say at any time in between: I need a doctor, I want to see a doctor because something hurts. So, that is always possible. (Austria, Judge)*

*Q: Haben die Jugendlichen, wenn sie in Untersuchungshaft kommen, das Recht eine medizinische Untersuchung zu beantragen oder ihre Verteidiger?*

*A: Grundsätzlich ist es ohnehin so, dass sie, wenn sie in Haft kommen, zu einer Gesundenuntersuchung kommen. Da werden sie einmal durchgecheckt, das gilt für alle Häftlinge, unabhängig ob sie jugendlich sind oder erwachsen. Sie können auch dazwischen jederzeit sagen: ich brauche einen Arzt oder eine Ärztin ich will einem Arzt oder einer Ärztin vorgeführt werden, denn mir tut da etwas weh. Also, das ist immer möglich. (Österreich, RichterIn)*

Some interviewees state that basic medical needs are met by the infirmary and the social services. However, in case a child defendant needs a certain medicine, they may wait for it. Moreover, there may be barriers in accessing certain medicine, in case the doctor refuses. An interviewed judge confirms this view, and according to him/her children in pre-trial detention have access to healthcare. However, they may only take a shower 2-3 times a week:

*Q: Do the young people have sufficient access to health care, education, and leisure activities?*

*A: Yes, that should be the case. It is also prescribed by law. What I know from the prison [City] is that the juveniles are allowed to shower 2-3 times a week. I don't think that's enough, for example. In my opinion, showers should be possible every day. There is already sufficient medical care. There is a separate hospital unit in the prison. I don't know if there are any gaps, especially at night. All that would be provided for by law. (Austria, Judge)*

*Q: Haben die Jugendlichen im ausreichenden Ausmaß Zugang zu Gesundheitsversorgung, Bildung, Freizeitaktivitäten?*

*A: Ja, das sollte schon sein, es ist auch im Gesetz so vorgeschrieben. Was ich von der Justizanstalt [Stadt] weiß, ist dass die Jugendlichen 2-3 mal in der Woche duschen dürfen. Also das halte ich für zu wenig zum Beispiel. Also meines Erachtens sollte jeden Tag Dusche möglich sein. Medizinische Versorgung ist schon ausreichend vorhanden. Es gibt eine eigene Krankenabteilung in der Anstalt. Ob es da auch zu Lücken kommen kann, speziell in der Nacht, weiß ich nicht. Gesetzlich vorgesehen wäre das alles. (Österreich, RichterIn)*

When it comes to **education and trainings, sports and leisure activities, and measures for re-integration into society**, interviewees differentiate between child defendants, who are in pre-trial detention or very short time in criminal detention (a few months), and others, who are in criminal detention for more than five months. All these measures are offered for children in criminal detention of more than five months. However, children in pre-trial detention and those in short criminal detention periods have no access to completing vocational trainings, mandatory education, or measures fostering re-integration into society. An interviewed judge mentions that children in pre-trial detention have not been convicted yet, thus, there is no need for measures fostering re-integration into society. Still, basic education is also offered to those in pre-trial detention – in particular to those, who are of mandatory school age. The older juveniles in pre-trial detention have to work in the kitchen or the laundry unit.

Child defendants in criminal detention can catch up on their school-leaving qualifications. Moreover, children in criminal detention (juvenile prison) are offered trainings, like the European Computer Driving Licence (ECDL) and handicraft lessons. Furthermore, vocational training in motor vehicle mechanics are available and, for girls, vocational training as hairdresser or nail designer. According to an interviewed lawyer, a development plan is elaborated with children in criminal detention of more than five months. Thus, children who are in criminal detention have access to measures for their

personal development and reintegration into society. An interviewed judge mentions that in the juvenile prison, there are different programmes and offers, namely there is a playing room, a library, education, and sports. With regard to programmes that foster development and reintegration into society, there is a so called “execution of release”, whereby the social workers or probation officers assess whether or not the child has access to accommodation, work, etc. upon release. According to interviewees of different professions, the longer the detention, the more important are education and other programmes to foster their development and reintegration into society. For a child, who is in pre-trial detention or in criminal detention for a time period of 4 to 5 months, according to two judges, no such programmes are needed.

*Q: Who judges the proportionality of these measures compared to the length of imprisonment?*

*A: The longer the imprisonment, the more necessary it is to take measures that make reintegration possible afterwards. If it's short, I don't need many things, but if it's long - and I'm talking about years now - then it's already checked at the halfway point of the sentence, then, at the latest at two-thirds [of the sentence], if it's really multiple enforcement, until the end, but there we have the possibility to consider the deprivation of liberty as relaxed beforehand, where there are always periods of time in freedom, so that the young people can pursue a job and be reintegrated into a structure. (Austria, Judge)*

*Q: Wer beurteilt die Proportionalität dieser Maßnahmen im Vergleich zur Länge der Haft?*

*A: Je länger die Haft, desto notwendiger ist es, Maßnahmen zu setzen, die nachher Wiedereingliederung möglich machen. Wenn es kurz ist, brauche ich viele Dinge nicht, aber wenn es lang dauert – und ich spreche jetzt von Jahren – dann wird schon geprüft bei der Hälfte der Strafe, dann spätestens bei zwei Dritteln, wenn es wirklich mehrmaliger Vollzug ist, bis zum Ende, aber da haben wir die Möglichkeit, den Freiheitsentzug schon vorher als gelockert, wo es immer wieder Zeiträume in Freiheit gibt, dass die Jugendlichen einer Arbeit nachgehen können und in eine Struktur wieder eingegliedert werden. (Österreich, RichterIn)*

Generally, the interviewed lawyers, prosecutors, judges, and non-legal experts point out that there is a lack of education and trainings, as well as other leisure activities and support measures in pre-trial detention. An interviewed ombudsman for children states that these measures were also severely restricted due to the Covid-19 pandemic (). However, findings from the interviews with the child defendants in pre-trial detention suggest, that children may keep themselves busy by helping in the kitchen or with the laundry or by doing creative activities (painting, playing the guitar, etc.).<sup>50</sup>

#### d. Contact with family members during deprivation of liberty

Both initial and regular contacts with family members are allowed for children who are deprived of liberty. These contacts are only prohibited if the parents are accused of the same offence too, meaning a danger of collusion exists. According to an interviewed judge, children are allowed to meet their girl-/boyfriends – even if they are accused too. However, in these instances a justice guard is present during the meetings and listens to what is being said. As soon as they talk about the offence, the meeting is stopped.

Children, who are deprived of liberty, may apply for conducting phone-calls immediately upon arrest. However, they need to know the telephone numbers of their family members by heart, as they have no access to their mobile phones. Moreover, they need to pay for the telephone fees themselves.

According to the interviewees, the Covid-19 pandemic has severely restricted the contacts between family members and children, who are deprived of liberty. The personal visits of family members in the detention facility decreased severely. Members of the JCA Styria observe that the young people

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<sup>50</sup> FRA (European Union Agency for Fundamental Rights) (2021), *Procedural safeguards of children who are suspects or accused persons in criminal proceedings. Part II: Fieldwork research with children, Country Report Austria*, (not yet published).

are already very worn down, because they have not had a visit for a very long time. Usually, child defendants in pre-trial detention have the chance to get visited by relatives up to twice a week. However, the Covid-19 pandemic and the entailed restrictions prevented these visits. According to the Viennese interviewees, virtual meetings were offered in the Viennese detention facility as an alternative. There are lists available, in and through which the children request these virtual meetings with their family members. The justice guards care for fairness between the detained children, e.g. with regard to equal opportunities to meet family members virtually. The virtual meetings with family members are monitored by the authorities. An interviewed non-legal professional confirms this assessment for Vienna and points out that the justice guards at the juvenile detention facility Vienna are very engaged in fostering the contact between the children in detention and their parents. This is because the staff experiences that the children in detention are doing better if they are regularly in touch with their family members. Interviewed experts from Styria mention that virtual meetings are not possible there, due to a lack of equipment and resources.

Interviewees, who were interviewed from late April 2021 on, mention that the contact restrictions were partially lifted, so that glass pane visits became possible again. The glass pane is placed between the meeting persons in form of a divider, which prevents smuggling and disease transmission.

#### e. Discussion of findings

The views of the interviewees on deprivation of liberty are heterogenous in general and relating to sub-topics. In general, the majority of interviewees is convinced that deprivation of liberty is applied as measure of last resort for children. Nevertheless, interviewed lawyers and some non-legal experts oppose this view. The Social Network Conference is reported as an effective instrument to reduce the time spent in pre-trial detention, offer alternative measures (conditions and obligations) instead, and monitor and guide the child in obeying them. Moreover, based on the results of the individual assessment (see C.5), alternative measures to criminal detention are more likely imposed on children. The majority of children deprived of liberty benefit from these measures – at least, if they have access to a social network and supporting persons. Those, who are unaccompanied in Austria or who have a weak social network, benefit less from these measures and are more likely to end up deprived of liberty. This view is shared by interviewed experts from all professional groups, except for the police officers, who do not provide information about deprivation of liberty.

The male children are deprived of liberty separately from male adults and young male adults. The female children are deprived of liberty together with female adults and young female adults. The interviewees' views on the medical examination upon arrest are heterogenous too. Some interviewees believe that the medical examination takes place *ex officio* and, thus, cannot be requested by child defendants, their families, or lawyers. Others believe that it takes place *ex officio* and can additionally be requested. Again, others believe that the medical examination can be requested by children, their families, or defence lawyers, but that it does not take place *ex officio* – unless there are reasons to conduct it. Moreover, the views differ in terms of how this examination is carried out. While the interviewees homogenously state that the medical examination is carried out by a doctor, the views differ on how invasive it is. Some experts say that it is actually no medical examination, but rather a talk to a doctor in the course of which a questionnaire is filled out by the child defendant. Other experts say that the examination is more invasive and the body is examined too. The results of the medical examination are used to provide healthcare, if needed, and to determine the ability of the child to mentally bear the deprivation of liberty and to be questioned. If the results show that the child faces difficulties to bear the deprivation of liberty, pre-trial detention cannot be circumvented, but additional psychological or psychiatric measures are applied. However, criminal detention or interrogations may be postponed. The heterogenous information provided by the interviewed experts indicate that there is a low level of knowledge on the actual implementation of the right of children, who are deprived of liberty, to a medical examination.

In general, the interviewed experts do not doubt any access to (basic) healthcare. The findings clearly indicate that access to education, training, leisure time activities, psychological and physical development, as well as measures for re-integration into society are available in criminal detention. Thus, especially children, who spend more than five months in criminal detention, have access to these measures. However, these measures and services are not or hardly available to children in pre-trial detention. Some interviewed experts – in particular judges and prosecutors – explicitly state that due to the acceleration principle that applies to criminal proceedings involving children as defendants, children stay only for a short amount of time in pre-trial detention. Therefore, such measures are not needed.

Children have a right to regular contacts with their parents. However, the execution of this right was severely restricted by the Covid-19 pandemic and the consequent contact restrictions. Instead of the regular personal visits, the detention facility Vienna offered virtual meetings. This was not the case in Styria. Phone-calls to parents were a means to compensate for the lack of personal meetings. However, children had to apply for these phone calls, have the telephone numbers with them, and pay for the fees. Even if some interviewed professionals state that the possibilities for telephone calls were increased because of the Covid-19 pandemic, there were still waiting queues and barriers. However, since April 2021, contact restrictions have been relaxed. Glass pane visits became possible again. Since July 2021, face-to-face contacts have been allowed again for visitors applying the following rule: Visitors need to be either vaccinated, recovered from Covid-19 or tested negative for Covid-19.

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

### **a. Legal overview**

§§ 32 (1) and (2) Juvenile Court Act exclude trials of juveniles in their absence. The juvenile defendants' right to participate effectively in the trial is laid down in § 32 (1) Juvenile Court Act, stating that the provisions on proceedings *in absentia* shall not apply to juvenile defendants. If the defendant does not attend the main hearing, the hearing shall be adjourned and, if necessary, the defendant shall be ordered to be brought before the court. Moreover, § 6 (1) Criminal Procedure Code 1975<sup>51</sup> on the right to be heard and § 221 (1) Criminal Procedure Code 1975<sup>52</sup> on the summons to the hearing apply. In case the provisions excluding the trial of juveniles in their absence are neglected, this constitutes a ground for nullity according to § 32 (1) Juvenile Court Act.

The right of the child to be accompanied by the holder of parental responsibility during the proceedings is implemented in § 38 Juvenile Court Act. § 38 (1) Juvenile Court Act stipulates that the legal representative of a juvenile defendant has the right to be heard and to be present at investigations or hearings to the same extent as these rights are granted to the juvenile defendant. The same applies to the right to inspect files, unless the legal representative is suspected of having participated in the offence. § 38 (1a) Juvenile Court Act further stipulates that the instructions received by the juvenile under § 32a Juvenile Court Act shall also be brought to the attention of the legal representative as soon as possible. The explanatory remarks to the EU Criminal Law Amendment Act 2020<sup>53</sup> explain that the legal representative may make use of all legal remedies, to which the juvenile is entitled. If the court is aware that care and education of the juvenile defendant are entrusted upon someone else than the legal representative, this other person also has the rights specified in § 38 (1) to (3) Juvenile Court Act according to § 38 (4) Juvenile Court Act. Moreover, § 31 (1) Extradition and

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<sup>51</sup> Austria, Criminal Procedure Code 1975 ([Strafprozeßordnung 1975, StPO](#)), Federal Law Gazette No. 631/1975.

<sup>52</sup> Austria, Criminal Procedure Code 1975 ([Strafprozeßordnung 1975, StPO](#)), Federal Law Gazette No. 631/1975.

<sup>53</sup> Austria, Explanatory remarks to the EU Criminal Law Amendment Act 2020 ([Strafrechtliches EU-Anpassungsgesetz 2020 – StrEU-AG 2020](#)).

Legal Assistance Act<sup>54</sup> has been amended in order to implement Article 15 of Directive (EU) 2016/800 for European arrest warrant proceedings.

In Austria, Article 15 of Directive (EU) 2016/800 is implemented by granting the legal representative of a juvenile defendant the right to be heard and to be present at investigations or hearings to the same extent as these rights are granted to the juvenile defendant. Therefore, the remedies also depend on the underlying procedural right (see, for instance, above on the right to be heard and to be present at hearings).

The standards relating to the right to privacy of child defendants are laid down in § 42 Juvenile Court Act. § 42 (1) Juvenile Court Act provides that the public shall be excluded from the main hearing *ex officio* or upon application, if this is required in the interest of the juvenile. The legal commentary to this provision explains that the exclusion of the public can refer to the entire main hearing (with the exception of the pronouncement of the judgement, which always has to be public) or only to parts of it, in which a subject matter of the proceedings is dealt with, which could have a detrimental effect on the juvenile. With regard to the fundamental right guarantee of a public hearing according to Article 90 (1) of the Federal Constitution<sup>55</sup> and Art 6 (1) ECHR, the exclusion is to be limited to parts of the main hearing if at all possible. The lack of a factual justification for the (too extensive) exclusion order constitutes nullity under § 281 (1) Z3 Criminal Procedure Code 1975<sup>56, 57</sup>.

If the public is excluded, the juvenile's legal representative, the legal guardian, a probation officer appointed for the juvenile, as well as representatives of the Child and Youth Aid Office, the Juvenile Court Assistance, and the probation service may attend the main hearing in addition to the persons named in § 230 of the Criminal Procedure Code 1975<sup>58</sup> according to § 42 (2) Juvenile Court Act. § 230a Criminal Procedure Code 1975 stipulates that it is prohibited to publish information from a hearing if the public has been excluded from it. The court may also require the persons present to keep confidentiality. Such a court decision shall be recorded in the minutes of the hearing. §§ 228 to 230a Criminal Procedure Code 1975<sup>59</sup> also apply to juvenile defendants, which implies that there is no remedy against the decision (*Beschluss* in the sense of § 35 (2) second case Criminal Procedure Code 1975) on the application for an exclusion of the public according to 229 (3) Criminal Procedure Code 1975.<sup>60</sup>

b. Right to effective participation in practice

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

The interviewees mention the following modifications of setting and conduct of court trials involving children as defendants (compared to adults):

- No judgements in absentia
- Judges and prosecutors, who are specially trained in juvenile justice matters and on considering the social environment of the defendant
- The results of the individual assessment are presented and considered in the sentencing/determination of the sentence
- Right to the presence of the holder of parental responsibility.

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<sup>54</sup> Austria, Extradition and Legal Assistance Act ([Bundesgesetz vom 4. Dezember 1979 über die Auslieferung und die Rechtshilfe in Strafsachen, Auslieferungs- und Rechtshilfegesetz - ARHG](#)), Federal Law Gazette 529/1979.

<sup>55</sup> Austria, Federal Constitution ([Bundes-Verfassungsgesetz, B-VG](#)), Federal Law Gazette NO. 1/1930.

<sup>56</sup> Austria, Criminal Procedure Code 1975 ([Strafprozeßordnung 1975, StPO](#)), Federal Law Gazette No. 631/1975.

<sup>57</sup> Schroll H. V., § 43 JGG, in: Höpfel F. and Ratz E., Wiener Kommentar zum Strafgesetzbuch.

<sup>58</sup> Austria, Criminal Procedure Code 1975 ([Strafprozeßordnung 1975, StPO](#)), Federal Law Gazette No. 631/1975.

<sup>59</sup> Austria, Criminal Procedure Code 1975 ([Strafprozeßordnung 1975, StPO](#)), Federal Law Gazette No. 631/1975.

<sup>60</sup> Austria, Criminal Procedure Code 1975 ([Strafprozeßordnung 1975, StPO](#)), Federal Law Gazette No. 631/1975.

Other than that, the findings clearly indicate that there are no modifications compared to adult proceedings. The trials against children take place in the “ordinary” court rooms and the same actors are present.

Some interviewees (in particular prosecutors and judges) are aware of the extended possibility to exclude the public from trials against child defendants. However, the findings suggest that they are reluctant to actually exclude the public from the trial “just because it is a child defendant”. The authorities rather believe that public access to court trials is important for the rule of law – even if children are involved as defendants. Moreover, interviewed experts observe that trials against children are even more often visited by school classes. Teachers believe that visiting court trials involving child defendants may have a deterrent effect on their pupils. An interviewed probation officer says:

*Q: But just because it is a trial against juveniles, the public is not excluded, is it?*

*A: No, what I know from experience is that school classes often visit trials against young people. Because the teachers often have the impression that, once the young people see that everything can end up in court, they might behave differently. Juvenile judges are often very committed, and they also want to be active in prevention. And I can remember numerous trials against young people where school classes were sitting inside. (Austria, Probation Officer)*

*Q: Aber nur weil es ein Verfahren gegen Jugendliche ist, wird die Öffentlichkeit nicht ausgeschlossen, oder?*

*A: Nein, also was ich aus Erfahrung weiß, ist es vielmehr so, dass gerade bei Verfahren gegen Jugendliche oft Schulklassen dabei sind. Weil die LehrerInnen oft so das Bild haben, wenn die Jugendlichen einmal sehen, dass das alles vor Gericht enden kann, dann verhalten sie sich vielleicht anders. JugendrichterInnen sind oft sehr engagiert und die wollen ja auch in der Prävention tätig sein. Und ich kann mich an zahlreiche Verhandlungen gegen Jugendliche erinnern, wo Schulklassen drinnen gesessen sind. (Österreich, BewährungshelferIn)*

The public is mainly excluded from trials against children if the cases involve crimes that are related to the sexual sphere or touch upon other sensitive aspects for the young people, whereby public access could affect the children’s chances for the future. In these instances, or other situations, where public access might have an incriminating effect on the child, the public is either excluded *ex officio* by the judge or upon request of the defence lawyer. An interviewed prosecutor explains:

*Q: Based on your experience and compared to adults, what specific adjustments are made to enable young people to participate effectively in the trial?*

*A: The most important modification is that adolescents and young adults have to participate in the trial, they have to be present. No trial can take place without their presence. This is different for adults, where hearings can take place without them under certain circumstances [...]. The second major adjustment is that, in the case of juveniles, hearings can take place without the public. There are strengthened conditions to exclude the public from the main hearing. This possibility also exists with adults, but with juveniles it is extended, namely whenever it is to be feared that the juvenile could be adversely affected, especially if many visitors are to be expected and this is unreasonable for the juvenile. Then, either *ex officio* or at the request of the defence lawyer or the juvenile him-/herself - I would say almost 100% - the public is excluded, so that the juvenile defendant is not intimidated by the public presence. (Austria, Prosecutor)*

*Q: Basierend auf Ihrer Erfahrung und verglichen mit Erwachsenen: welche spezifischen Anpassungen werden vorgenommen, um den Jugendlichen die effektive Teilnahme an der Verhandlung zu ermöglichen?*

*A: Die wichtigste Modifikation ist, dass Jugendliche und junge Erwachsene an der Verhandlung teilnehmen müssen, sie müssen anwesend sein. Es kann keine Verhandlung ohne ihre Anwesenheit stattfinden. Das ist bei Erwachsenen anders, wo Verhandlungen unter gewissen Umständen ohne sie stattfinden können [...]. Die zweite wesentliche Anpassung ist, dass bei*

*Jugendlichen Verhandlungen unter Ausschluss der Öffentlichkeit stattfinden können. Da gibt es verstärkte Bedingungen, die Öffentlichkeit von der Hauptverhandlung auszuschließen. Diese Möglichkeit gibt es auch bei Erwachsenen, bei Jugendlichen ist das allerdings ausgeweitet, nämlich immer dann, wenn zu befürchten ist, dass das den/die Jugendliche/n beeinträchtigen könnte, vor allem wenn viele Zuschauer zu erwarten sind und das unzumutbar ist für den/die Jugendliche/n. Dann wird entweder von Amtswegen oder auf Antrag des Verteidigers oder des/der Jugendlichen selbst – ich würde einmal sagen fast zu 100% - die Öffentlichkeit ausgeschlossen, damit der/die jugendliche Angeklagte durch diese Öffentlichkeit nicht eingeschüchtert wird. (Österreich, StaatsanwältIn)*

The interviewees - as members of the JCA - inform the child defendants about the fact that the main trial will be accessible to the public, and prepare them for it. The child defendants react differently: some do not care, while others are embarrassed.

*Q: Based on your experience and compared to adults, are there any adjustments made to the setting and the proceedings to enable the child to participate effectively?*

*A: Of course, so effective participation: the defence lawyer should be able to work effectively, the parents are there, the individual assessment, so that is already done. That is - in the case of an adult, the parents, the individual assessments are not available. Maybe the probation officer is added in case of adult defendants, but there are adjustments for children. But it's the same courtroom, the same dock, so there's no stuffed animal next to the defendant or anything like you know from divorce proceedings. You have to bear in mind that you are dealing with offenders who are perhaps young, who only understand the whole thing through the criminal proceedings. But there are also children, I know from my own experience, who are fully aware that what they have done is illegal and who act completely calmly and unemotionally. (Austria, Juvenile Court Assistant)*

*Q: Basierend auf Ihrer Erfahrung und verglichen mit Erwachsenen: werden bezüglich des Settings und des Verfahrensverlaufes irgendwelche Anpassungen vorgenommen um dem Kind die effektive Teilnahme zu ermöglichen?*

*A: Natürlich, also effektive Teilnahme: der Verteidiger soll effektiv arbeiten können, die Eltern sind dort, die Jugenderhebung, also das wird schon gemacht. Das ist ja – bei einem Erwachsenen fallen die Eltern, die Jugenderhebungen weg. Da kommt vielleicht der Bewährungshelfer dazu, aber das sind schon Änderungen, die es da gibt. Aber es ist der gleiche Verhandlungssaal, die gleiche Anklagebank, also da gibt es dann kein Plüschtier daneben oder so, wie man es halt von Scheidungsverfahren kennt. Man muss sich schon vor Augen halten, dass man es hier mit Straftätern zu tun hat, die vielleicht jung sind, die das ganze erst durch das Strafverfahren behirnen auf gut Deutsch. Es gibt aber auch Kinder, das weiß ich aus eigener Erfahrung, die sich dessen völlig bewusst sind, dass es etwas Illegales ist, was sie getan haben und die da völlig reuelos und emotionslos agieren. (Österreich, JugendgerichtshelferIn)*

An interviewed prosecutor additionally mentions that the individual assessments are not read out aloud during the trial if their content requires so. Sometimes, reading out the outcome of the individual assessment in front of the juveniles may have a negative impact on them. According to an interviewed prosecutor, mostly the JCA request not reading out the individual assessment report if it contains sensitive issues. In these cases, the report (or the problematic parts of it) is presented only in the deliberation, where the jurors sit down to find a judgement.

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

Only judges and prosecutors, who are specialised in juvenile justice and aware of the needs and concerns of child defendants, lead court trials against child defendants. The judges decide themselves to specialise in juvenile justice matters – they are not nominated by the authorities. Moreover, these judges and prosecutors are obliged to obtain special training in juvenile justice matters, as well as the

“soft skills” needed when dealing with juveniles. Moreover, they are encouraged to participate in regular trainings and conferences. This is the most important safeguard mentioned by interviewed experts: to hear children and consider their views.

The concrete proceedings are not so different from proceedings involving adults as defendants. At the beginning of the trial, the children are informed about the status of the proceedings against them. Moreover, they are informed about their right to participate, meaning that they are able to make a statement which will be used as evidence both for and against them. After that, the children are heard. They have the opportunity to express their views on the case and on the evidence in a summarised version. Later on, they receive questions from the court, the public prosecutor's office, and the defence lawyer. Moreover, the children have the right to ask questions to witnesses - either directly or via their defence lawyers.

*Q: How are the juveniles heard in the trial and to what extent are their views taken into account?*

*A: Well, the procedural rights with regard to the possibility to express oneself are not significantly different in proceedings against juveniles than in proceedings against adults. So, at the beginning of the trial, the juvenile is informed about his/her status, about the fact that s/he can participate, in the sense of being able to make a statement and that everything s/he says will be used as evidence – both, for and against him/her. And then, in a hearing, s/he has the opportunity to summarise, to give his/her version, his/her view of things. S/He can then answer questions from the court, the public prosecutor's office, the defence, and, of course, s/he also has the right to reply to witness statements via his/her defence lawyer, or to ask questions to witnesses him-/herself. Yes - but there are no significant differences in relation to criminal proceedings against adults. (Austria, Judge)*

*Q: Wie werden die Jugendlichen in der Verhandlung gehört und in welchem Ausmaß werden ihre Sichtweisen berücksichtigt?*

*A: Also die Verfahrensrechte in Bezug auf die Möglichkeit sich zu äußern, sind in Verfahren gegen Jugendliche nicht wesentlich anders als in Verfahren gegen Erwachsene. Also, der/die Jugendliche wird zu Beginn der Verhandlung überhaupt belehrt, über seinen/ihren Status, darüber, dass er/sie sich beteiligen kann, im Sinne von: eine Aussage machen kann und dass alles, was er/sie sagt, als Beweismittel verwertet wird – sowohl für ihn/sie, als auch gegen ihn/sie. Und dann hat er/sie in einer Einvernahme die Möglichkeit, zusammenfassend, seine/ihre Version, seine Sicht der Dinge zu schildern. Er/sie kann dann Fragen des Gerichts, der Staatsanwaltschaft, der Verteidigung beantworten, hat in weiterer Folge natürlich auch das Recht, zu replizieren, auf Zeugenaussagen, über seinen/ihren Verteidiger/Verteidigerin, oder auch selbst Fragen an Zeugen/Zeuginnen zu stellen. Ja – aber da gibt es keine wesentlichen Unterschiede bezogen auf ein Strafverfahren gegen Erwachsene. (Österreich, RichterIn)*

If the child defendants make use of their right to express themselves and participate in the court trial – if they confess and are cooperative during the court trial – their views as well as their social background are considered by the court in the sentencing. This is particularly true, if the child defendants talk openly and speak the truth during the court hearing. An interviewed prosecutor brings examples for situations, where this is not the case:

*Q: How are the views of young people heard and considered in court? You have said before that one is perhaps a bit more lenient and so on.*

*A: One is not necessarily always more lenient with juveniles, but one does consider juvenile stupidity and says: that was unique. On the other hand, you are a bit stricter with certain views where you say: that's not possible.*

*Q: What kind of views could those be?*

*A: Well, these typical guardians of morals just come to mind, someone who thinks he has the right to tell a young girl how she has to behave. They say: don't be angry with me, but that's not possible and certainly not in our country. With us, all people are equal and women have the*

*same rights as men, and you have no right to tell another girl that she has to wear a headscarf or that she's not allowed to meet any boys or anything like that - they will be told that quite clearly. But that would also be the case with adults. (Austria, Prosecutor)*

*Q: Wie werden die Ansichten von Jugendlichen bei Gericht gehört und in Betracht gezogen? Sie haben vorher schon gesagt, man ist vielleicht etwas milder und so.*

*A: Man ist nicht unbedingt immer milder mit Jugendlichen, aber man zieht schon jugendliche Dummheit in Betracht und sagt: das war einmalig. Auf der anderen Seite ist man ein bisschen strenger mit gewissen Ansichten, wo man sagt: das geht so nicht.*

*Q: Was für Ansichten könnten das sein?*

*A: na ja, diese typischen Sittenwächter fällt mir jetzt grad ein, jemand, der meint, er hat das Recht einem jungen Mädchen zu sagen, wie sie sich zu benehmen hat. Da sagt man schon: sei mir nicht böse, aber das geht gar nicht und bei uns schon gar nicht. Bei uns sind alle Menschen gleich und Frauen haben die gleichen Rechte wie Männer und du hast kein Recht, einem anderen Mädchen zu sagen, dass sie ein Kopftuch tragen muss oder dass sie keine Burschen treffen darf oder so – das wird man ihnen auch ganz klar sagen. Aber das wäre auch bei Erwachsenen so. (Österreich, StaatsanwältIn)*

This quote shows that the judges' behavior and his/her judgements are strongly directed towards having an influence on the future behavior of the child defendant and to (re-)integrate them into society. The findings suggest that there is a different approach in court trials against child defendants: the sentencing is mainly directed towards the prevention of reoffending and bringing the child back on track. The sentencing in case of adult defendants is more directed towards punishment and its general preventive effects.

*Q: Let's move on to the main trial: based on your experience and compared to adults, in your experience are special adjustments made to make sure that young people can participate effectively?*

*A: [...] There is a completely different atmosphere in the courtroom with juveniles and, usually, the probation officers sit in the back and there is simply a different atmosphere with juveniles. It's also more humane, you deal with it differently, even as a defence lawyer you try to convey it differently. Because what's the point of hitting [punishing] a young person? Neither the legislator nor society wants that. Because it doesn't get any better. You rather have to care that they are reintegrated, that they are embedded in a structure, receive probation service. (Austria, Defence Lawyer)*

*Q: Kommen wir nun zur Hauptverhandlung: basierend auf Ihrer Erfahrung und verglichen mit Erwachsenen, werden Ihrer Erfahrung nach, besondere Anpassungen vorgenommen, um sicherzugehen, dass Jugendliche effektiv daran teilnehmen können?*

*A: [...] es ist bei Jugendlichen schon eine ganz andere Stimmung im Gerichtssaal und in der Regel sitzen auch die Bewährungshelfer hinten drinnen und es ist einfach eine andere Stimmung bei Jugendlichen. Es ist auch menschlicher, man geht anders damit um auch als Verteidiger versucht man das anders rüberzubringen. Weil was hat es für einen Sinn, bei einer/m Jugendlichen draufzuhauen? Das will weder der Gesetzgeber so, noch die Gesellschaft. Denn es wird ja nicht besser. Da muss man eher schauen, dass man den/die resozialisiert, dass man ihn/sie einbettet in ein Gefüge, Bewährungshilfe. (Österreich, StrafverteidigerIn)*

Because of this different approach and the specialisation of judges and prosecutors, the authorities are very experienced in dealing with child defendants and considering their concerns, needs, as well as social and family environment. Moreover, the judges are more directed towards raising the child defendants' awareness for injustice than in the case of adults.

Another interviewee observes that some judges support child defendants to behave respectfully and correctly before the court, while others blame them for their incorrect behaviour and intimidate them.

The interviewee believes that juvenile judges are generally motivated to “educate” the child defendants and try to achieve the best solution for the child when questioning them. One example would be that judges try to explain to child defendants their line of thinking by saying “look, if you respond that way, it means to me that ...” or “would you like to reconsider your response?” or “if you could give the consent to probation service, it would be easier for me not to impose a custodial sentence on you”, etc. Thus, even though the judges are serious in the matter, they try to support the child defendants in the achievement of the best solution for them. This assessment is confirmed by other interviewees in several professional groups. An interviewed judge brings an example on how s/he does this.

*Q: Are there any special measures for young people to ensure that they can participate effectively in the process? That their views are heard.*

*A: Basically, there is no difference to adults. Adults also have to be instructed, have to understand what is at stake. Of course, it can be a little bit youth-friendly language to translate words like ‘forced’, which we know from legal jargon, by saying: ‘did you take away his/her mobile phone?’. A typical situation is, for example, three young people circling another young person in the park and saying: give me the mobile phone. And s/he gives the mobile phone and, then, they take the mobile phone and leave. Then, the accused tells me in court: s/he gave it to me, I didn't do anything. An adult is more likely to understand that s/he did something wrong. To a young person you have to explain: ‘Yes, why do you think s/he gave it to you?’. And then s/he says: ‘S/he was probably a bit scared.’. And then I ask: ‘Why do you think s/he was afraid of?’ ‘Probably because there were three of us.’ And then I say: ‘and that's the point, that you scared him/her.’ And that's how you explain it to a young person. (Austria, Judge)*

*Q: Gibt es irgendwelche besonderen Maßnahmen für Jugendliche, die sicherstellen, dass sie effektiv am Verfahren teilnehmen können? Dass ihre Sichtweisen gehört werden.*

*A: Also, grundsätzlich gibt es da keinen Unterschied zu Erwachsenen. Auch Erwachsene sind zu belehren, haben zu verstehen worum es da geht. Ein bisschen kann es natürlich jugendgerechte Sprache sein, dass man – ja – Worte, wie ‘abgenötigt’, die man aus dem juristischen Jargon halt kennt, übersetzt, indem man sagt: ‘hast du ihm/ihr das Handy weggenommen?’. So eine typische Situation ist z. B. drei Jugendliche umkreisen im Park eine/n andere/n Jugendliche/n und sagen: gib mir das Handy. Und der/die gibt das Handy her und dann nehmen sie das Handy und gehen wieder. Dann sagt der/die Beschuldigte mir vor Gericht: Er/Sie hat es mir ja gegeben, ich habe ja nichts gemacht. Ein Erwachsener versteht das eher, dass er/sie da was Falsches gemacht hat. Einem/Einer Jugendlichen muss man dann halt erklären: Ja warum glaubst du, dass er/sie es dir gegeben hat? Und dann sagt er/sie: Wahrscheinlich hatte er/sie ein bisschen Angst. Und dann frage ich: Was glaubst du warum er/sie Angst hatte? Wahrscheinlich, weil wir zu Dritt waren. Und dann sage ich: und darum geht es, dass ihr ihm/ihr Angst gemacht habt. Und so erklärt man das halt bei einem/einer Jugendlichen. (Österreich, RichterIn)*

This quote shows how judges act in order to support the children in behaving correctly and, thus, enabling their effective participation in the trial and achieving the best solution for the child defendants. This view is supported by the information provided by other interviewed experts. Judges support the children by calming them down if they show signs of stressed behavior. Further, judges set limits to the child's behavior if they behave or talk inappropriately. They ask child defendants repeatedly if they understand what is going on or if they have any questions. Furthermore, when the judgement is made, the judges offer the child defendants time to think about it, e.g. to take some days and figure out together with their defence lawyers whether they will accept it or appeal against it.

An interviewed judge states that child defendants do not so much like to actively or effectively participate in the court trial. They do not want to share their views and express themselves too much. According to this interviewee, this behavior is stronger displayed by defendants in case of white-collar crimes, than in case of child defendants.

An interviewed ombudsman for children observes that juveniles who belong to ethnic groups with a strong clan-life are disadvantaged in their effective participation during the trial. The social pressure of the clan, and the physical presence of clan members during the trial hinders the child defendants from speaking freely according to their conscience about what has happened and the reasons for it. The interviewee knows from incidents of accused persons or witnesses, who were put under pressure by visitors in the waiting area. According to the interviewed ombudsman, even the specially trained juvenile judges are not well prepared to deal with this pressure from clans on child defendants, or also on witnesses. The exclusion of the public from the trial is no real option in these cases, as the child will hardly apply for it – due to the pressure. Thus, the interviewee argues for trainings of judges and prosecutors to recognise social pressure from clans ().

An interviewed defence lawyer says that all child defendants are treated equally in this regard. No differences are made along categories of ethnicity or religion. However, child defendants, who are cooperative but maybe have learning difficulties, may receive a more beneficial treatment by the authorities.

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

According to the interviewees, child defendants may be accompanied by whom they want. As long as the public is not excluded from court trials against children, friends, schoolmates, and even teachers may be present. The holder of parental responsibility, a person of trust, and the defence lawyer may accompany the child even if the public is excluded from the trial. These actors may usually also speak and be heard during the trial. Moreover, the children may confer with them before and after the trial.

Talks to the **defence lawyers** are also possible during the trial – except when the child defendants are interrogated. Otherwise, the defence lawyer just has to ask the judge for an interruption of the trial. According to judges and prosecutors, children and defence lawyers particularly request to confer during the trial if they have initially refused to testify, but reconsider this decision when incriminating evidence comes up during the trial.

Children have a right to be accompanied by the **holder of parental responsibility**. If the holder of parental responsibility cannot be present during the trial, their parental rights are transferred to the defence lawyer for the duration of the trial. If they are present, they may speak and be heard during the trial. According to an interviewed judge, the parents are important providers of information relevant to the case and the social background of the child defendant.

Interviewed experts report that **interpreters** are available for the child defendants, but not for their parents. In case of families with a migration background, it is usually the children, who speak German well, but not the parents. In practice, the parents would rather need an interpreter to effectively follow the court trial than the children. An interviewed member of the JCA points out:

*Q: Compared to adults, are there any special measures or adjustments to the settings to allow juveniles to participate effectively in the trial?*

*A: [...] The legal guardian must be present, the lawyer is often entrusted with this, if the legal guardians are not present, then the lawyer takes over the legal responsibility for the duration of the trial. But, otherwise, I don't know that the young person has any (...). Interpreting services are also possible for adults. What we always suggest for court hearings, for young people who can speak German well, but whose parents do not speak German, is that interpreting services be organized for the parents as well. But, otherwise, there are no special measures or information for young people. (Austria, Juvenile Court Assistant)*

*Q: Verglichen mit Erwachsenen: gibt es irgendwelche besonderen Maßnahmen oder Anpassungen der Settings, um den Jugendlichen die effektive Teilnahme an der Verhandlung zu ermöglichen?*

*A: [...] Der gesetzliche Vertreter muss anwesend sein, dem Rechtsanwalt wird das oft überantwortet, wenn die gesetzlichen Vertreter nicht anwesend sind, dann übernimmt der*

*Rechtsanwalt für die Dauer die gesetzliche Verantwortung. Aber ansonsten wüsste ich nicht, dass der Jugendliche irgendwelche (...) Dolmetsch-Leistungen sind ja auch möglich bei Erwachsenen. Was wir schon immer anregen bei Gerichtsverhandlungen, bei Jugendlichen, die zwar gut Deutsch können, deren Eltern aber nicht der Deutschen Sprache mächtig sind, dass man auch für die Eltern Dolmetsch-Leistungen organisiert. Aber ansonsten gibt es keine speziellen Maßnahmen oder Informationen für Jugendliche. (Österreich, JugendgerichtshelferIn)*

Finally, the findings indicate that the presence of **probation officers** and the JCA, who carry out the individual assessment, during the court trials is important for children too. These actors are a valuable resource of information for the judge and the court – in terms of the perspectives of the child defendant, as well as their social backgrounds. Moreover, these actors, in addition to the defence lawyers, also inform the children and explain to them the outcome / judgement in more detail.

An interviewed defence lawyer mentions challenges in communication due to the mandatory mouth and nose protection in the course of the Covid-19 pandemic prevention. Another lawyer mentions challenges in talking confidentially to children, who are deprived of liberty. According to him/her, s/he cannot talk privately to them before the trial starts, as, first, they are accompanied by justice guards, who are always present, to keep them from escaping, and, second, there is usually no room available to talk in private. The interviewee doubts that the presence of a justice guardian is necessary. Another interviewed defence lawyer circumvents this problem by visiting his/her clients in prison and not only 10 minutes before the trial starts. This defence lawyer prepares them for the trial in the framework of a “trial game”. Thereby, the interviewee plays the role of the judge and the prosecutor, and poses the expected questions to his/her clients. This way, namely by going through a whole mock trial with their defence lawyer, the children can prepare themselves for the actual trial and get an idea of the trial’s conduct. The interviewee also explains to his/her clients the different roles of the actors and where they will all be sitting.

#### d. Discussion of findings

The findings clearly indicate that the specialisation of judges and prosecutors on juvenile justice matters enables the child defendants’ effective participation during the trial. The juvenile judges and prosecutors are not only trained on the “hard skills” in juvenile justice law, but also in obtaining the “soft skills” in dealing with child defendants and taking into account their specific needs and concerns. Moreover, the findings indicate that the court trials – and the criminal proceedings as a whole – are dedicated to the prevention of re-offending, as well as re-integration of the child into society. This approach is also mirrored in the sentencing in case of conviction, whereby the application of alternative measures to detention and support measures, based on the individual assessment, play a strong role. The judges support the child defendants by creating a sense of awareness of injustice and by helping them to realise that what they did was wrong. The social environment and existing support services (probation services and other support persons) are strongly involved in the re-integration of the child defendant into society.

According to the findings, the children are heard in the framework of questioning and may comment on all evidence that is presented during the trial. The children may always confer with their lawyers – in the framework of whispering or by interrupting the court trial. The children may also re-consider their decision on whether or not to take responsibility vis-a-vis the accusation – whether they present themselves innocent or guilty, whether they remain silent or not. According to the interviewed experts, the vast majority of judges (particularly the young ones) are really eager in supporting the child to achieve the best solutions for them. An interviewed defence lawyer even reported that it is a pleasure to legally represent child defendants – compared to adults.

Some interviewed lawyers report challenges for the effective participation of child defendants and their family in the court trial. These are:

- The exclusion of the public only in exceptional cases. Otherwise, the public access of court trials is important for the rule of law. Particularly in trials involving child defendants, school classes are more likely to be present – child defendants in court trials are presented by teachers as ‘cautionary tale’.
- Communication with the lawyer during the trial (whispering) is hindered by the mandatory mouth and nose protection due to the Covid-19 pandemic.
- Confidential Communication in private before the trial is difficult with child defendants, who are accompanied by justice guards from pre-trial detention. Justice guards are always present to prevent an escape.
- No interpreters are available for the communication with the child defendant’s parents.

## PART D. GENERAL ASSESSMENT

### D.1 Challenges

Only an interviewed prosecutor and an interviewed member of the Youth Welfare Authority (guardianships) do not name any challenges with regard to guaranteeing the procedural safeguards of children. All other interviewees indeed identify challenges – during the interview and, at its end, by answering the explicit question on challenges. These challenges are structured in this section in line with the general structure of the report.

#### a. The right to information

One interviewed judge mentions challenges in relation to the right to information. According to him/her, the information of child defendants about their procedural rights is too extensive and too unspecific. The interviewee says that the police is obliged to inform the child defendant about all procedural rights, all possible outcomes of all investigative steps and all remedies. This information load overburdens children and hinders their understanding from the outset. The interviewee acknowledges that children need to be well informed about their procedural rights. However, the Directive (EU) 2016/800 foresees informing children in such a high level of detail that it must overburden children. Moreover, the interviewee mentions that many of the procedural safeguards for children are implemented *ex officio* anyway, e.g. the individual assessment, the legal aid lawyers, and the like. The interviewee suggests a more flexible way of informing children about their procedural rights and safeguards, and, consequently, the provision of more heterogeneous templates for informing them. The interviewee suggests a more tailored (case-specific) information of children in criminal proceedings.

#### b. Effective legal representation

Ensuring the physical presence of the defence lawyer during the police interrogation is a reported challenge in relation to the effective legal representation. In particular in rural areas, the on-call legal service is not sufficiently established to ensure the immediate presence of a defence lawyer in every police interrogation and it takes a long time until the defence lawyer arrives which leads to the deprivation of the child defendant's liberty in the meantime.

Moreover, the physical presence of a defence lawyer is not mandatory in case of misdemeanours. However, child defendants, who are accused of misdemeanours, also feel incriminated at the police. Audio-visual recording of police interrogations without defence lawyer present is another incriminating factor.

An interviewed judge recommends using modern means of virtual communication, to secure the mandatory presence of a lawyer during immediate police interrogations with arrested children. This has two advantages: first, travelling time for lawyers can be reduced and, second, the immediate availability of a lawyer for an arrested child is easier secured.

Furthermore, child defendants who cannot afford a defence lawyer are provided with two different lawyers. One from the on-call service for the immediate police interrogation and another one as a legal aid lawyer. After the representation by the lawyer from the on-call service ends and the representation by the legal aid lawyer commences, there is a certain amount of time, namely several days, where the child is legally unrepresented. However, no procedural acts are conducted during this time. There is a difference of the point in time when legal aid lawyers and privately paid for lawyers enter the case: the latter already enter the case before the police interrogation is carried out, whereas legal aid lawyers enter the case at a later stage. This is due to the fact that the on-call defence lawyers, who come to the immediate interrogation, are usually not nominated as legal aid lawyers later on.

The following communication barriers were mentioned by the interviewed lawyers: language barriers in cases of children who speak languages, which are not covered by the sworn and certified court interpreters; interpretation services do not extend to the parents of child defendants.

If lawyers visit (child) defendants in prison, they are not allowed to bring electronic devices with them. Thus, they have to carry the heavy paper file with them, which is a challenge for the defence lawyers. Usually, they take – because of weight – only a part of the paper file with them. In case, the child defendant has questions on pieces of the file, which the defence lawyers have not with them, barriers of information or communication are the result. Moreover, due to Covid-19 the visiting times are restricted in the detention facilities, also for defence lawyers.

c. Audio-visual recording of police interrogations

There is an observable reluctance among the interviewees when it comes to the audio-visual recording of police interrogations. Interviewed police officers did not receive the relevant training and equipment when the interviews were conducted. Furthermore, a defence lawyer observes that the audio-visual recording and the presence of cameras and equipment have an incriminating effect on children – in particular if the audio-visual recording is implemented as an alternative to the physical presence of defence lawyers and support persons. A judge expects an increased workload from the audio-visual recording, as watching the video of a whole interrogation takes longer than reading a summarized report. Moreover, this judge does not expect an increased quality of court trials if audio-visual recordings of interrogations are shown there. S/He doubts that the impression of the police interview is made more immediate by the video recording. According to another interviewed judge, an audio-visual recording of police interrogations would help both the authorities and the child defendants with regard to transparency. Audio visual recordings of police interrogations would support children in the implementation of their procedural rights and protect police officers against accusations for violating procedural rights.

d. Deprivation of liberty

Interviewed non-legal experts, lawyers, and also an interviewed judge refer to deprivation of liberty as a challenge in relation to the procedural safeguards for children in criminal proceedings. First of all, there are still too many children deprived of liberty. Moreover, an interviewed lawyer and a judge perceive the conditions in the detention facility and in the pre-trial detention facility as improvable. Three lawyers additionally report that children with no or a low social network in Austria and children with no fixed residence status or place cannot effectively make use of alternative measures to detention.

e. Acceleration principle in criminal investigations vs. procedural safeguards

The biggest challenge for the investigative authorities (prosecution and police) is the contradicting demands of having the acceleration principle on the one hand and the procedural safeguards on the other. Particularly the mandatory physical presence of a defence lawyer during investigative acts is in conflict with the requirement to speed up the criminal investigations. The implementation of the procedural safeguards according to the EU Directive (EU) 2016/800 extend the duration of the investigative proceedings and the deprivation of liberty for child defendants may be extended through waiting for the arrival of the lawyer. This challenge applies in general and especially in rural areas and in criminal cases involving several child defendants. Interviewed members of the Juvenile Court Assistance, who are responsible for the individual assessment, refer to the same challenge in relation to their work. The acceleration principle in criminal proceedings against children is in conflict with a high-quality individual assessment, which considers all concerns and specific needs of child defendants. The individual assessment has to be carried out as fast as possible, but, at the same time, all specific situations, concerns, and needs have to be assessed to propose the tailored measures to the court. Further, several actors (private and professional ones) have to be contacted and involved

in the individual assessment, which is practically also in conflict with the acceleration principle of criminal proceedings against children.

f. Children in situations of vulnerability

With regard to the effective implementation of procedural rights, in particular the interviewed non-legal experts (social workers, psychologists) refer to children in situations of vulnerability. These are mainly child defendants with a migration background and children with no social network and support in Austria.

Both the individual assessment and the social network conference are implemented to develop alternative measures to reduce the time children are deprived of liberty or to avoid it. Both instruments are strongly based on the social network and the support structures a child has in Austria. The assumption behind this approach is that only a strong family and social network may prevent reoffending and is, thus, a legitimate reason for the juvenile justice authorities to release a child from prison. Consequently, both instruments disadvantage children with no or only a low social network and support in Austria. Children in vulnerable situations are not that disadvantaged in accessing the individual assessment, as it is offered ex officio. Children in vulnerable situations are disadvantaged in accessing the social network conference, which is carried out by the probation services upon request of the authorities. Particularly children without social network hardly benefit from it. Furthermore, the authorities assume that the danger of flight, which is a legitimate reason to impose pre-trial detention, is more likely in cases of migrant children and those without secure residence in Austria.

Additionally, language barriers render the communication with authorities and defence lawyers more difficult. Even if interpreters are provided to enable the communication with the authorities, language barriers prevent the child defendants from an effective understanding of the general conduct of the proceedings and the accusation. Moreover, cultural differences in perceptions and descriptions of reality play a role in criminal proceedings. An interviewed non-legal expert, who has a migration background, refers to different cultural narratives and ways to express oneself. In some languages, a very colorful narrative style is employed, meaning that people tend to exaggerate but not consciously lie. In German, people talk very fact-based. These differences may entail misunderstandings during court trials. Moreover, children who are involved in strong clan structures with high social pressure are disadvantaged in their effective participation in criminal proceedings and in having a fair trial. Clan structures and high social pressure may force children to false confessions, in order to protect adults. According to an expert's experience, clans tend to force those to confess, who have to expect the lowest sentences, e.g. children. The procedural safeguards, as they are implemented now, can hardly compensate for this cultural pressure. Moreover, the authorities' awareness of these problems is low.

## D.2 Improvements

The **mandatory physical presence of defence lawyers** during police interrogations of children is the most important improvement since the implementation of Directive (EU) 2016/800. In case of immediate interrogations of children deprived of liberty, the authorities access the on-call legal service. In all other police interrogations, either a privately paid for defence lawyer is organised by the parents or a public aid lawyer is provided by the state. In all cases, the police wait with the interrogation until the lawyer can be physically present. According to interviewed experts of different professional groups, this is the main improvement in the course of the amendment of the Juvenile Court Act in June 2020.

Moreover, the **obligation to inform the parents of children**, who are to be questioned by the police, is mentioned as improvement since the implementation of Directive (EU) 2016/800. According to interviewed police officers, previously, it was the child defendants' choice whether the police inform the parents or not and, in practice, children most often refused having their parents informed. Since the implementation of the Directive, the parents must be present during the police interrogation. Only in case the parents are not traceable or they are unable to attend, another person of trust may be

present upon the parents' consent. According to interviewed police officers, children are more reluctant to testify and talk since then. Finally, interviewees mention provisions of Directive (EU) 2016/800, such as age assessment and medical examination. However, there is no coherent information provided on how these provisions are actually implemented.

Several other provisions of Directive (EU) 2016/800, were already implemented before the Directive (EU) 2016/800 requested it, such as the individual assessment or the social network conference to develop alternative measures to detention (deprivation of liberty as last resort) or that no trials and judgements can be held or delivered in absentia.

### **D.3 Promising practices**

Most interviewees named the following examples as good practices: the individual assessment, carried out by the Juvenile Court Assistance, the social network conference, carried out by the probation service, as well as the special trainings and awareness of judges on the needs and concerns of children.

The **individual assessments**<sup>61</sup> are mentioned as good practice in particular in criminal proceedings against juveniles which take longer. The experts who carry out the individual assessments may even provide parents with support and counselling on how to deal with their children. According to an interviewed lawyer's experience, many parents are overwhelmed with their child's involvement in criminal proceedings. The JCA staff, who carry out the individual assessments, support the parents in this challenging situation. An interviewed probation officer states that the Juvenile Court Assistance has been tasked with the conduct of the individual assessments for five years. This is a professionalization of this work, as the Juvenile Court Assistance consists of experts in criminal justice and social work. Previously, it was done by the Youth Welfare Authority.

The Viennese JCA staff draws special attention to the Viennese JCA, which is located at the Viennese detention facility and, thus, is involved in the whole criminal proceedings against juveniles who are in pre-trial detention. Interviewed judges highlight how they benefit from the individual assessment. The results of the individual assessment provide comprehensive information about the child defendant's social life, his/her current situation, and the prognosis for the future. These aspects are important information for the judges when determining the sentences. This view is confirmed by another judge, who is so in favour of the individual assessment that s/he would also recommend applying for it in cases involving adult defendants. The concept of an assessment of the personal and social background of an accused would be useful in all criminal proceedings.

The **specially trained judges and prosecutors**<sup>62</sup> are mentioned as promising practice, because these judges / prosecutors facilitate the effective participation of child defendants in the court trial; they are highly aware of the needs and concerns of child defendants and ready and trained to support these defendants. These judges apply the approach to give the child defendants a second chance. Because of their training and specialized experience, these judges are able and empathic enough to distinguish between "real crime" and an incident, which constitutes a crime according to the law, but, in practice, a juvenile slipped into it, because he / she had several problems. The judges can distinguish whether a defendant is dangerous or not, and impose the sentences and supporting measures accordingly. An interviewed judge emphasizes the motivation of these judges. S/He believes that only persons with a special interest in supporting children in criminal proceedings in the sense of an intrinsic motivation do this work. These are judges, who not mainly aim at convicting criminals, but rather want to get the young people back on track through the provision of supportive measures and considering their social environment. These persons need to have additional competences to the legal

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<sup>61</sup> Austria, Vienna Juvenile Court Assistance (2021), Individual Assessments ([Jugenderhebungen](#)).

<sup>62</sup> Austria, Association of Austrian Judges (2021), Section for Juvenile Criminal Law ([Fachgruppe Jugendstrafrecht](#)).

expertise. Thus, because of this intrinsic motivation and the commitment of judges, the procedural safeguards for child defendants are implemented.

Further, despite of all challenges in relation to the **fast assignment of cost-free legal representation**<sup>63</sup> in Austria, which is implemented by the on-call legal service and the legal aid lawyers, interviewees also state it as a promising practice. Both types of legal representation are cost-free and accessible to child defendants with low bureaucratic efforts.

The two interviewed probation officers and an interviewed defence lawyer mention the **social network conference** as example of good practice. The social network conference strongly involves the child defendants and their social environment and develops alternative measures to pre-trial detention. The interviewed defence lawyer is so in favor of the social network conference that s/he suggests extending its application to child defendants who remain at liberty but would still need a support network, as well as to adult defendants.

The probation services name another example of good practice from their own organization. It is an **App for the communication** between the child defendants, the authorities of the criminal proceedings, and the probation services. The planning of the app started in 2019 and it's implementation is planned for October 2021. The target group are the clients of the probation service. There is no restriction to juveniles, even though it is assumed that child defendants will use it more likely than adults. The probation services have a documentation platform (DOKU), where all cases and communication are documented. The DOKU is provided with additional functions to enable communication with the app on the clients' smartphones. In this way, documents and messages can be sent directly from DOKU to the clients' app. The app for the clients will be available in the usual app stores. Clients have a diary in the app that is only for their personal purposes - moods, thoughts can be described and tracked. Documents from the smartphone can be sent to the social workers through the app and stored directly in the DOKU. Messages can be exchanged with the social workers and reminders of appointments at the police, court or with the probation officer are displayed through the app. The aim of the app is to make administrative processes and the access to clients easier for the social workers. In addition, the app is equipped with an area containing questions about the offence, which brings clients to think about certain questions before the appointments, thus, increasing retention. As far as the interviewee knows, the probation service Austria is currently the first in Europe to develop such an app. Apps are being developed in other countries, but without an interface to the probation service's documentation software.

Finally, an example of **good practice from Switzerland** is mentioned. In Switzerland, the juvenile prosecutors are members of the Youth Welfare Authority. Their mandate encompasses both the imposition of coercive and supportive measures. Furthermore, as a member of the Youth Welfare Authority, this actor may impose coercive measures on children also before the age of criminal responsibility. On the other hand, there are closed or semi-closed institutions available for child defendants as alternative detention facilities. The child defendants are locked there only during the night and can go to school during the day. This way, the deprivation of liberty is no real endangerment for the child defendant's integration into social life, education, and vocational training.

Five interviewees, including three out of four police officers, cannot name any promising practices from Austria. An interviewed police officer believes that the police has become more and more powerless in their work during the last three years. S/He refers to the challenges in relation with the criminal investigations, e.g. waiting for the arrival of the lawyer until the interrogation may start or the increase of child defendants, who make use of their right to remain silent, because they were

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<sup>63</sup> The Austrian Bar Association (*Österreichischer Rechtsanwaltskammertag*) (2020), On-call legal service. Information sheet on the organisation as of 1 June 2020, [Rechtsanwaltschaftlicher Bereitschaftsdienst. Informationsblatt über die Organisation ab 01.06.2020](#), see also the [Information sheet in English](#).

advised to do so by their lawyers. As a consequence, the police still put a lot of efforts into the criminal investigations with low outcome.

#### D.4 Suggestions

The interviewees do not provide a lot of suggestions to further implement and protect the procedural rights and safeguards of children who are suspects or accused persons in criminal proceedings. The suggestion of an interviewed lawyer to have a talk to a defence lawyer prior to the police interrogation as precondition for waiving the right to a lawyer has already been implemented since June 2020. Another interviewed lawyer in Vienna suggests having a group of police officers in each police department, who are specially mandated with juvenile justice matters – like it is the case for prosecutors and judges. However, according to an interviewed police officer, this recommendation is already implemented. S/He is a member of this group of police officers who are especially responsible for child defendants.

An interviewed defence lawyer, who legally represents child defendants as a lawyer of choice, emphasizes the importance of access to defence as a safeguard for child defendants. However, legal aid lawyers, who are assigned by the Austrian Bar Association to legally represent child defendants cost-free, are not necessarily specialised in (juvenile) criminal proceedings. A large part of defence lawyers of child defendants works via legal aid without specialization in criminal proceedings. Thus, the interviewee is in favour of the application of criteria for the selection of defence lawyers in Juvenile Court matters at the Bar Association. This is particularly relevant as legal aid lawyers are not lawyers of choice. Lawyers of choice have to be paid for privately.

Some suggestions relate to the extension of services which are available for child defendants only to adult defendants. Other suggestions refer to an increase of the resources of professionals (Juvenile Court Assistance, on-call legal service) to make their work easier and to increase the quality of their services. Child defendants benefit indirectly from this increase in staff and resources.

#### D.5 Additions

Due to the length of the interview and the comprehensive interview guidelines applied, the vast majority of interviewees did not mention any additions. They were exhausted during the end of the interview or had to rush to other appointments, as their break between the interview for this study and the next appointment was cancelled due to the interview's length.

Some interviewees repeat challenges or good practices when asked for any additions, e.g. an interviewed police officer summarises the challenges for police investigations stemming from the mandatory physical presence of defence lawyers during all investigative acts. These are:

- obstructing the criminal investigations by waiting for the defence lawyer to arrive (ad hoc identity parades) which conflicts the acceleration principle in criminal proceedings involving children;
- restricted availability of on-call lawyers for child defendants, who have no lawyer or who cannot afford a defence lawyer;
- having more child defendants in one criminal act;
- tendency of defence lawyers to advise the child defendants to make use of their right to remain silent;
- Mandatory presence of a defence lawyer.

An interviewed prosecutor additionally discusses all **procedural safeguards** for children critically, namely the usual advice from defence lawyers to remain silent. According to the prosecutor, the child defendants do not necessarily benefit from making use of their right to remain silent. S/He says that the possibility of diversion (reconciliation of offences, community service, probationary period) is not possible anymore. The interviewee did not mention that the child may confess at any time (not only

at the police) to make use of diversion. However, the interviewee says that if the defendant remains silent, the prosecution needs to press charges. The interviewee believes that more training on juvenile justice matters for defence lawyers would help to avoid such problems – as the defence lawyers would then apply a different defence strategy. Moreover, the prosecutor states that the summons to the police interrogations contain a lot of detailed information about rights as the Directive (EU) 2016/800 provides for. The prosecutor believes that many child defendants are overwhelmed with all the information. Thus, s/he suggests focusing on the immediately important rights when informing child defendants.

Other interviewees comment on different approaches to **sentencing** when asked for any additions. According to an interviewed police officer, custodial sentences and terminated proceedings have no learning-effect for children and, thus, are not suitable to prevent future crime. Child defendants need to feel the consequences after they have committed criminal offences. The interviewee is in favour of diversion and the imposition of community service. Also, an interviewed probation officer is in favour of more out-of-court settlements in criminal proceedings involving children as defendants.

Finally, interviewees add that the **cooperation and coordination among the experts involved** in criminal proceedings against children works well. A probation officer mentions that the Austrian Bar Association is supportive and takes all complaints against individual lawyers seriously. All actors (police, prosecutor, judges) are very engaged to work for the benefits of child defendants. Authorities only run out of patience in case the child defendant repeatedly commits criminal acts. Finally, an interviewed police officer wishes for more exchange between police officers dealing with juvenile crimes and gang crimes across EU countries. Moreover, s/he demands more exchange visits (two weeks) to different EU countries, to establish mutual learning and an exchange on the practices, and to have a comparison of how it works in other countries. The interviewee criticises that there are no resources available for this exchange at the police.

With regard to equal treatment of all child defendants and equal access to a fair trial, the views of non-legal experts and lawyers are heterogenous. Some believe that all child defendants are treated equally. An interviewed lawyer even feels that the authorities are even more cautious, careful, and supportive in dealing with defendants with a migration background or in need of international protection than in case of Austrian child defendants. The interviewee states that the authorities believe that Austrian defendants are supported well by the family etc., while it is presumed that this is not the case for migrant defendants. Moreover, the interviewee observes that criminal proceedings against child defendants with a migration background require more court resources: informing them about their rights, accessing their parents – the implementation of all these procedural rights is more resource-intensive for migrant children, than for Austrian children or “integrated children” from similar cultures. In the latter cases, the parents understand what a summons to a court trial is and its basic meaning. Thus, the interviewee cannot identify any inequalities affecting child defendants with a migration background. An interviewed probation officer opposes this view. In his/her view, not all child defendants are treated equally or have equal access to a fair trial. This probation officer identifies differences along the following categories: socio-economic background, migration background, flight history and skin colour. The interviewee says that it is not necessarily conscious prejudices that affect the judge’s dealing with members of these groups. It is rather their experiences with these groups and their expectations in relation to media reports and critics by the public. Moreover, the biased selections take place earlier in the criminal proceedings: by the police. The police is more likely to examine individuals with dark skin colour. The more the police examine, the more individuals with drugs the police find. Then, according to the interviewee, child defendants with a migration background, in need of international protection or with dark skin colour are more likely to be held in pre-trial detention, because a danger of flight is assumed. The interviewee perceives this as paradox, particularly in case of persons in need of international protection. Further, if a judge has trials on drug offences involving (child) defendants with dark skin colour every day, it becomes difficult to always reflect on this and see it as the bias-motivated selection for police checks. The interviewee emphasises

that these judges may have a liberal political attitude, meaning that they are not necessarily right-wing oriented or against migration. Moreover, child defendants with a migration background have more difficulties in accessing the labour market, receiving higher education, and participating in society. This clear lack of perspectives also makes them prone to crime.

## PART E. CONCLUSIONS

According to Article § 31a Juvenile Court Act, juvenile criminal cases shall be conducted with special acceleration. The findings of the fieldwork clearly indicate that **the provision of some procedural safeguards conflict with this acceleration principle**. The mandatory physical presence of a defence lawyer during all investigative acts is in conflict with the immediate need for police interrogations. If a group of children gets caught in the act, they are arrested for presentation to an immediate interrogation or taken into police custody. The physical presence of a defence lawyer for each child defendant during the police interrogation is mandatory in these cases. However, it takes at least some hours until the defence lawyers arrive. The majority of child defendants do not have their “own” defence lawyer, who is immediately on the spot when called. In practice, the police call the on-call legal service, which is provided and coordinated by the Austrian Bar Association. The on-call legal service is actually designed for immediate telephone counselling of arrested defendants prior to the police interrogation. Only in the course of the implementation of Directive (EU) 2016/800 this on-call service was expanded to include the physical presence of lawyers during immediate police interrogations of child defendants. The findings of the fieldwork clearly indicate that the number of on-call lawyers was not increased accordingly. Thus, in practice, the police have to wait for several hours or even until the next day to commence the interrogation. In the meantime, the child defendants remain deprived of liberty. This challenge becomes even more visible in rural areas and in instances involving more than one child defendant, such as gang robbery. Findings also indicate that police officers refrain from calling the legal on-call service, but rather immediately call the prosecutor and clarify the imposition of pre-trial detention. If the prosecutor confirms the request for pre-trial detention at the detention and legal protection judge, the police even refrain from interrogating the child defendant. The police immediately hand the case over to the detention and legal protection judge and the child is transferred from police custody to pre-trial detention without being questioned. In particular the interviewed police officers state that some defendants would indeed testify without a defence lawyer. Some of them could immediately be released from custody, after they have confessed. However, this option does not exist anymore.

According to the findings of the fieldwork, the police uses a standardised programme-based information procedure when informing children about their procedural rights. The police do not inform children about the general conduct of the proceedings, but the defence lawyers and the probation officers do. Police interrogations are to be audio-visually recorded if the children remain at liberty and are unaccompanied during the interrogation. Findings show that there is no practical experience with the audio-visual recording so far.

Findings also indicate that several **procedural safeguards** for child defendants (cost-free assistance by a lawyer, individual assessment, medical examination) are **provided and implemented *ex officio***. Thus, the children are not informed about their right to request these safeguards, they are just provided with them. The social network conference to develop alternative measures to pre-trial detention is not provided *ex officio* – but still without previously informing the child. Compared to the situation before the implementation of Directive (EU) 2016/800, children no get less a say or decision-making competences in the meantime. In line with this, the mandatory presence of parents during the police interrogation cannot be waived anymore by the child. Moreover, the child may only waive their right to an individual assessment. If the child does not show up at the appointment, the individual assessment will not take place. Still, the child is not asked whether or not s/he wants to be involved in an individual assessment.

The **individual assessment** is carried out by the Juvenile Court Assistance upon an order of the prosecutor or the judge. It is carried out prior to the main trial, as its findings will be used there and are helpful for the judge in the determination of the sentences. The individual assessment involves

the child defendant, their parents, and social network. The individual assessment is perceived as an example of good practice by some judges and non-legal experts.

The **right to assistance by a lawyer** and free legal aid are ensured by the on-call legal service and the legal aid lawyers. The findings imply challenges in relation to the effective participation of defence lawyers in all procedural steps, due to a lack of specialisation of lawyers in (juvenile) criminal law, the involvement of different cost-free lawyers in criminal proceedings and the low remuneration of legal aid lawyers.

Basically, the findings indicate that **deprivation of liberty is imposed as a measure of last resort** in case of all (child) defendants. However, unaccompanied minors, children with unsure residence status, children with a weak social network, and children who commit crimes repeatedly are the exception.

Male children are **separated from adult and young adult males**. Female children are separated from males, but not from adult women. The majority of interviewees say that the medical examination is carried out *ex officio* upon arrest. It is mainly a meeting with a doctor whereby medical needs are clarified. Thus, it is carried out as non-invasive as possible. Children in pre-trial detention have access to health care. Their access to basic education, as well as sports and leisure activities is perceived as not sufficient. Children in criminal detention (> five months) have sufficient access to education, vocational training, sports and leisure activities, as well as re-integration measures. The social network conference is the most important tool for child defendants to reduce the time spent in pre-trial detention. An earlier release from pre-trial detention works by means of developing alternative measures together with the child defendants and their social network, and monitoring the implementation of these alternative measures by the probation services. The child defendants do not have a right to the social network conference. It is imposed upon an order of the judge upon a recommendation by the juvenile court assistance in the frame of the individual assessment.

The **effective participation in the court trial is enabled** by specialised judges, who are trained in and aware of the needs and concerns of children. The conduct and aim of juvenile proceedings are the prevention of reoffending and re-integration into society by considering the child's social environment and future perspectives when determining the sentences. Consequently, supportive measures and conditions, such as education or vocational training, using psychotherapy, probation services or drug counselling are rather imposed than criminal detention. The setting of court trials against children is similar to the one of adult defendants. There are no modifications except for the judges, who are specialised in juvenile criminal law and the soft skills in dealing with child defendants. The public has access to the court trials against child defendants. The public is only excluded in case of sexual offences or other issues that could affect the personal or intimate spheres of the accused and hinder their progress. Moreover, the outcome of the individual assessment is not read out aloud during the court trial, but only summarised. Child defendants must be physically present during court hearings. They have a right to be accompanied by their defence lawyers, their parents, and persons of trust. Children may confer with their lawyers and support persons prior and after the court trials. They may confer with the lawyer also during the court trial, except for their interrogation.

Findings indicate that the procedural safeguards of cost-free assistance by a lawyer, the right to individual assessment, deprivation of liberty as measure of last resort, and effective participation in the trial are **equally available** to all child defendants. However, child defendants in some specific situations face **challenges in effectively making use of them**. The **socio-economic background** plays a role in effectively using legal representation by a defence lawyer. Children from families with a high socio-economic background can more likely afford a lawyer of choice, who is to be privately paid, specialised in juvenile justice matters and engaged to develop an effective defence strategy. Children from families with a low socio-economic background have access to cost-free legal aid lawyers. These lawyers are not lawyers of choice but provided by the state. These lawyers are not necessarily specialised in juvenile justice matters – not even in defence in criminal proceedings. The Austrian

system of legal aid rather obliges every lawyer, who is a member of the Austrian Bar Association to take over legal aid cases in criminal proceedings in the framework of a schedule. The remuneration is much lower than it would be in case of private hiring. Thus, even if defence lawyers are available cost-free and – in case of child defendants – provided actually *ex officio*, their specialisation and commitment to effectively defend their clients in their criminal proceedings is subject of doubt.

**Children with no or low social network and children from families suffering from psychosocial problems** (e.g. drug abuse, poverty, neglect) are disadvantaged in making effective use of the individual assessment. The individual assessment and – even more – the social network conference are strongly based on the social network and support structures of child defendants. It is assumed by the authorities, that the social network and support structures ensure the implementation of the conditions for release from pre-trial detention and criminal detention. Thus, children who have no or weak network and support are more likely and longer deprived of liberty. Moreover, children with a **migration background** or no fixed residence are more likely to be deprived of liberty. According to interviewed experts, the danger of flight, which is a legitimate reason for the imposition of pre-trial detention, is more likely assumed in case of migrant children. Two interviewed social workers additionally mention the relevance of **racial profiling**. When it comes to the effective participation in the court trial, experts mention that children may be disadvantaged because of **culture-specific ways to express themselves** and because of **strong clan structures**. As a consequence, children may be accused of lying – even if exaggerating ways of telling stories is part of cultural narratives. Children, who are socialised in cultures with strong clan structures, are more likely forced to false confessions by their network.

All in all, the findings indicate that the Directive (EU) 2016/800 is well implemented in Austria. Several provisions and safeguards were already implemented before the transposition deadline, while the mandatory presence of a lawyer was implemented by the amendment of the Juvenile Court Act in June 2020. Findings indicate that children, who are accused or suspected of crime, are well supported in criminal proceedings. Bringing them back on track and preventing reoffending is the core element of sentencing. In the words of an interviewed defence lawyer: “it is really easy to defend children in criminal proceedings, as all doors are open to them, and they just have to go through”.

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

Organisation	Focus	(Publically available) Contact details
<p><b>Juvenile court assistance, <i>Jugendgerichtshilfe</i> (institution)</b></p>	<p>The Juvenile Court Assistance assists the courts and public prosecutors according to § 47 (1) Juvenile Court Act. Persons working at the Juvenile Court Assistance shall report orally or in writing to the court or public prosecutor's office. If they report orally in criminal proceedings, they are heard as witnesses on their perceptions (§ 47 (2) Juvenile Court Act).</p> <p>The tasks of the Juvenile Court Assistance (§ 48 Juvenile Court Act) are:</p> <ol style="list-style-type: none"> <li>1. The Juvenile Court Assistance conducts individual assessments taking account of the living and family circumstances of the child defendant, including the economic and social background, his development and degree of maturity, as well as all other circumstances that may serve to assess the person and his/her physical, mental, and psychological characteristics (§ 43 (1a) Juvenile Court Act). The Juvenile Court Assistance conducts individual assessment (<i>Jugenderhebung</i>, § 48 (1) Juvenile Court Act) when commissioned to do so by the public prosecutor's office or the court. Social workers of the Juvenile Court Assistance interview the child defendant and the parents or legal guardians to determine the person's living and family circumstances, personal development, and all other circumstances relevant to the assessment. In particular, the</li> </ol>	<p>The largest Juvenile Court Assistance is established in Vienna (Wickenburggasse 18-20, 1080 Vienna, <a href="#">website</a>) and a list of further Juvenile Court Assistance is available at the <a href="#">website of the Federal Ministry of Justice</a>.</p>

aptitudes, abilities, needs, interests, and development possibilities are considered, as well as the entire living environment. If necessary, psychologists are consulted during the assessment. The assessments by the Juvenile Court Assistance also show which measures are necessary and required to avert dangers or eliminate existing problems. To complete the overall picture, the Juvenile Court Assistance contacts care institutions if the child defendant is connected with such an institution.

2. The Juvenile Court Assistance takes part in mediation in penal matters (*Tatausgleich*) or in the arrangement and implementation of community service, training and courses.

3. The Juvenile Court Assistance makes proposals to the guardianship court or the child and youth aid agency regarding the elimination of existing damage or danger to the upbringing or health of a child and to take immediate measures required in case of imminent danger (*Krisenintervention*);

4. The Juvenile Court Assistance also ascertains the circumstances relevant to the decision on the release of the defendant pursuant to § 35 (1) Juvenile Court Act (detention decision assistance, *Haftentscheidungshilfe*).

The Juvenile Court Assistance is entitled to summon and question persons who could provide information on the circumstances of a juvenile, and to establish direct contact with the juvenile (§ 50 (1) Juvenile Court Act). Criminal police, public prosecutor's offices, courts, as well as institutions for

the education, care, and treatment of juveniles have to provide the Juvenile Court Assistance with the necessary information and allow them to inspect the files and records (§ 50 (2) Juvenile Court Act)

## NEUSTART (NGO)

NEUSTART probation service supports out-of-court settlement (mediation in penal matters, *Tatausgleich*) as an alternative to a trial in the case of misdemeanour, also for child defendants. The conflict regulator or mediator of NEUSTART (social worker) establishes the contact between the defendant and the victim, and tries to achieve a settlement or reconciliation without a trial or a conviction with both of them. Another task of the NEUSTART social workers relevant for child defendants is the select of an institution appropriate to the offense and the defendant to perform community service (*gemeinnützige Arbeit*). NEUSTART mediators also help and support efforts to compensate for the consequences of the offense. They also report to the public prosecutor and the judge on the fulfilment of the community service.

The main office of NEUSTART is located in Castelligasse 17, 1050 Vienna. A list of all NEUSTART offices established in all nine provinces is available [online](#).