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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the implementation of Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings

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1. INTRODUCTION

Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings[1] (the 'Directive') aims to establish procedural safeguards to ensure that children, meaning persons below the age of 18, who are suspects or accused persons in criminal proceedings, are able to understand and follow those proceedings as well as to exercise their right to a fair trial effectively. It also aims to prevent recidivism and to foster the social integration of children in conflict with the law.

The safeguards set out in this Directive are based on the right to a fair trial and the right of defence as enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union[2] in conjunction with Article 24 on the rights of the child, which establishes the principle that the child's best interests must be a primary consideration in all actions in relation to children.

The Directive is the fifth instrument adopted under Article 82(2)(b) of the Treaty on the Functioning of the European Union (TFEU), which provides the legal basis for adopting minimum rules on 'the rights of individuals in criminal procedure'. It applies in 25 Member States[3].

The EU has adopted the following other five Directives focusing on the rights of suspects and accused persons:

- the Directive on the right to interpretation and translation[4];
- the Directive on the right to information[5];
- the Directive on the right of access to a lawyer and to communicate with third persons while deprived of liberty[6];
- the Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial[7]; and
- the Directive on legal aid[8].

[1] OJ L 132, 21.5.2016, p. 1–20.
[2] OJ C 326, 26.10.2012, p. 391–407.
[3] In accordance with Protocol No 21 and Protocol No 22, respectively, Ireland and Denmark are not bound by the Directive. Therefore, they are not considered in this assessment.
[4] Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010, p. 1.
[5] Directive 2012/13/EU on the right to information in criminal proceedings, OJ L 142, 1.6.2012, p. 1.
[6] Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, OJ L 294, 6.11.2013, p. 1.
[7] Directive (EU) 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, p. 1.
[8] Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016, p. 1; corrigendum: OJ L 91, 5.4.2017, p. 40.

These six procedural rights Directives serve to strengthen Member States' trust in each other's criminal justice systems and thereby to improve mutual recognition of decisions in criminal matters.

The European Commission has already published implementation reports for five of the directives[9] in accordance with its reporting requirements under those acts. Article 25 of the present Directive similarly requires the Commission to submit a report to the European Parliament and to the Council assessing the extent to which the Member States have taken the necessary measures to comply with this Directive, including an evaluation of the application of Article 6, accompanied, if necessary, by legislative proposals.

For the purpose of compiling information on the practical application of Article 6, as well as to, inter alia, gather information about the implementation of provisions of the Directive that require practical implementation measures rather than legislative transposition, a questionnaire was sent out to the Member States. Replies were received by 20 of the 25 participating Member States.

This report is therefore based on the information provided by Member States to the Commission in the context of the notification of national measures transposing the Directive and corresponding explanatory documents as well as the additional information provided in response to the questionnaire to the extent that such additional information was indeed submitted. Information is also drawn from research conducted by the European Union Agency for Fundamental Rights[10] and from Commission-funded studies by external stakeholders[11].

This report will also highlight provisions of the Directive that require the adoption of practical implementation measures and will provide an overview of the information about the adoption of such measures provided by the Member States.

2. GENERAL ASSESSMENT

According to Article 24 of the Directive, Member States had to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 11 June 2019 and were obliged to immediately inform the Commission thereof.

The approach to the transposition of the Directive varied between Member States, due to structural differences between their justice systems. Three general types of approaches can be identified. **A first group of Member States** have adopted specific legal instruments on

[9] COM(2018) 857 final, COM(2018) 858 final, COM(2019) 560 final, COM(2021) 144 final and COM(2023) 44 final.

[10] Study by the European Union Agency for Fundamental Rights (2022), *Children as suspects or accused persons in criminal proceedings — procedural safeguards*, available at Children as suspects or accused persons in criminal proceedings — procedural safeguards | European Union Agency for Fundamental Rights (europa.eu).

[11] See for example: LA Child Project, 'Legal aid for children in criminal proceedings: Report on current European national frameworks', available at https://lachild.eu/wp-content/uploads/2021/06/FINAL-LA-Child-European-report-EN.pdf; CLEAR-Rights Project, 'Practices and gaps in legal aid systems for children in Belgium, France, Hungary, Romania and The Netherlands', available at https://www.defenceforchildren.nl/media/6430/clear-rights_eu-review_en_fv.pdf.

procedural safeguards for children, such as in the form of a juvenile justice act, which is set up as *lex specialis* to general rules of criminal procedure applicable to all suspects and accused persons. **A second group of Member States** have opted for child-specific amendments to their general procedural rules i.e. their general codes of criminal procedure. **A third group of Member States** provide rules on criminal proceedings involving children in both their general Codes of Criminal Procedure as well as in other legal instruments specific to proceedings against children who have committed an act qualifying as a criminal offence, without such proceedings themselves qualifying as criminal proceedings under national law. In these Member States, children are subject to the general rules of criminal procedure only by way of exception in particularly serious cases or already from the age of 17 rather than 18. In all other cases, children who committed an act qualifying as a criminal offence are subject to proceedings which are not recognised as criminal proceedings by the respective Member States. These Member States therefore do not acknowledge the applicability of the Directive to such proceedings. Based on the Engel criteria developed by the European Court of Human Rights as applied by the Court of Justice in its case law[12], however, it can be considered that these proceedings qualify as criminal proceedings falling within the scope of the Directive. In some of these Member States, this has resulted in substantive issues of compliance of the rules of procedure applicable to children in such proceedings with the requirements of the Directive.

Bulgaria, Cyprus, Czechia, Germany, Greece, Croatia and Malta[13] failed to notify transposing measures by the required deadline. In June 2019, the Commission therefore launched infringement proceedings under Article 258 TFEU against these seven Member States. Cyprus furthermore received a Reasoned Opinion for continued non-communication of transposing measures in May 2020. Transposing measures were subsequently notified by all seven of these Member States.

Compliance issues were identified with regards to the complete and/or correct transposition of the Directive in all Member States. Of the seven cases against Member States for complete non-communication of transposing measures opened in June 2019, four cases, against Malta, Cyprus, Croatia and Czechia[14], have been closed to date. The other three Member States are at the stage of having received an additional Letter of formal notice[15] for partial non-communication of transposing measures highlighting remaining gaps in transposition. Since July 2023, the Commission has furthermore opened infringement proceedings for complete[16] or partial[17] non-communication of transposing measures against all remaining 18 Member

[12] For the European Court of Human Rights see *Engel and Others v. the Netherlands*, 8 June 1976, paras. 80 to 82 and subsequent case-law; For the European Court of Justice see e.g. Judgment of the Court (Grand Chamber) of 5 June 2012, *Bonda*, Case C-489/10, EU:C:2012:319, paras. 37ff and subsequent case law.
[13] Cyprus (ref. no. INFR(2019)0175); Germany (ref. no. INFR(2019)0183); Czechia (ref. no. INFR(2019)0180); Greece (ref. no. INFR(2019)0191); Croatia (ref. no. INFR(2019)0203); Malta (ref. no. INFR(2019)0227).
[14] Cyprus also received another Additional reasoned opinion before the case was closed.
[15] Germany, Bulgaria, Greece.
[16] Luxembourg (ref. no. INFR(2024)2002); Spain (ref. no. INFR(2023)2176); Italy (ref. no. INFR(2023)2090).
[17] Poland (ref. no. INFR(2023)2127); Sweden (ref. no. 2023/2110); Hungary (ref. no. 2023/2109); Slovakia (ref. no. 2023/2108); Romania (ref. no. INFR(2023)2107); Austria (ref. no. INFR(2023)2106); Netherlands (ref. no. INFR(2023)2089); Lithuania (ref. no. 2023/2074); Slovenia (ref. no. 2021/2075); Estonia (ref. no. 2021/2076); Latvia (ref. no. INFR(2023)2124); France (ref. no. INFR(2023)2125); Finland (ref. no. INFR(2023)2126); Belgium (ref. no. INFR(2023)2136); Portugal (ref. no. INFR(2023)2091).

States. Three of these infringement proceedings could already be closed again[18]. Active infringement proceedings for partial failure to communicate national measures transposing the Directive pursuant to Article 260(3) TFEU are therefore currently ongoing against 18 Member States. As regards the conformity of notified transposing measures with the Directive, a study and preliminary assessment have been carried out. The Commission will, in due time, also take the necessary steps to address the shortcomings identified in this context by opening infringement proceedings pursuant to Article 258 TFEU.

Overall, the extent and nature of the shortcomings identified vary. Three types of compliance issues should be specifically highlighted. The first type are compliance issues with regards to certain provisions of the Directive that can be considered significant due to the number of Member States whose transposition shows the same shortcoming.

The second type of notable compliance issues can be considered particularly problematic due to the scope of their impact, as affected children are effectively excluded from enjoying the majority of or even all of the rights and safeguards to which they are entitled under the Directive. This type of issues arise, in particular, vis-a-vis the incorrect transposition of Article 2, setting out the scope of the Directive and the incorrect transposition of Article 17 of the Directive, which aims to ensure that the rights referred to in Articles 4, 5, 6 and 8, Articles 10 to 15 and Article 18 of the Directive apply *mutatis mutandis*, in respect of children who are requested persons.

The third type of compliance issues relate to a lack of attention to the difference between the scope and nature of certain key procedural rights standards for adult suspects and accused persons and their scope and nature as foreseen by the Directive for children. Article 6 of the Directive regulating assistance by a lawyer as well as Articles 4 and 5 regulating information rights, are particularly affected by a lack of recognition (and therefore lack of transposition) of the added legal requirements on Member States vis-à-vis children compared to adults.

Such failure to fully comply with the provisions of the Directive negatively affects the effectiveness of the rights provided for therein. The Commission will continue taking every appropriate measure to remedy it, including infringement proceedings pursuant to Articles 258/260(3) TFEU.

In this context, it is also noted that the Court of Justice of the European Union (the Court of Justice) recently issued its first judgement on the interpretation of the Directive in case C-603/22[19]. The case concerned the application of the Directive to criminal proceedings in Poland against three children (17 years of age).

[18] Romania, Slovenia, Lithuania.
[19] Judgement of 5 September 2024, Case C-603/22, M.S. and others, ECLI:EU:C:2024:685.

3. SPECIFIC POINTS OF ASSESSMENT

3.1. Scope (Article 2) and European Arrest Warrant proceedings (Article 17)

Article 2(1) determines the scope of the Directive, which applies to children who are suspects and accused persons in criminal proceedings until those proceedings have been finally concluded. This means that the Directive, in principle, applies immediately once the child *de facto* becomes a suspect, which can, for instance, be the case where they have been implicated as the alleged perpetrator of an offence by a witness or a victim, irrespective of whether they have already been recognised as a suspect or accused person through a formal act by the authorities or made aware of that they are suspected or accused of having committed a criminal offence. This particularly wide scope of the Directive is important with regards to certain safeguards, such as the right to privacy, that are meant to take effect even before the child comes directly into contact with the investigative authorities and are informed of any suspicion against them. It must also be noted, that while some provisions of the Directive, such as those on assistance by a lawyer, are meant to apply only once the child has been made aware that they are a suspect or accused person, a failure by the competent authorities to so inform the child even though they do in fact already suspect them, does not invalidate the child's right to enjoy their rights under the Directive from such time as they are de facto considered a suspect. This reasoning has been confirmed by the Court of Justice in the context of the application of Directive 2012/13/EU and ensures that any oversight by the competent authorities as regards the notification of a suspect of their status in the proceedings does not deprive them of their rights.

More than a third of the Member States, however, have not given the same scope to protections at national level. Some Member States only apply the Directive, or at least certain provisions thereof, to children once they have been formally recognised as a suspect or an accused person (in some Member States subsumed under the notion of 'defendant') through an official act or are directly in contact with the investigating authorities, for instance during police questioning. Others apply the regular rules of criminal procedure which do not specifically protect children in cases where children committed a particularly serious crime or generally from the age of 17 onwards. Therefore, in these Member States, not all children, in principle, benefit from the rights and safeguards provided for in the Directive. Compliance with the Directive in these cases is only incidental where similarities exist between certain safeguards for adults and those for children set out in the Directive. Overall, compliance issues in the transposition of the scope of the Directive are particularly problematic as they can effectively deprive a large number of children of all of the Directive's protections at once. It is noted that many issues in the transposition of specific substantive provisions of the Directive link back to the incorrect transposition of its scope.

Those Member States that do not apply national safeguards to children before they are formally recognised as suspects or accused persons have also shown issues in the transposition of **paragraph 4 of Article 2**. Article 2(4) makes the Directive applicable to children who may, for instance, initially be considered witnesses but make self-incriminatory statements during questioning and thereby become suspects. In such cases, as clarified in Recital 29, questioning must be suspended until the child is made aware that they are a suspect or accused person and is assisted by a lawyer. These measures are necessary to

ensure, for instance, that such children are aware of and can effectively exercise their right not to incriminate themselves and the right to remain silent.

In accordance with **Article 2(2)**, the Directive also applies to children who are arrested following an extradition request by another Member, such as through a European Arrest Warrant, from the time of their arrest in the executing Member State. This extension of the scope of the Directive is explained in more detail in **Article 17** of the Directive, which specifies those rights and safeguards which should apply equally to all children who are suspects or accused persons, whether they are awaiting extradition or not.

More than a third of all Member States did not expressly transpose Article 2(2) and in consequence failed to extend some of the necessary rights set out in Article 17, such as the right to be accompanied by a holder of parental responsibility to children who are awaiting surrender.

Based on **Article 2(3**), most rights of the Directive also continue to apply to children who come of age during the criminal proceedings against them where the competent authorities consider that it would be appropriate in the light of all the circumstances of the case, including the maturity and vulnerability of the person concerned. From the time the young person turns 21, Member States may decide to no longer apply the Directive, even if the proceedings are still ongoing. Compliance issues have been identified in a significant number of Member States in relation to this provision.

In some Member States an authority other than a court having jurisdiction in criminal matters has competence for imposing sanctions or deprivation of liberty cannot be imposed as a sanction in relation to relatively minor offences, such as road traffic offences, which might be established following a traffic control. **Article 2(6)** provides, that in such cases, in respect of minor offences and offences for which deprivation of liberty cannot be imposed as a sentence, the Directive applies only to the proceedings before a court having jurisdiction in criminal matters and where the child is deprived of liberty.

A significant number of Member States have, however, failed to make the distinction between proceedings for minor offences before courts having jurisdiction in criminal matters and those before other authorities or have do not guarantee the rights of the Directive where deprivation of liberty can be imposed as a sanction for specific minor offences. They do not extend national safeguards to children suspected or accused of minor offences at all.

3.2. Definitions (Article 3)

Article 3 of the Directive defines key concepts, such as the notions of ‘child’, ‘holder of parental responsibility’ and ‘parental responsibility’. It also provides that where it is uncertain whether a person has reached the age of 18, that person shall be presumed to be a child; a requirement which a third of all Member States have failed to expressly transpose for the purpose of criminal proceedings.

3.3. Right to information (Article 4)

Article 4(1) prescribes which information a child who is suspected or accused of a criminal offence must receive and at which specific points in time this information is to be provided. In addition to their rights in accordance with Directive 2012/13/EU, children should thus

promptly be made aware of general aspects of the conduct of the proceedings, such as about the next procedural steps. Almost half of the Member States do not explicitly provide for this.

Further information to be provided promptly concerns legal aid and other rights enshrined in Articles 5, 6, 14, 15(4) of the Directive, which can and should be exercised from an early stage of the proceedings. Information on the right to an individual assessment as well as other rights enshrined in Articles 8, 10, 11, 15(1), 16, and 19, which come into play at different points in time, depending on the different legal systems, should be given at the earliest appropriate stage. Finally, there is some information which must be provided upon deprivation of liberty, namely information in respect of the right to specific treatment during deprivation of liberty, as provided for in Article 12 of the Directive.

Overall, there are only a handful of Member States that require their competent authorities to provide all the required information progressively at the different stages of the proceedings indicated in the Directive. In most Member States, the scope of information to be provided is more limited or information on applicable procedural rights and safeguards is given all at once. The latter can easily overwhelm the child. Indeed, the purpose of the staggered provision of information in the Directive is mainly to ensure that children are able to fully benefit from crucial information about specific rights exactly when those rights become applicable or relevant.

Many Member States also do not explicitly require competent authorities to provide information to children in simple and accessible language as required by **paragraph 2 of Article 4**. Others have failed to formally introduce a specifically adapted letter of rights for children which will include a reference to all of their rights under the Directive as they have been transposed into national law, as required by **paragraph 3**.

In this context it is important to note, that when consulted on this matter, some of these Member States indicated that specific letters of rights for children have been drawn up and are used in practice, yet no corresponding obligation has been transposed into national law, which constitutes a compliance issue.

3.4. Right of the child to have the holder of parental responsibility informed (Article 5)

As Recital 22 of the Directive recalls, Member States should inform the holder or holders of parental responsibility (both parents, in principle, count as holders of parental responsibility) about the procedural rights of the child. The information should be provided as soon as possible and in such detail as is necessary to safeguard the fairness of the proceedings and to allow the holder(s) of parental responsibility to support the child in effectively exercising their rights. This principle is enshrined in **Article 5(1)** of the Directive, but has not been transposed in compliance with the Directive in a majority of Member States.

Some Member States failed to distinguish between the obligation to inform the holder(s) of parental responsibility of the child's rights under the Directive and the obligation to inform them that the child has been deprived of liberty. The latter is enshrined in Article 5(2) of Directive 2013/48/EU, not in the Directive. However, there are also indirect compliance issues. These are linked to the incorrect transposition of Article 4 on the child's right to

information where in some Member States, as noted above, national law does not require the child to be given all the information they should be given in accordance with the Directive. The holder(s) of parental responsibility or another appropriate adult nominated by the child and accepted as such by the competent authority in accordance with **paragraph 2 of Article 5** are generally only required to be given the same (insufficient) information as the child. This gives rise to an indirect compliance issue in many Member States.

Overall, compliance issues in the transposition of Article 5(2) concerning the appointment and provision of information to another appropriate adult have been identified in **21** Member States. In addition to the indirect compliance issue linked to Article 4, compliance issues follow, inter alia, from the lack of precision in the transposition of the strictly limited grounds for derogating from the primary right of the holder(s) of parental responsibility to receive the information on the one hand or the lack of recognition of the figure of another appropriate adult appointed by the child as a party equal to that of a holder of parental responsibility in terms of procedural rights and privileges on the other.

The former issue also feeds into compliance issues noted for the transposition of **Article 5(3)** of the Directive, which provides for the procedure to be followed where the circumstances for withholding information from the holder(s) of parental responsibility cease to exist.

3.5. Assistance by a lawyer (Article 6)

Article 6(1) recalls and reinforces the right of access to a lawyer as enshrined in Directive 2013/48/EU. While there are currently **9** infringements open against Member States for the incorrect transposition of the Directive 2013/48/EU[20], none of the notified measures transposing this Directive were identified as prejudicing this right. Nevertheless, the transposing measures notified by Member States in many instances fall short of the requirements of the present Directive as set out in the following paragraphs of Article 6.

Paragraph 2 of Article 6 establishes a general obligation for Member States to ensure that children are assisted by a lawyer in a way which allows them to exercise the rights of the defence effectively. Assistance by a lawyer is to be understood in this context as legal support and representation by a lawyer during the criminal proceedings. Where the child or the holder of parental responsibility have not appointed a lawyer themselves, the competent authorities must therefore do so.

The detailed procedural requirements which aim to ensure that assistance by a lawyer is guaranteed in such a way as to make the effective exercise of defence rights possible, are set out in paragraphs 3 to 8. These have, however, not all been transposed in compliance with the Directive in many Member States (as discussed in further detail below). Therefore, compliance with the general principle set out in paragraph 2 of Article 6 is overall not guaranteed in all circumstances in a majority of Member States legal systems either.

More than half of the Member States have, for instance, not achieved a fully compliant transposition of **paragraph 3 of Article 6**, which requires Member States to ensure that

[20] Czechia (INFR(2021)2107), Italy (INFR(2023)2006), Netherlands (INFR(2023)2007), Slovakia (INFR(2023)2008), Slovenia (INFR(2023)2010), Poland (INFR(2024)2073), Bulgaria (INFR(2024)2003), Estonia (INFR(2021)2135), Hungary (INFR(2021)2137).

children are assisted by a lawyer without undue delay once they are made aware that they are suspects or accused persons. The Directive names four possible earliest points in the proceedings at which legal assistance should set in.

In some of these non-compliant Member States, legal assistance is not yet ensured where the child is clearly already a suspect in the investigation, but has not yet been designated as such, because the notion of a suspect is not recognised in the particular legal system. This links back to the incorrect transposition of the scope of the Directive[21]. Legal assistance without undue delay is also not ensured in all cases in those Member States where proceedings against a child can be governed by the regular instead of child specific rules of criminal procedure. In other Member States still, it may be ensured that a lawyer is appointed for the child, but there is no legal certainty as to whether the lawyer must be present and effectively assist the child during the particular acts specified in the Directive without the child having to request their presence/participation. In some legal systems it is the lawyers that have the right to decide whether their presence is necessary or not and therefore decline to be present, while the Directive provides that it is the child's right to have the lawyer there. Similar compliance issues affect the transposition of **Article 6(4)**, which stipulates that as part of the assistance by a lawyer to be ensured, Member States are required to ensure that children have the right to meet with a lawyer in private prior to questioning. It must also be ensured that a lawyer is present and can effectively participate during questioning and that children are, as a minimum, assisted by a lawyer during certain investigative or evidence-gathering acts provided for in the Directive. In many Member States, the presence and active assistance by a lawyer is not always required in all of these situations. Some, for instance, do not guarantee a personal meeting with the lawyer prior to questioning.

Article 6(5) safeguards the confidentiality of communication between children and their lawyer, in whichever form, such as meetings, written correspondence or communication via telephone. However, not all Member States explicitly extend the scope of confidentiality to all kinds of communication.

The right to assistance by a lawyer is, however, not absolute. The Directive foresees two grounds for derogating from the rules on assistance by a lawyer, one based on proportionality (Article 6(6)) and the other based on exceptional and temporary necessity (Article 6(8)).

Where compliance with the right to a fair trial allows for it**,** Member States may thus, in accordance with **Article 6(6)**, derogate from providing assistance by a lawyer, where this would not be proportionate in the light of the circumstances of the case. A derogation on proportionality grounds thus requires a case-by-case assessment, taking into account, but not solely prefaced on, the seriousness of the alleged criminal offence, the complexity of the case and the measures that could be taken in respect of such an offence. The child's best interests must in any case always be a primary consideration and children must still be assisted by a lawyer when they are brought before a competent court or judge in order to decide on detention as well as during detention. Importantly, deprivation of liberty must also not be imposed as a criminal sentence where a lack of assistance by a lawyer has affected the child's ability to effectively exercise their rights of defence.

[21] See section 3.1.

A majority of Member States made use of this possibility in some form, but not necessarily in full compliance with the Directive. For instance, many fail to limit the circumstances under which this proportionality-based derogation is limited to the same extent as in the Directive. Notably, some Member States do not require a true case-by-case assessment taking into account all the circumstances of the case. They instead apply the derogation option based on generic criteria, such as the seriousness of the offence, alone. This is not sufficient to guarantee the best interests of the child as there may be circumstances linked to a child's particular vulnerabilities or level of maturity that affect their ability to properly understand and participate in the proceedings and would therefore speak against a derogation from assistance by a lawyer, even where certain generic criteria are fulfilled.

Member States may also not derogate from ensuring assistance by a lawyer just because the lawyer does not appear in time for a specific investigative or evidence-gathering act, such as questioning, for which assistance must normally be ensured. **Article 6(7)** of the Directive provides that in such cases the competent authorities must postpone the act for a reasonable period of time in order to allow for the arrival of the lawyer. Where the child has not nominated a lawyer, the authorities should postpone the act until they have arranged a lawyer for the child.

As noted in the context of the discussion on paragraphs 3 and 4, however, some Member States do not strictly require a child to be assisted by a lawyer in all cases provided for in the Directive. This also affects the transposition of paragraph 7 of Article 6.

As regards necessity-based temporary derogations from the requirement to ensure assistance by a lawyer, **Article 6(8)** allows Member States, in exceptional circumstances, and only at the pre-trial stage, to temporarily conduct investigative or evidence-gathering acts in the absence of a lawyer for compelling reasons set out in the Directive. This includes, for instance, an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person or to secure important evidence regarding a serious criminal offence. Of course, such a derogation may also only be applied where an assessment of the particular circumstances of the individual case, including as regards any particular vulnerabilities the child may have, justifies it, taking into account the child's best interests. Importantly, any decision to apply such a derogation must be taken by a judicial authority or must be subject to judicial review.

A large majority of Member States provide for such a derogation option, but not necessarily in full compliance with the Directive. Some foresee broader grounds for a temporary derogation or fail to account for the 'urgency' requirement established by the Directive. This is problematic, since such derogations from assistance by a lawyer always carry a risk of prejudicing the child's effective exercise of their rights of defence and should only be applied within strict limitations. In particular, children may inadvertently incriminate themselves, either because they have not fully understood the extent of their rights to remain silent and not to incriminate themselves or because they feel intimidated and pressured to respond to questions.

3.6. Right to an individual assessment (Article 7)

In criminal proceedings against children, it is of crucial importance for them to be individually assessed to identify their specific needs in terms of protection, education,

training and social integration. This is provided for **in paragraphs 1 and 2 of Article 7.** As specified in paragraph 2, the individual assessment must, in particular, take into account the child's personality and maturity, their economic, social and family background, and any specific vulnerabilities that they may have, such as learning disabilities or communication difficulties.

The results of the assessment should never be used as a form of unofficial contextual 'evidence' against them, but should only be used to determine, in accordance with **paragraph 4 of Article 7,** if and to what extent they would need special measures during the criminal proceedings, the extent of their criminal responsibility and the appropriateness of a particular penalty or educative measure.

National rules on the conduct of individual assessments and their purpose are not in compliance with the Directive in at least half of the Member States. As regards the transposition of the personal scope of the right to an individual assessment, a compliance issue arises in Member States that do not require all children to be individually assessed, such as those above the age of 17, or do not foresee individual assessments in all types of cases, such as those in which the proceedings are governed by the regular rules of criminal procedure instead of child specific ones. This links back to the incorrect transposition of the scope of the Directive[22]. Furthermore, some Member States made the individual assessment as a rule optional instead of obligatory, to be carried out at the discretion of the prosecution. In such cases, there is no legal certainty that the individual assessment will always be carried out where required by the Directive, even where non-binding guidance encourages prosecutors to abide by its principles. Furthermore, in some Member States, the substantive scope of the assessment to be carried out is more limited than foreseen by the Directive. Often it is also not regulated how all necessary and relevant information will be collected in cases where this has not already been done by other relevant authorities, such as child protective services.

As regards the purpose of the individual assessment and its role in decision-making through the criminal proceedings, Member States frequently failed to make express provisions in national law. Where a purpose is set out in national law, it is mostly limited to informing decisions on sentencing. Where the results of an individual assessment are not taken into account in all main decisions affecting the child throughout the proceedings, its function as a key tool for ensuring that the proceedings will be child-friendly and guided by the child's best interests is severely limited.

To ensure that the results of the individual assessment can, in practice, positively inform key decisions taken vis-à-vis the child already during the pre-trial stage, **paragraph 5** provides that it should be carried out at the earliest appropriate stage of the proceedings and subject to **paragraph 6** at the latest before the formal indictment is presented. Only in exceptional circumstances, such as where the child is detained and awaiting the individual assessment report would unnecessarily prolong that detention, can the assessment be presented only at the beginning of the trial hearing before a court. Recital 38 explains that the appropriateness and effectiveness of the measures or decisions that are taken before an individual assessment is carried out could then be re-assessed when the individual assessment becomes available.

[22] See section 3.1.

While most Member States provide for the individual assessment to be available at the latest prior to indictment or at least by the beginning of the trial hearings before a court, the majority of transposing measures do not further specify this earliest appropriate point in time.

Even where individual assessments are conducted at the earliest appropriate stage, they may lack in quality as very few Member States explicitly require the child, and their holder(s) of parental responsibility, where appropriate, to be closely involved in the assessment or for the assessment to be updated throughout the proceedings, where there is cause, as required by **paragraphs 7 and 8 of Article 7**. Furthermore, in some Member States it is not effectively regulated by whom and from which sources necessary/relevant information will be collected in cases where no information on the child and their circumstances is already readily available from other relevant authorities, such as child protective services. This affects compliance with the requirement for individual assessments to be carried out by qualified personnel, following, as far as possible, a multidisciplinary approach in those Member States. In accordance with **Article 7(9)** Member States may derogate from the obligation to carry out an individual assessment where this is compatible with the child's best interests and warranted taking into account the specific circumstances of the case, such as whether or not the child has, in the recent past, already been the subject of an individual assessment. While most of those Member States that chose to provide for this derogation option did so in compliance with the Directive, a few do not legally require a case-by-case assessment for the purpose of its application.

3.7. Right to a medical examination (Article 8)

In order to safeguard the health and personal integrity of a child who is deprived of liberty, **Article 8(1)** of the Directive requires Member States to ensure that such children have the right to a professional and minimally invasive medical examination without undue delay, to be carried out, in accordance with paragraph 3, either on the initiative of the competent authorities or the child, their lawyer or holder(s) of parental responsibility, recorded in writing (see **paragraph 4**) and updated where required (see **paragraph 5**). The purpose of such an examination is to assess the child's general mental and physical condition and in particular, as specified in **paragraph 2**, their capacity to be subject to questioning, other investigative or evidence-gathering acts, or any measures taken or envisaged against the child, such as prolonged deprivation of liberty in pre-trial detention. The examination is also required as a basis for determining where medical assistance must be provided (see **paragraph 4**).

While all Member States provide the option for some form of medical examination to be conducted where children are deprived of liberty in police custody or pre-trial detention, such examinations are not always required to be carried out without undue delay.

In many legal systems, it is also not expressly provided that the results of a medical examination need to be taken into account to determine whether the child is fit to be subject to certain procedural/coercive acts. It is frequently left to the discretion of the competent investigative authorities whether to request medical records for this purpose, which is not compliant with the Directive.

3.8. Audiovisual recording of questioning (Article 9)

Children who are suspects or accused persons in criminal proceedings are not always able to understand the content of questioning to which they are subject. In order to ensure sufficient protection of such children**,** the questioning of children by police or other law enforcement authorities during the criminal proceedings must be audio-visually recorded where, as set out in **Article 9(1)**, this is proportionate in the individual case. The competent authorities in charge of questioning should take into account, in particular, whether a lawyer is present or not and whether the child is deprived of liberty or not and must ensure that the child's best interests are always a primary consideration.

Where national law provides for such recording based only on certain generic criteria and does not require the particular circumstances of the case to be taken into account, such as whether the child has an intellectual or psychosocial disability which could make audiovisual recording appropriate, it is doubtful whether the transposition is compliant with the Directive. Insufficient technical infrastructure is no valid ground for derogating from the rules on audiovisual recording as established by the Directive. A systemic lack of investment into appropriate technical infrastructure cannot be considered an exceptional insurmountable technical problem that would justify a derogation from the Directive's rules on audiovisual recording. Overall, such issues have been noted regarding the transposition of Article 9 in two thirds of the Member States.

3.9. Limitation to deprivation of liberty (Article 10)

Children are in a particularly vulnerable position when they are deprived of liberty, in particular in police custody or pre-trial detention. Any deprivation of liberty bears a possible risk of harm as regards their physical, mental and social development as well as their successful reintegration into society. The Directive therefore establishes two key principles to be observed by competent authorities when they impose deprivation of liberty.

The first principle is that deprivation of liberty of a child at any stage of the proceedings must be limited to the shortest appropriate period of time, taking due account of the age and individual situation of the child as well as the particular circumstances of the case (**Article 10(1)**). The second principle is that deprivation of liberty, in particular detention, must always be a measure of last resort and that decisions to impose pre-trial detention must be based on a reasoned decision, taken without undue delay, that is subject to periodic judicial review at reasonable intervals (**Article 10(2**)).

More than a third of all Member States have not transposed either the first or the second principle in full compliance with the Directive. Recurrent compliance issues play a role here, including the incorrect transposition of the scope of the Directive[23] and the general lack of explicit legal requirement in many Member States' national legislation for competent authorities to conduct thorough case-by-case assessments that take into account the specific circumstances of the child and the case, in particular to determine the potential suitability of alternative measures[24].

[23] See section 3.1.
[24] See section 3.6. on the right to an individual assessment.

3.10. Alternative measures (Article 11)

Article 11 of the Directive requires Member States to ensure that measures alternative to detention are applied to children where possible instead of depriving them of their liberty. Such alternative measures could include a prohibition for the child to be in certain places, an obligation for them to reside in a specific place, restrictions concerning contact with specific persons, reporting obligations to the competent authorities, participation in educational programmes, or, subject to the child's consent, participation in therapeutic or addiction programmes (see Recital 46).

Most Member States provide for such alternative measures, but the type of measures differ across Member States and even regions within those Member States. Only a handful of Member States do not guarantee the availability of more than one alternative measure in national law or do not guarantee alternatives to all children.

In this context, it is key to note, that the Directive speaks of alternative measures in the plural, meaning that more than one potential alternative measure should be available by law, given the large range of possible measures that Member States can, in principle, choose from. The main challenge for ensuring that children do in fact benefit from the application of such alternative measures, however, lies in judicial practice, the results of which varies across Member States.

3.11. Specific treatment in the case of deprivation of liberty (Article 12)

Article 12(1) of the Directive requires that children who are detained must be held separately from adults, unless this is not in the child's best interests. **Article 12(2)** similarly requires that children who are kept in police custody are held separately from adults, unless this is not in the child's best interests, or unless, in exceptional circumstances, this is not possible in practice. The latter derogation option may come to bear on cases in sparsely populated areas, where police stations are not equipped with separate facilities for holding children, as they deal with very few cases involving them. In such circumstances, children must, however, be held together with adults in a manner that is compatible with the child's best interests.

These principles are not fully complied in the national law of about a third of Member States. Of note here is the difference between the rules on separation in police custody and in pre-trial detention as regards the possibility to derogate. For pre-trial detention, the Directive requires that joint accommodation may only be arranged where it is in fact in the child’s best interests not to hold them separately. Structural problems in the adaptation of detention infrastructure are no justified basis for a derogation from this rule.

There are also a number of cases in which Member States’ endeavours to transpose **paragraphs 3 and 4 of Article 12** had the effect of weakening compliance with the child’s right to, in principle, be held separately from adults, even young adults who just turned 18**.**

Paragraphs 3 and 4 regulate the extension of the more supportive and protective detention regime for children to those who come of age during their time in detention (at least until they reach the age of 21). The problem in some Member States is that an extension of joint accommodation with children is, in effect, provided for by default rather than being made conditional on a case-by-case assessment, taking into account the best interests of the

children the young adult would be detained with. In other Member States, national law is framed in a way which suggests that young adults would be held separately from both children and other adults, but legal uncertainty as to this interpretation remains.

In addition to separate accommodation from adults, other special protective and supporting measures are necessary to ensure children's well-being and capacity for reintegration, in particular where they are subject to pre-trial detention. **Article 12(5)** therefore requires Member States to take appropriate measures across five substantive areas with regards to children in pre-trial detention that ensure, among others, their effective exercise of the right to family life through regular contact in the form of visits and correspondence with their parents, family and friends. Such measures should also, where/to the extent appropriate, cover situations of police custody and, where provided for under national law, other situations of deprivation of liberty.

All Member States have adopted measures, including legislation, that aim, at least to a certain extent, to ensure, in particular, children's health while deprived of liberty. Other requirements, such as to ensure respect for children's freedom of religion or belief, are mainly given effect through general provisions on the protection of freedom of religion. Many Member States also notified general provisions of national law that enshrine the right to be treated with dignity and in compliance with applicable human rights standards.

In many Member States, notified transposing measures are (partially) insufficient to achieve the standards foreseen by the Directive for one of the following reasons: measures are not specific enough or cannot be considered effective to ensure the rights and standards foreseen by the Directive, are insufficient in scope to cover all the key aims identified by the Directive or forms of deprivation of liberty to the extent required or do not cover all children deprived of liberty (effect of non-compliant transposition of the scope of the Directive). When consulted, several Member States also indicated the existence of additional practical implementation measures, such as the establishment of support and educational programmes which are offered on a voluntary regular or ad-hoc basis by relevant social or educational services and some stressed the individualisation of treatment for each child. Overall, however, a majority of Member States were found to have failed to demonstrate a fully compliant transposition of Article 12(5).

Similarly, around half of Member States failed to adopt specific measures to ensure that children who are deprived of liberty can meet with the holder of parental responsibility as soon as possible, as they are required to, at least, endeavour to do in accordance with **Article 12(6)** of the Directive.

3.12. Timely and diligent treatment of cases (Article 13)

Article 13(1) and (2) of the Directive requires Member States to take all appropriate measures to ensure that criminal proceedings involving children are treated as a matter of urgency and with due diligence and that children themselves are always treated in a manner which protects their dignity, is appropriate to their age, maturity and level of understanding and takes into account any special needs, including any communication difficulties, that they may have.

As in the context of specific measures for children deprived of liberty, most Member States consider that these requirements are given sufficient effect through general provisions of national law, such as constitutional principles, which require respect for the dignity of the individual and applicable human rights standards, including the UN Convention on the Rights of the Child, which has been ratified by all EU Member States.

3.13. Right to protection of privacy (Article 14)

The privacy of children during criminal proceedings, including of their personal information contained in the criminal file, should be ensured in the best possible way to prevent, among others, stigmatisation as a hurdle for their reintegration into society. A corresponding requirement for the protection of children is accordingly set out in **Article 14(1)** of the Directive.

Paragraph 2 of Article 14 requires that court hearings involving children are usually held in the absence of the public, or for courts or judges to be allowed to order their exclusion, while **paragraph 3** adds that appropriate measures must be taken to ensure that audiovisual records of questioning are not publicly disseminated.

Only minor compliance issues in less than a handful of Member States were identified in the transposition of either of these provisions. However, in many Member States the scope of national provisions transposing the general right to privacy of children as set out in paragraph 1 of Article 14, does not appear to extend to children who are suspected of having committed a criminal offence, but have not yet been officially designated as a suspect or accused person (or the Member States' equivalent notions of these concepts) by the competent authorities. This links back to the incorrect transposition of the scope of the Directive[25].

In any case, Member States must, in accordance with **paragraph 4 of Article 14** and while respecting freedom of expression and information as well as freedom and pluralism of the media, also encourage the media to take self-regulatory measures in order to achieve the objectives of the Directive's rules on privacy.

Most Member States therefore did not officially notify transposing measures for this provision. However, in the response to the Commission's consultation on practical implementation measures, more than a third of Member States indicated that the media is at least partially bound by legislative measures prohibiting the dissemination of personal information, images or recordings of children who are suspects or accused persons. This is complemented by self-regulation. Other Member States indicated that the media in their legal system operates according to guidelines issued by dedicated national administrative bodies and/or according to self-imposed and self-monitored codes of ethics without State intervention.

[25] See section 3.1.

3.14. Right of the child to be accompanied by the holder of parental responsibility during the proceedings (Article 15)

An exclusively child-specific procedural safeguard is introduced with the right of the child to be accompanied by the holder of parental responsibility during court hearings, as enshrined in **paragraph 1 of Article 15** of the Directive, as well as, in accordance with paragraph 4, during other stages of the proceedings where this is in the child's best interests and does not prejudice the criminal proceedings. If more than one person holds parental responsibility for the same child, the child should, as set out in Recital 57, have the right to be accompanied by all of them, unless this is not possible in practice despite the competent authorities' reasonable efforts.

Most Member States have established this right, although a few Member States limit its scope by way of derogation options not foreseen by the Directive. This also links back to the incorrect transposition of the scope of the Directive[26].

Most compliance issues, however, occurred in the transposition of the rules on the appointment of another appropriate adult, as set out in paragraphs 2 and 3, which are similar to those set out in Article 5 of the Directive

Some Member States do not allow the child to appoint the other appropriate adult themselves, in the first instance. In certain other Member States, competent authorities have the discretionary power to exclude holders of parental responsibility from the proceedings without necessarily having to ensure that another appropriate adult is appointed to replace them. This is mainly linked to a failure to introduce the notion of ‘another appropriate adult’ who has not also been formally appointed as an actual legal guardian for the child, such as a teacher or a family member that does not legally hold parental responsibility for the child.

Overall, issues in the compliant transposition of the right to be accompanied, can have a severely negative impact on the child’s effective understanding of the criminal procedure and their ability to exercise their procedural rights. In particular children who are, in application of Article 6(6) or 6(8) of the Directive, not assisted by a lawyer, could be left entirely without a guiding and supportive presence of an appropriate adult.

3.15. Right of children to appear in person at, and participate in, their trial (Article 16)

Article 16(1) recalls children’s right to be present at their trial. It additionally requires, however, that Member States also take all necessary measures to enable them to participate effectively, including by giving them the opportunity to be heard and to express their views. As Recital 60 suggests, Member States should provide incentives for children to attend their trial, including by summoning them in person and by sending a copy of the summons to their holder(s) of parental responsibility or another appropriate adult.

Of the few Member States whose national law is not fully compliant with these requirements, two provide that at least part of the trial can, in certain cases, be conducted without the physical presence of child.

[26] See section 3.1.

Article 16(2), furthermore sets out a requirement for children who were tried *in absentia* to be granted the right to a new trial that allows for the examination of (new) evidence or to another effective legal remedy, in accordance with, and under the conditions set out in, Directive (EU) 2016/343. In general, provisions of national law regulating such matters are not specific to children, but apply to all suspects and accused persons. In this context, it must be noted that issues in the transposition of the relevant provisions of Directive (EU) 2016/343, namely Article 8 on the right to be present at the trial and Article 9 on the right to a new trial, have not been correctly transposed in at least six Member States[27], against which infringement proceedings have been opened.

3.16. Right to legal aid (Article 18)

Children who are suspects or accused persons, like adults, benefit from entitlements to legal aid as set out in Directive (EU) 2016/1919. However, for children, **Article 18** explicitly requires that national law in relation to legal aid guarantees not only the right of access to a lawyer granted to all suspects and accused persons, but the effective exercise of the right to actually be assisted by a lawyer as set out in Article 6 of this Directive.

Compliance issues with regards to the transposition of Directive (EU) 2016/1919 also affect the provision of legal aid to children. Those Member States who have failed to correctly transpose Directive (EU) 2016/1919 are automatically also considered to have incorrectly transposed Article 18 of this Directive, unless the transposition issue only affects adult suspects or accused persons because there are different rules governing the provision of legal aid to children who are suspects or accused persons that are in conformity with Directive (EU) 2016/1919. As regards compliance issues with Directive (EU) 2016/1919, the rules on the timing for provision of legal aid set out in Article 4(5) have not been transposed in a compliant manner by almost all Member States[28]. As the affected Member States apply the same rules on legal aid to children as they do to adults, these compliance issues under Directive (EU) 2016/1919 also constitute compliance issues under this Directive.

As noted in relation to the transposition of Article 6 of the Directive, not all Member States provide for assistance by a lawyer, including the appointment of a legal aid lawyer, from the earliest point in time foreseen by the Directive. This also links back to the incorrect transposition of the scope of the Directive[29].

In some Member States, children who receive legal aid also have to repay those costs in certain circumstances, even though assistance by a lawyer is mandatory. As the implementation report[30] for Directive (EU) 2016/1919 highlights, half the Member States generally enable cost recovery in case of conviction or where the criminal proceedings are terminated due to circumstances that do not exonerate the person such as the expiration of the

[27] Belgium (INFR(2023)2094), Bulgaria (INFR(2023)2093), Croatia (INFR(2023)2092), Hungary (INFR(2023)2141), Latvia (INFR(2023)2140), Poland (INFR(2024)2034).
[28] See Report from the Commission to the European Parliament and the Council on the implementation of Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, COM/2023/44 final.
[29] See section 3.1.
[30] Ibid.

statute of limitations. In some cases, such cost recovery is performed irrespective of the affected persons economic/financial situation.

3.17. Remedies (Article 19)

The right to an effective remedy, as enshrined in Article 47 of the Charter, is a fundamental procedural right. **Article 19** therefore requires that children have an effective remedy under national law in the event of a breach of their rights under this Directive. What form those remedies take is a matter of procedural autonomy. Compliance with this provision in terms of transposition is very high. All Member States have at least some form of remedy in place in the event a child's rights under the Directive are violated.

3.18. Training (Article 20)

Effective and continuous training of members of professions in contact with children during criminal proceedings in areas such as children's rights, appropriate questioning techniques, child psychology, and communication in a language adapted to the child, is of vital importance for ensuring that the Directive is implemented and applied in a manner which is compliant with its requirements and objectives. Article 20 therefore sets out requirements for such training for different key actors. Approaches to the transposition of these requirements differ widely between Member States.

Paragraph 1 requires Member States to ensure that staff of both law enforcement authorities and detention facilities who handle cases involving children, receive specific training to a level appropriate to their contact with children. However, a lack of well-established training frameworks subject to quality control mechanisms in practice contributes to compliance issues in many Member States. Some Member States have only transposed the Directive's training requirements either for law enforcement or for penitentiary staff. Many make participation in relevant trainings voluntary. There also appear to be significant differences in the frequency of trainings offered. When consulted, some Member States confirmed that trainings are provided only ad-hoc, based on internal needs assessments, while others have established regular training cycles. This has also been highlighted by the Fundamental Rights Agency[31]. Consulted stakeholders furthermore point to possible shortcomings in the quality of trainings provided. With regards to judges and prosecutors who deal with criminal proceedings involving children, Member States must, in accordance with **paragraph 2**, at least take appropriate measures to ensure that they have specific competence or have effective access to specific training.

Such 'appropriate measures' are not necessarily limited to legislative measures and should in any case respect judicial independence and differences in the organisation of the judiciary across the Member States as well as the role of those responsible for the training of judges and prosecutors, such as independent national institutes for judicial training. Most Member States that do have legislative requirements for the training of judges and prosecutors in place, therefore kept such rules very general and pointed to supplementary practical

[31] Study by the European Union Agency for Fundamental Rights (2022), Children as suspects or accused persons in criminal proceedings — procedural safeguards, available at https://fra.europa.eu/de/publication/2022/children-criminal-proceedings.

implementation measures, including measures taken by independent bodies for the training and self-regulation of the judicial profession.

In those Member States in which no legislative provisions on the training of prosecutors and judges exist, a variety of different implementation frameworks, mainly reliant on practical implementation measures, are in place. When consulted, two Member States indicated that their legal system works with special juvenile courts and prosecution services. Only judges and prosecutors who have acquired specialised knowledge through training offered by relevant training institutions for judges and prosecutors can be appointed to work in those positions. There are furthermore Member States in which specialised training is offered by dedicated training institutions but, it appears, only on a voluntary basis, at least for some relevant justice professionals. This is not necessarily sufficient to ensure that specific training is in fact received by all relevant individuals.

Appropriate measures must, according to **paragraph 3**, also be taken to at least promote the provision of such specific training to lawyers who deal with criminal proceedings involving children, taking into account, of course, the need to respect the independence of the legal profession and the role of those responsible for the training of lawyers, such as national Bar Associations.

When consulted on this matter, a few Member States indicated that they provide funding to national bar associations to facilitate the appropriate training of lawyers in child-friendly justice methods and/or require lawyers who want to be included on the list of legal aid lawyers for children to have undergone specific training. However, the vast majority of Member States indicated that in their legal system, training is regulated and provided entirely by the national bar associations and that the state does not interfere in this matter.

Finally, **paragraph 4** asks Member States to encourage initiatives enabling those providing children with support and restorative justice services to receive adequate training and to observe professional standards with regards to impartiality, respectfulness and professionalism. This should be achieved through Member States' public services or through the funding of child support organisations.

When consulted, some Member States provided information on practical implementation measures and structures in place to facilitate the training of child support and restorative justice professionals. Measures adopted include, inter alia: the establishment of dedicated training institutions/programmes; the provision of funding to civil society organisations providing relevant training and guidance; a requirement for all professionals working with children to take a basic training course on the rights of the child as part of their professional qualification; and the opening of state funded training courses for members of the judiciary to other professions, in particular probation officers and professionals guiding mediation procedures.

3.19. Data Collection (Article 21)

In order to monitor and evaluate the effectiveness of this Directive, there is a need for collection of relevant data. In accordance with **Article 21,** Member States therefore had to send available data showing how the rights set out in this Directive have been implemented to the Commission by 11 June 2021 and must do so again every three years thereafter.

In line with Recital 64, this should include both data recorded by the judicial authorities and by law enforcement authorities and, as far as possible, administrative data compiled by healthcare and social welfare services as regards the rights set out in this Directive, in particular in relation to the number of children given access to a lawyer, the number of individual assessments carried out, the number of audiovisual recordings of questioning and the number of children deprived of liberty.

Data has been transmitted by more than two thirds of the Member States. Even where data has been transmitted, however, it has rarely been as comprehensive as envisioned by the Directive. Member States should therefore, as far as possible, adjust their data collection practices in line with the Directive.

3.20. Costs (Article 22)

Finally, the Directive regulates the allocation of additional procedural costs resulting from the application of the right to an individual assessment as enshrined in Article 7, the right to a medical examination as set out in Article 8 and audiovisual recording of questioning, as provided for in Article 9 of the Directive. **Article 22** requires that it must always be the Member States that bear these costs, irrespective of the outcome of the proceedings, except for costs resulting from the application of the right to a medical examination where these are covered by medical insurance.

In a small number of Member States, it is nevertheless not explicitly ensured that the State will bear such costs, while in others, national law in fact directly provides for at least part of the costs to be borne by the child, either in general or at least in cases where the child is found guilty. This places an undue financial burden on children and ultimately their holder(s) of parental responsibility in such Member States and constitutes a compliance issue.

3.21. Transposition (Article 24)

Article 24(1) obliges Member States to adopt measures to transpose the Directive and to inform the Commission thereof. However, it also requires that when adopted, those measures contain a reference to the Directive or are accompanied by such a reference on the occasion of their official publication. This kind of provision is also referred to as an 'interconnection clause'. It is meant to ensure sufficient publicity for the transposition measures and enable affected persons to ascertain the scope of their rights and obligations in the particular area governed by EU law as transposed in national law[32].

Member States are free to choose how this reference is made, as long as they adopt a specific transposition measure (*acte positif de transposition*) that explicitly refers to the Directive. In particular with regards to pre-existing laws, this could, for instance, be a specific act published in the Member State's official journal, which unequivocally indicates the pre-existing laws, regulations or administrative provisions by which the respective Member State considers that it transposed the Directive. No legislative amendments are thus necessarily

[32] Judgment of the Court of Justice of 27 February 2003, Commission v Belgium, C-415/01, EU:C:2003:118, paragraph 21.

called for. However, where no measure is taken to ensure a reference to the Directive, the affected measures can be rejected by the Commission as transposing measures.

Initially, only three Member States fully implemented the Directive's interconnection clause. Most other Member States complied with this requirement only as regards new measures adopted for the purpose of transposing the Directive and not as regards pre-existing legislation, while a handful of Member States failed to implement this requirement entirely. This lack of proper implementation of the interconnection clause was raised in infringements against the 22 affected Member States.

On 30 April 2024, following discussions with Member States, the Commission proposed a one-year test phase, during which the official publication of national transposition measures required by the interconnection clause is ensured via EUR-Lex. At the end of the test phase, the Commission will evaluate the results and Member States' practices. If the test phase is not found to have delivered the required results, the Commission reserves its right to resume enforcing the obligations flowing from the interconnection clauses. In the meantime, grievances in ongoing pre-litigation proceedings or enquiries about the fulfilment of the requirements under interconnection clauses will not be (further) pursued, if Member States have agreed to the publication of hyperlinks and/or documents directly on EUR-Lex.

Despite the clear advantages of the EUR-Lex solution in terms of accessibility, Member States have the right to opt out of this publication method if they commit to referring systematically and directly to the directives in their national transposition measures or to publishing national official notices to that effect, both for national legislation pre-dating and post-dating the respective directive to be transposed.

4. APPLICATION OF ARTICLE 6 OF THE DIRECTIVE

In addition to the general assessment of the transposition of Article 6 of the Directive, the Commission also committed to reporting on the application of this provision. For this purpose, as mentioned in the introduction to this report, the Commission consulted Member States and asked them to provide relevant information and statistics. Member States were asked to provide information/data on their practice/practical arrangements with regards to:

(a) the right to meet with a lawyer prior to questioning as set out in paragraph 4(a);
(b) the rules on confidentiality of communication as set out in paragraphs 4(a) and 5;
(c) the proportionality-based derogation option provided for in paragraph 6 and the temporary derogations option provided for in paragraph 8;
(d) the rules on postponement of questioning as set out in paragraph 7; and
(e) relevant case law.

The following feedback was obtained:

First, as regards the right to meet and consult with a lawyer prior to questioning, all but two Member States reported that their law does not provide for a minimum/maximum period of time for such consultations. Most Member States indicate that in practice, children and their lawyers will be granted as much time as necessary, within reason. In most cases, such consultations reportedly come to around 30 minutes.

In some Member States, however, consultations are as a matter of principle limited to 30 minutes, extendable only upon justified request. Arrangements that set such a generic limit to the time granted to children for a consultation with their lawyer are not *per se* non-compliant with the Directive. It has to be ensured, however, that in practice request for an extension of this limit are always granted where this is necessary to safeguard the fairness of the proceedings, in particular where a child may need more time with their lawyer due, for instance, to communication difficulties.

For a few Member States, the information provided also indicates that they do not ensure that the child always has the possibility to meet with the lawyer in person for the purpose of such consultations. In those Member States, consultations are at least in some cases, only facilitated via telephone. This practice is, in principle, not compliant with the right to 'meet' with the lawyer as established by the Directive, as a meeting implies that the lawyer should be present in person. Whether it could be justified in certain cases on the basis of the best interests of the child needs to be further assessed.

Second, concerning the application of the rules on confidentiality of communication between a child and their lawyer, as set out in paragraphs 4(a) and 5, all respondent Member States reported that it is always ensured that consultations between a child and their lawyer are confidential. The majority indicated that separate facilities are made available for this purpose where the child is deprived of liberty in police custody or pre-trial detention.

However, at least two Member States appear to allow for such facilities to be visually monitored. While the Directive does not explicitly preclude this practice, it can potentially raise concerns, where legally privileged documents or other materials that are examined by the child and their lawyer during such a consultation are visibly accessible to the person(s) monitoring it.

Third, looking at the application of the derogation options provided for in paragraphs 6 and 8 of the Directive, some of the respondent Member States indicated that this derogation option is not provided for in their legal systems. Those Member States which consider that it is provided for, either indicated that no data is available on the number of cases in which the derogation option has been applied or simply did not provide any figures. One Member State reported that the derogation option does exist in their legal system, but that it has not yet been applied.

Member States were also asked to indicate the national authority responsible for making the assessment required by paragraph 6 for ascertaining whether a derogation from the Directive's requirements on assistance by a lawyer is proportionate and compatible with the child's right to a fair trial and the effective exercise of their rights of defence. To this question, most Member States replied that the responsible authority is the one aiming to conduct the questioning or other investigative act (usually the police) or the authority that is overall in charge of the proceedings at the time (usually a prosecutor or an investigative judge at the pre-trial stage, depending on the legal system). A small number of Member States always require a judicial authority to make the relevant assessment.

In remains unclear, however, whether in all cases in which the responsible authority is a law enforcement authority, the decision to apply the derogation must nevertheless still be approved by a prosecutor or investigative judge, as the case may be, or will be subject to

judicial review at the trial stage. This would be important to ensure an effective remedy for and ideally also to prevent any potential abuse of the derogation option.

Essentially the same replies were received with regards to the application of the temporary derogation option provided for in **paragraph 8** of the Directive. No data on the frequency of application was provided and it remains unclear, whether a decision by a law enforcement authority to apply the derogation option will always be subject to judicial review.

Fourth, in relation to the application of the rules on postponement of questioning set out in paragraph 7, almost half the Member States provided information on how the notion of 'reasonable period of time', introduced in paragraph 7 of Article 6, is interpreted in their national legal system.

Most do not explicitly define this notion in national law, but rather let competent authorities interpret this notion on a case-by-case basis, taking into account the individual circumstances of the case, in particular whether the child is deprived of liberty or not.

Some Member States did, however, indicate specific limits for the amount of time that will be granted to a child's chosen lawyer to appear. This ranges from one hour to three days (in cases where the child is not deprived of liberty and the delay is not expected to jeopardise the investigation).

As highlighted in the discussion on the transposition of Article 6(7), the Directive does not define the notion of 'reasonable period of time'. The Commission considers, however, that it should be interpreted as 'for as long as it takes to get a lawyer on site', it being understood, that in cases of clearly exaggerated or unreasonable delays, Member States are allowed to appoint another, on-duty lawyer for the duration of the specific act.

Finally, concerning relevant case-law at the national level in which a violation of the child's rights under Article 6, in particular in relation to the application of the derogation options foreseen by paragraphs 6 and 8, has been raised, Member States indicated that they are not aware of any such cases and/or do not maintain relevant statistics. The Commission was therefore not in a position to assess with regards to which particular elements of Article 6 compliance issues may have been raised in practice or the frequency of such occurrences.

5. CONCLUSION

The aim of the Directive is to strengthen and supplement procedural safeguards for children who are suspects or accused persons in criminal proceedings in a comprehensive manner, to ensure that they have the real and effective possibility to fully understand and follow proceedings against them as well as to exercise their right to a fair trial. As such, this Directive has significantly progressed efforts to ensure equal access to justice across the EU for one of the most vulnerable categories of suspects and accused persons. Its potential for positive impact does not only extend to strengthened mutual trust between Member States in each other's justice systems, but also to the prevention of recidivism and the fostering of children's social rehabilitation and reintegration.

However, this report highlights that there are still compliance issues relating to key provisions of the Directive in some Member States. This is particularly true and problematic as regards the scope of the national measures implementing the Directive, and the transposition of key substantive provisions, including on information rights, assistance by a lawyer, the right to an individual assessment and rules for the imposition of and treatment in case of deprivation of liberty. Based on the information collected for this report, it also appears that compliance issues exist as regards the application of Article 6 of the Directive, in particular concerning the rules on postponement of questioning and the right to meet with and consult a lawyer prior to questioning.

The Commission will, as a matter of priority, continue pursuing the infringement cases opened for lack of full transposition of the Directive and will continue to assess Member States' compliance with the Directive. Where necessary, the Commission will take every appropriate measure to ensure compliance with the Directive's provisions throughout the EU.