

Procedural Rights of Children Suspected or Accused in Criminal Proceedings in the EU

Regional Comparative Report



**PROCEDURAL RIGHTS OF CHILDREN
SUSPECTED OR ACCUSED IN CRIMINAL PROCEEDINGS IN THE EU**
REGIONAL COMPARATIVE REPORT



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Glossary and acronyms

Belgium Report	PRO-JUS project National Report for Belgium
Child	Person under the age of 18 in accordance with the UN Convention on the Rights of the Child
EU	European Union
France Report	PRO-JUS project National Report for France
Guardian ad litem/Guardian	Person appointed by the court to explore and advise what solutions would be in the best interests of a child in a court case.
Hungary Report	PRO-JUS project National Report for Hungary
Juvenile Justice	Person under 18 years of age coming under special legislation/institutional system for dealing with persons under the age of 18 who are charged with criminal offences.
Lawyer/Counsel	Directive 2013/48/EU refers to the right of access to a lawyer. This means 'a person who is qualified in accordance with national law and authorized to give legal advice and to provide legal assistance to suspects'. Some countries may use the term 'Counsel' in their national legislation.
Netherlands Report	PRO-JUS project National Report for the Netherlands
NGO	Non-governmental Organisation
PRO-JUS	Procedural Rights of Juveniles Suspected or Accused in the European Union project
Spain Report	PRO-JUS project National Report for Spain
Suspects/accused	Directive 2010/64/EU provides rights to suspects and accused persons and the report refers to these terms together or alternately. The terms may be used differently in the national law of different countries.

Contents page

EXECUTIVE SUMMARY	7
BACKGROUND.....	7
1. INTRODUCTION	11
1.1. BACKGROUND.....	11
1.2. PROBLEM STATEMENT.....	11
1.3. METHODOLOGY.....	12
2. CONTEXT	13
2.1. JUVENILE JUSTICE SYSTEM	13
2.2. PROFILE OF FOREIGN SUSPECTED CHILDREN	14
3. EU DIRECTIVE 2010/64: THE RIGHT TO INTERPRETATION AND TRANSLATION IN CRIMINAL PROCEEDINGS	18
3.1. CONTENT OF THE DIRECTIVE	18
3.2. TRANSPOSITION STATUS	19
3.3. APPLICATION IN PRACTICE	20
4. EU DIRECTIVE 2012/13: THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS	29
4.1. CONTENT OF THE DIRECTIVE	29
4.2. TRANSPOSITION STATUS	30
4.3. APPLICATION IN PRACTICE	31
5. EU DIRECTIVE 2013/48/EU: THE RIGHT OF ACCESS TO A LAWYER, THE RIGHT TO HAVE A THIRD PARTY INFORMED UPON DEPRIVATION OF LIBERTY AND THE RIGHT TO COMMUNICATE WITH THIRD PERSONS AND WITH CONSULAR AUTHORITIES	35
5.1. CONTENT OF DIRECTIVE	35
5.2. TRANSPOSITION STATUS	37
5.3. APPLICATION IN PRACTICE	37
6. CONCLUSIONS	42
7. RECOMMENDATIONS	43
Bibliography	45

EXECUTIVE SUMMARY

BACKGROUND

The 'Procedural Rights of Juveniles Suspected or Accused in the European Union' (PRO-JUS) project was set up to help ensure that foreign children who are suspected or accused of crimes in European Union countries have access to a fair trial. The project involved studying the application of the following three European Union Directives aimed at upholding the rights of interpretation, information, and access to legal and other support:

1. Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings;
2. Directive 2012/13/EU on the right to information in criminal proceedings;
3. 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.

The research was carried out by teams in five countries - Belgium, France, Hungary, the Netherlands, and Spain – and involved desk research, interviews and specialised database analysis. A total of 152 interviews were carried out with 109 adults and 43 children. The country research was analysed in order to produce this comparative report which identifies common issues, trends and examples of good practice.

In terms of the context, most of the countries under review have well-developed and distinct juvenile justice systems which in the case of France and Belgium date back to over 50 years. Hungary is the only country which does not have a specific code and separate institutions for persons under 18 accused of criminal offences. Each country has a different approach to juvenile justice although all are premised on the recognition that allowances and adjustments need to be made for children taking into account their different level of maturity as compared to adults.

The numbers and characteristics of foreign child suspects and accused in the project countries is not known due to the lack of available data. The data available is either partial or unreliable making it difficult to obtain an accurate picture of the extent of the phenomenon. Moreover, the data that is available cannot be compared across countries as it has been collected through the use of different definitions, parameters, and methodologies.

FINDINGS

The data and analysis from the five national reports has been compared and results in the following overall findings which are organised according to the relevant articles of the three Directives in question. The national reports should be consulted for detailed country specific information.

Directive 2010/64/EU concerning the Right to Interpretation and Translation

This Directive has been transposed into national law or is directly applicable in all five project countries. The findings regarding its application in practice are as follows:

Art 2 (1) - Right to interpretation: This right is systematically applied across countries – efforts are made to assist suspects who do not understand or speak the language without delay by the provision of interpretation services in a timely manner. However, there are challenges in provision especially for lesser known languages.

Art 2 (3) - Hard of hearing: There is a lack of appropriate assistance in all countries for persons who have a speech or hearing impediment. The situation is further exacerbated for foreign children with such conditions as they require even more specialised support.

Art 2 (4) - Determination procedure: The lack of standardised procedures for determining whether the assistance of an interpreter is required by testing whether the suspect speaks and understands the language of criminal proceedings is a weakness in most countries. Only one country has a systematic approach; elsewhere needs are identified on the basis of subjective assessments and “gut feeling”.

Art 2 (5) - Complaints: Insufficient use is being made in all countries of the right to challenge the refusal of interpretation or to complain that the quality of interpretation is inadequate for safeguarding the fairness of proceedings.

Art 2 (6) - Technology: Little use is being made of the opportunity to use communications technology to facilitate the interpretation process. There is only one country where communications facilities are being used as a matter of course.

Art 3 (1) - Written translation: The provision of written translation is limited in all countries and in some places, information is habitually provided through verbal translation only.

Art 3(2) - Essential documents: The written translation of all essential documents to suspects who do not understand the language is not being provided anywhere. There is limited understanding among criminal justice professionals as to which documents count as ‘essential’.

Art 4 - Costs: Costs are borne by the State in all countries but there is a lack of sufficient financial resource which puts a downward pressure on costs which in turn undermines quality.

Art 5 (1) - Quality: The provision of interpretation of sufficient quality for enabling a suspect to be well-informed and capable of exercising a right to a defence is a major weakness in all countries. Quality control systems are lacking; the lack of benchmarks and means of redress results in an ad hoc system of quality control which serves to undermine the fairness of criminal justice systems.

Art 5 (2) - Registers: Most countries have striven to establish registers of properly qualified translators and interpreters. However, the systems are being undermined by weaknesses in vetting and registration processes, the lack of suitably qualified persons as well as a reliance on parallel unofficial listings which involve the deployment of interpreters who do not have the required skills and knowledge.

Art 5 (3) - Confidentiality: Safeguarding confidentiality of interpretation is not being adequately considered in criminal justices processes. This important aspect is only identified and addressed in two country reports even though it is likely to be an issue everywhere.

Art 6 - Training: There is no evidence from the reports that the training of judges, prosecutors and other judicial personnel involves special attention to communication with the assistance of an interpreter.

Directive 2012/13/EU concerns the Right to Information

This Directive has been transposed into national law or is directly applicable in all five project countries. The findings regarding its application in practice are as follows:

Art 3 (1) - Right to information: The reports indicate that suspects or accused persons in all countries are promptly provided with information concerning key procedural rights either verbally or in writing. The key issue for foreign/suspected children is whether this right is realised in practice through specific adaptations to their needs.

Art 4 (1) - Written letter of rights: Arrested or detained persons are not promptly provided with and able to keep a written Letter of Rights in all countries: some authorities provide comprehensive statements in multiple translations; others only provide verbal information.

Art 3 (2) - Understandable information: The information provided is usually not in simple and accessible language and does not take into account the needs of foreign children as vulnerable persons considering their age, language, culture and so on.

Art 7 - Case materials: This issue is little addressed in the national reports; only one country report mentions that professionals welcome the increased rights under the Directive to access documents in the possession of the authorities that are essential to challenging effectively the lawfulness of the arrest or detention.

Directive 2013/48/EU on the Right to Access a Lawyer and Third Parties

At the time of writing this report, the deadline for transposition of 27 November 2016 had not yet passed and project countries were in the process of integrating the Directives into national law. It is worth noting that a number of requirements in the Directives already form part of the criminal codes of the countries concerned.

Art 3 (1) - Right to a lawyer: All countries grant access to a lawyer so that the accused or suspected person can exercise their right to defence. However, the implementation of this right is problematic in all places and does not operate in an optimal way due to various administrative constraints.

Art 4 - Confidentiality: Confidentiality of communications between accused/suspect foreign children and their lawyers may not be sufficiently respected due to lack of private spaces, or the presence of interpreters who are not properly bound by codes of ethics.

Art 5 - Third party: The right to contact at least one third party is granted in all countries and is usually taken to mean parents or guardians in the case of children.

Art 7 - Consular authorities: All countries respect the right to inform and communicate with consular authorities but foreign children rarely ask to do so. One country obliges contact with the consulate which may pose a risk to those seeking asylum.

CONCLUSIONS

The three Directives have been or are in the process of being transposed into national law in all five countries. In many cases, the rights in question already exist in national laws and have been reaffirmed or refined by the application of the Directives. Therefore integration into national law is not the issue for the most part; the critical question is the extent to which these provisions are being applied in practice. The three Directives are interconnected in the sense that Directive 2010/64/EU on interpretation needs to be applied for the other two Directives on rights to information (2012/13/EU) and lawyers (2013/48/EU) to have meaningful effect.

The overall picture to emerge from this research is that the procedural rights in question are observed in a formal sense but challenges remain in implementation. The lack of assured access to quality interpretation is a key impediment to foreign children in terms of their ability to exercise other important rights. Poor or absent interpretation can have a very real impact on the lives of foreign children who are accused or suspected of crimes if they are unable to convey a proper defence or have a fair trial. The study found disturbing cases of foreign children who were not assisted by interpreters, could not explain anything about their circumstances or their age, and ended up being wrongly confined to adult prisons for months at a time. On the other hand, a failure to provide adequate interpretation may also undermine the effective prosecution of a case and undermine the rights of other parties involved. It is therefore in the interests of a fair and efficient criminal justice system that the procedural rights contained in the Directives are observed.

The task of assuring proper interpretation support at any point in time across all EU countries is a formidable one given the almost limitless permutations that may arise from trying to match up foreign children speaking any number of the world's languages and dialects with interpreters who are able to speak the language of the child as well as the country in which the criminal procedure is taking place to a sufficiently high level to ensure a fair process. The challenge is considerable and further exacerbated by the lack of adequate financial and human resources needed to meet these needs. While the Directives assert important and essential rights, and this study identifies critical gaps in provision, the key conundrum facing practitioners and policy-makers is what strategies and methodologies can be devised that are manageable, proportionate and realistic and yet able to meet the needs on the ground.

RECOMMENDATIONS

The report takes as a given that the Directives must be implemented in full; it does not therefore seek to reiterate the requirements of those Directives but instead aims to focus on practical recommendations that can help improve the situation. Full recommendations with explanatory text and implementation suggestions can be found in the 'Recommendations' section of this report. A summary of recommendations is as follows:

- a) Set up systems of quality control for interpretation
- b) Strengthen official registers of interpreters
- c) Require interpreters to sign a code of ethics
- d) Establish clear protocols for the use of intermediary languages for interpretation
- e) Utilise standardised procedures for determining the need for interpretation
- f) Provide a standard written and translated letter of rights
- g) Make greater use of communications technology
- h) Provide multi-faceted training for professionals involved in the criminal justice system
- i) Increase data collection on the scale and characteristics of the phenomenon
- j) Encourage coordination between professionals involved in the criminal justice process
- k) Ensure greater coordination between different parts of government
- l) Encourage greater cross-border cooperation and sharing of tools and methodologies

1. INTRODUCTION

1.1. BACKGROUND

The 'Procedural Rights of Juveniles Suspected or Accused in the European Union' (PRO-JUS) project was set up to help ensure that foreign children who are suspected or accused of crimes in European Union countries have access to a fair trial. A child suspected of a criminal offence needs to understand the criminal process if he/she is to exercise the right to a fair trial in accordance with Article 6 of the European Convention on Human Rights. Foreign children are particularly vulnerable due to their inability to speak the language or understand the criminal justice system of the country in which they find themselves accused or suspected. The European Union has passed several Directives which contain minimum rules regarding the protection of the procedural rights of persons suspected of a criminal offence. The following Directives apply to both adults and children and are intended to help harmonise standards across criminal justice systems in European Union countries in relation to interpretation, information, and access to legal and other support:

- Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings;
- Directive 2012/13/EU on the right to information in criminal proceedings;
- 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.

The PRO-JUS project aims to uphold the rights of such children by increasing the knowledge and capacity of professionals in the criminal justice system in order to improve the implementation of the three procedural Directives in 15 Member States. This report assesses the implementation of the three Directives in five Member States – Belgium, France, Hungary, the Netherlands, and Spain. In addition, the project products include a procedural handbook and advocacy initiatives to be carried out across the region.

1.2. PROBLEM STATEMENT

The basis for this research is the concern that it is difficult for children caught up in criminal proceedings to ensure that their rights are respected.¹ Their vulnerability may, during a police investigation or criminal proceedings, be further increased by social characteristics, such as nationality, membership of a marginalised minority group or other personal circumstances such as trauma or medical illness. The experience of vulnerable persons in the criminal justice system may be further aggravated by the administrative process itself. Previous research indicates, for example, that the law may be applied differently to children who are nationals of a country compared to those that are foreigners².

In order to have a proper defence, a suspect must be able to sufficiently understand his/her lawyer, have a functional understanding of the proceedings and have adequate support in the preparation of a defence. A language barrier can thus be a major obstacle. Moreover, the lawyer and other criminal justice professionals require specialised skills to be able to deal with children, particularly if there are cultural differences. The extent to which foreign children are suspected of criminal offences in EU Member States is difficult to establish and discussed further in section 2. Whatever the numbers, this is a real problem on the ground which has likely been compounded by the migration crisis in Europe in recent years. The main question this research seeks to address is: *'Can non-national children who are suspects in criminal proceedings actually exercise their rights that have been granted to them in the EU Directives 2010/64, 2012/13 and 2013/48 – both in theory and in practice?'*

1 Golub, S. en Grandjean, A., Promoting equitable access to justice for all children. UNICEF Insights, Issue 1/2014 (2014).

2 Gyurkó, Sz. (ed) - Nemeth, B.: Comparative situation analysis of juvenile justice system in 20 CEE countries in accordance with the four relevant Terre des hommes scopes, Budapest, Tdh. 2016 (not published yet)

1.3. METHODOLOGY

The research was carried out by different research teams in each of the five countries using a common research methodology based on desk research and interviews with professionals and foreign children with experience of the criminal justice system.

Desk research – this involved research into national laws on whether and how the Directives have been transposed alongside literature and documentary reviews showing the application of these regulations in practice. Some of the country teams were able to access specialised databases: the France report researchers consulted 38 judicial files from the Tribunal de Grande Instance de Creteil; the Hungary team consulted 12 police case files and obtained statistical data from the Police and the Public Prosecutor’s Office; and the Netherlands team carried out a survey of the judiciary and received four responses.

Semi-structured interviews – these involved interviews with key stakeholders and children to better understand the practical application of regulations and policies and to find out which factors contributed to or detracted from the assurance of the rights in question. Interviewees comprised lawyers, judges, prosecutors, interpreters/translators, police, guardians, administrators, ombudsmen, NGO and care home staff etc. Access to different groups varied from country to country, for instance, the Hungary team did not have access to judges for interview. All research teams endeavoured to interview foreign child suspects/accused, however, it proved challenging to identify children who fitted the profile and to secure access to them. The teams in Spain and France were most successful in interviewing foreign children who did not speak the national language.

Observation – This included, for example, the France research team accompanying educators from Paris in socio-educational fact-finding interviews, and also observing trial and sentencing hearings of foreign children.

Table 1 shows the numbers of adults and children interviewed in each country. In total 152 interviews took place involving 109 adults; and 43 children. The most comprehensive research appears to have taken place in France based on the number of interviews, access to judicial databases and observations; whereas the Netherlands research is based on a smaller sample. All country teams experienced challenges in obtaining data and in securing interviews. The problem was pronounced in Hungary as the research coincided with the height of the migration crisis in 2015 resulting in increased sensitivities and unwillingness by the authorities to provide information. It is also noted that the research was guided by several ethical principles including informed consent and data protection. While the country reports were initially based on a common methodology and template, in practice the research was adapted to the needs on the ground. The result is that each of the reports is unique and tackles the issue in different ways.

Table 1

	<i>Belgium</i>	<i>France</i>	<i>Hungary</i>	<i>Netherlands</i>	<i>Spain</i>
<i>Interviews (adults)</i>	20	34	22	12	21
<i>Interviews (children)</i>	20	7	1	0	15
<i>Total Interviews</i>	40	41	23	12	36
				Overall total – 152	

The information from the five country reports was analysed to draw comparisons across countries, to identify common issues and trends as well as good practices. This comparative report pulls together this cross-country analysis by reviewing each Directive in turn. Drawing comparisons was a challenging task as each report had addressed the issues and presented the information in different ways. The comparative report therefore assesses the information in the country report according to key articles in the Directives in order to arrive at an overview of implementation. Not all the articles in the Directives are covered; only those related to issues picked up on and addressed in the national reports.

2. CONTEXT

2.1. JUVENILE JUSTICE SYSTEM

Overview

Most of the countries under review have well-developed and distinct juvenile justice systems which in the case of France and Belgium date back to over 50 years. Hungary is the only country not to have specific legislation and institutions for persons under 18 accused of criminal offences. Each country has a different approach to juvenile justice though all are premised on the recognition that allowances and adjustments need to be made for children on the basis of their diminished responsibility taking into account their lower levels of maturity as compared to adults.

The threshold for criminal responsibility is highest in Belgium at 16 years, followed by Spain and at 14, France at 13 and Netherlands and Hungary³ at 12 years. Belgium and France restrict the punitive measures that can be taken against children between the ages of 12 and 13 respectively to educational and protectionist measures. Hungary has a concept of impunity of children where a covert adult offender is driving action behind the scenes. It is also worth noting that the Netherlands has comprehensive out of court settlement initiatives aimed at expediting justice for children and where appropriate, to help children avoid being burdened with criminal records early in life.

Coordination between the criminal, child care and immigration systems varies from country to country – there are very separate and independent systems in Hungary as compared to the Netherlands where coordination between the criminal justice and child care systems, at least, is well-established and prescribed by law. There is no special legislation or policy for foreign child suspects or accused in any country. Nevertheless, there are localised good practices, for example - in Paris, France concerning the specialisation of lawyers and also the coordination of interpreters. Information by country is provided below in summary form; in all cases reference should be made to the national reports for further information.

Country information

Belgium: As a federal state, responsibilities for juvenile justice are shared between the federal arm and the three regions. The age of criminal responsibility is 16 years. The law derives from 1965 legislation concerning the treatment of children who have committed an act classed as an offence. The law takes a protectionist approach: disallowing criminal sanctions for children in favour of measures aimed at supervision, protection and education. Proceedings are heard before a specialised juvenile court save for exceptional cases where the system allows such courts to decline jurisdiction and pass the case over to adult tribunals.

France: The separate legal system for young offenders was originally set up under legislation dating back over 50 years. The law has undergone multiple reforms since then and further modernisation and consolidation is envisaged. The system is founded on two principles – specialised courts, procedures and magistrates for dealing with juvenile cases; and the autonomy of criminal law for young offenders. The age of criminal responsibility is 13 years. There is a presumption of non-liability and a preference for educational measures: this is an absolute requirement for children under 13; and a preference for those between 13 to 18 years.

The justice system is founded on the principle of equality and avoids any kind of discrimination, including positive discrimination, treating foreign and national children equally. However, the research encountered two measures aimed at improving the management of cases involving foreign children. Firstly, the foreign unaccompanied children division of the Paris juvenile branch office consists of attorneys who are specialised in youth and migration law and who provide legal assistance for foreign children. In addition, the Educational Unit of the Tribunal de Grande Instance de Paris (UEAT), given the number of foreign children referred to judicial authorities, set up an educational assistance initiative providing specialist support in the most common languages to improve the management of cases of children **and to** ensure the continuity of educational work. A team of bilingual social workers are responsible for providing assistance to Romanian and Arabic speaking children.

³ The age of criminal responsibility in Hungary is 14 years for most crimes but 12 years in the case of five particular crimes, including murder and burglary.

Hungary: There is no separate legislation or institutional system for children in conflict with law. The age of criminal responsibility is 14 but decreases to 12 for the most severe offences. The law has a concept of impunity if the child is under the influence of a covert adult offender; the study found many such examples in its case review of accused or suspected foreign children. The Hungarian system has been criticised by international and national organisations on various grounds: lacking a separate system; low age of criminal responsibility; shortage of professional, protection and evaluation guidelines; lack of alternative sanctions and diversion strategies; inadequate conditions of detention facilities; removal of lower penalties and the imposition of detention for lower level misdemeanours when detention should be used as a last resort. The criminal justice system, the child protection system and the immigration system work more or less independently of each other. The study did not find data showing that mandatory reporting by the criminal justice authorities to the child protection agencies takes place as required; nor that coordination occurs over the child's migration and asylum status.

Netherlands: The Criminal Code includes special provisions which apply to children between 12 to 18 years. Children under the age of 12 years are not prosecutable under Dutch criminal law on the basis of an irrefutable presumption of lack of capacity. However, children under the age of 12 do not fall entirely outside of the scope of criminal law as a limited number of investigative and coercive measures can be applied if there is a reasonable suspicion that the child has committed a serious offence. The court also has the ability to apply adult sentences to 16 and 17 year olds in certain circumstances and on the other hand to extend the application of juvenile justice provisions to young persons between the ages of 18 and 23 years.

The law requires the police to immediately notify the Child Care and Protection Board of the pre-trial detention (police custody) of a child so that they may provide early assistance. The Board is not obliged to offer assistance but if it chooses to report, the Public Prosecutor is obliged to take note of its view before requesting pre-trial detention. If the Prosecutor brings the case to the court, he is obliged to request a report from the Board regarding the personality and the living circumstances of the child. The Dutch system has various out of court settlement processes which help accelerate the process for children, allow for lower level penalties or the resolution of the situation through other forms of penalties aside from the imposition of criminal convictions and criminal records.

Spain: The system of juvenile justice has been evolving for the past 30 years and is established as a separate system and specialised courts for persons under 18 years of age. Juvenile justice only applies to persons who have committed acts defined as criminal offences. There is no criminal responsibility under the age of 14 years and escalating penalties apply as children become older and reach 18 years of age. The system allows for proceedings to be discontinued in the best interests of the child in the event of certain non-serious cases and also for resolution through conciliation and restorative justice measures.

2.2. PROFILE OF FOREIGN SUSPECTED CHILDREN

Overview

There is a lack of reliable data on the numbers and characteristics of foreign child suspects and accused in the project countries. There is either no national data or unreliable and partial data which makes it difficult to obtain an accurate picture. On the face of the available data, Hungary, Belgium and the Netherlands appear to have the lowest numbers of foreign children in the criminal justice system: with 195 foreign child offenders recorded in Hungary in 2015; 234 convicted foreign children in Belgium in 2012; and 265 children of foreign descent placed in juvenile justice institutions in the Netherlands in 2014. Figures from France and Spain suggest higher numbers. In Spain, data from 2015 shows that 3,927 foreign children aged 14-17 years were arrested or investigated for a criminal offence. In France, data from Paris alone shows 1,199 cases involving foreign children referred for prosecution and relating to some 400 individual children. The sources for the data on different countries is outlined below.

The key point to note is that this data may be unreliable or partial. For instance, the Hungary report says that the profile of foreign children is not always accurately recorded in police documents, as it found evidence that children of foreign

nationality were sometimes listed as being Hungarian. The data from Spain while suggesting higher numbers, only refers to arrests and investigations, not convictions. The information from the Netherlands speaks of children of foreign descent, which does not necessarily equate to them being non-nationals. The France data is from Paris alone.

Given the variability of the information, it is not possible to compare across countries. The available data uses different definitions, parameters, population groups and methodologies and cannot be assessed against data from elsewhere in order to arrive at a reliable conclusion. One observation that may be made is that the numbers of foreign children/suspects eventually receiving a criminal sentence appears small in some countries (with the proviso that it is impossible to arrive at a firm conclusion on this without knowing the overall population of both children and foreign children in order to assess the relative proportion of both groups in the criminal justice system). Moreover, the true scale of need goes beyond those who are convicted, children who are arrested and investigated, even if their cases are subsequently dropped, need to be assured of their rights under the three Directives. The paragraphs below provide a summary of country data; in all cases, reference should be made to the national reports for more information.

Country information

Belgium: The Belgium study was unable to gather official data on the nationalities of children in conflict with the law reporting that the statistics do not exist on the level of the federation or the federation entities. Even hearing logs, which contain all other details (date of birth, full name, etc.), do not mention nationality. One statistic is provided (without a source), namely that in 2012, out of 142,454 persons convicted in criminal proceedings, 26,423 were foreigners, of which 234 were children. The annual statistics of the juvenile prosecution services only concern the volume and nature of cases. The report further states that this lack of statistics appears to be deliberate given the sensitive nature of the subject and the risk of stigmatisation.

Other general data in the Belgium report sheds light on the situation of foreign children but not necessarily those who are accused or suspected. For instance, there is data on foreign unaccompanied children but no breakdown of how many of these are accused or suspected: figures from 2015 record 5,047 foreign unaccompanied children⁴ with the majority coming from Afghanistan, Syria, Iraq and Guinea⁵, 91.5% were male⁶ mostly between the ages of 16 to 18 years⁷.

Other data sheds provides information on the origin of youths in custody but not their nationality i.e. it does not clarify that they are non-Belgian nationals. A study carried out in 2005⁸ traced the profiles of young people where jurisdiction was declined and who were referred to adult courts (i.e. most serious cases) and found that most of this group originated from outside of Europe (primarily Morocco), with only 16.7% of Belgian origin.

A study carried out in 2011 by the INCC operational division of criminology on the characteristics of persons placed under arrest warrant and/or on conditional release⁹ showed that almost half of the population of detained persons (45.8%) did not have Belgian nationality. The most represented nationalities were, in descending order: Moroccan, Algerian, French, Romanian and Dutch. By contrast, those given alternatives to detention were mostly Belgians (almost 90% and sometimes more). These reports suggest that foreign children are more likely to receive custodial sentences but the data is unclear on whether they are non-Belgians or nationals of foreign descent. Furthermore, it does not examine the hidden variables behind custodial outcomes, notably the lack of a foothold, fixed address and income etc., which may lead judges to place persons in provisional detention as a matter of course.

France: Criminal justice statistics are rarely available for foreign children. There is partial information for illustrative purposes from the educational community service (Service territorial éducatif de Milieu ouvert or STEMO) for Central Paris. In 2015, the 'Judicial Protection of Juveniles' indicates that 2,297 cases of children were referred to the prosecutor, among which 1,199 cases involved foreign children and equated to 400 unique children¹⁰.

4 "Familles d'accueil pour Mineurs Etrangers Non Accompagnés (MENA)" brochure, Mentor Escale, www.mentorescale.be.

5 UNICEF Belgium

6 *Ibid.*

7 Website of the Federal Justice Service: http://justice.belgium.be/fr/themes_et_dossiers/enfants_et_jeunes/mineurs_etrangers_non_accompagne/mineur_etranger_non_accompagne_mena_

8 NUYTIENS et al., 2005. course of the years 1999, 2000 and 2001 (Antwerp, Mons, Brussels, Charleroi and Mechelen

9 A. JONCKHEERE and E. MAES, "Caractéristiques des personnes placées sous mandat d'arrêt et/ou en liberté sous conditions", in *La détention préventive et ses alternatives*, Direction Opérationnelle de Criminologie, Institut National de Criminologie et de Criminologie, SPF Justice, 2011, pp. 35 and on.

10 Internal document of the Judicial Protection of Juveniles, Service Territorial de Milieu Ouvert Paris Center, 19 April 2016

This amounted to 52.1% of all charges¹¹. The same data sources show numbers almost tripling between 2009 and 2014 with children concerned mainly originating from the Maghreb region (Algeria, Tunisia and Morocco), Romania and Serbia.

Further statistics show that in 2013, the juvenile public prosecutor's office was called upon to handle the cases of 234,000 children. According to the legal statistical service, this figure corresponds to 3.6% of the population of children between the ages of 10 and 17. In 2014, the number of cases involving foreign children represented 8% of all cases. Further research carried out in four courts in 2014 confirms this information that lesser numbers of foreign children are implicated in criminal proceedings than national children except in the case of Paris where the numbers are equal. However, these studies are of limited use as they do not show how these figures compare to the proportion of foreign children in the country and whether they are over-represented in the criminal justice process.

Hungary: The numbers of foreigners in conflict with the law have increased in recent years due to the European migration crisis as well as increasing criminal prohibitions arising from legal amendments in 2015 and the creation of the border fence¹². Data shows that children recognised as offenders by court decision are few in number, for instance in 2015 – 195 foreign children¹³ mainly from Afghanistan, Syria as well as neighbouring countries (Romania, Serbia, Slovakia, Ukraine). This is a small proportion of the total of 7,785 child offenders in the country¹⁴. Foreign children were found to commit the same types of crimes as nationals of their age - petty crimes against property and public nuisance. In addition, in 2015, foreign children were increasingly linked to crimes related to illegal entry¹⁵. The introduction of the border fence and the criminalisation of foreign children received criticism from NGOs.

In terms of outcomes for foreign children, the study data showed that from 2013-2014 most investigations ended with a reprimand, followed by prosecution, and with diversion taking place in less than 2% of the cases.¹⁶ Cases involving foreign children are less likely to reach court because they concern petty crime or because the children disappear or due to confusion about their names/identities. The study also found that it takes nearly three years for criminal proceedings to come to an end for a child under 18 years thus undermining the juvenile justice principle of ensuring the earliest possible imposition of legal consequences.

The report points to the data on foreign children being unreliable as it found nationality to be filled in incorrectly on the documents it reviewed i.e. incorrectly showing children who are evidently foreign as being of Hungarian nationality. Moreover, the report quotes the ombudsman's office as saying the procedure is inappropriate for national children let alone foreign children,

"The procedure is traumatizing. The Hungarian jurisdiction is not even compatible with Hungarian children - not to mention foreigners. Personal opportunities influence what happens/ will happen to the children, it is all a matter of luck."

The Hungary report cites a compelling case of a foreign child who was criminalised for the innocent act of keeping an animal as a pet. In the case in question, the child was stopped for an identity check at dawn during the height of the migration crisis. His papers were not in order and a body search revealed that the child had a Greek turtle in his backpack, which unbeknownst to him is a protected species in Hungary. As the police report recounts:

Today, on 16 August, 2014, at 5.35 am, at the control at the central train station of Mórahalom (a Hungarian city), there was one live Greek turtle in the pocket of his backpack, declared to be his own based on the available data. Pursuant to a regulation about the protected and strictly protected plant and animal species, the Greek turtle is a protected species in Hungary. He did not obtain the permission of the Nature Conservation Authority and he could not show the warrant necessary to transport the reptile through Hungary. Based on the above, he can be suspected with committing the crimes of unlawful possession of any species of protected living organisms or species of flora and fauna which are deemed important for conservation objectives in the European Union and with damaging the natural environment by import."

11 Direction territoriale de la protection judiciaire de la jeunesse de Paris, Service Territorial Éducatif de Milieu ouvert, Paris Centre, *Synthèse des prises en charge SEMNA/PJJ pour l'année 2015, 2016.*

12 The physical border fence is a separation barrier that runs along the international borders of Serbia and Hungary, and Croatia and Hungary. The Hungarian Parliament amended the Criminal Act (introducing a new crime of 'illegal border crossing') and adopted regulations about the 'extraordinary situations caused by illegal migrants'. After the legal changes, Hungary completed the construction of a 175 km wall in September-October 2015. The length of the border fence was doubled in 2016.

13 <https://www.alaraby.co.uk/english/blog/2016/7/21/hungarian-government-links-immigrants-to-terrorism-in-anti-refugee-campaign>

14 National Police Database and ENyUBS, 2016. Ministry of Home Affairs. <http://bsr.bm.hu>

15 Data set of the Unified System of Criminal Statistics of the Investigative Authorities and of Public Prosecution, 2014 and 2015 I-XI months.

16 Data set of the Unified System of Criminal Statistics of the Investigative Authorities and of Public Prosecution, based on Act C of 2012 and Act IV of 1978, 2013-2014.

The child, who had begun his journey from Iran over a year previously, said he acquired the turtle in one of the refugee camps in Greece: *"I did not know that I commit a crime by doing this and I just thought I would save this animal"*.

The Hungary report also considered whether racism or xenophobia was influencing practices in the criminal justice system¹⁷. Discriminatory practices, for instance, against the Roma minority, are well documented and supported through other research¹⁸. However, the report was unable to gather sufficient evidence in the context of this study as to how discriminatory attitudes affect the treatment of foreign child suspects/accused.

Netherlands: The researchers found it difficult to collect data on non-nationals. The literature review found few statistics which disaggregated data according to nationality. Interviewees suggested that such data are deliberately not published for reasons of political sensitivity, one commented that *"there is always a hassle with regard to ethnicity"*. Several respondents indicated that their impression was that foreign child suspects and accused were not a large group.

The study found some limited data on countries of origin but this does not necessarily mean the children in question were not Dutch nationals, it merely indicated that they were of foreign descent. For instance, HALT, the out of court settlement scheme data shows that between 2010 and 2014, children of non-Dutch parentage mainly came from Morocco, Suriname and Turkey and constituted half those of Dutch parentage. Other data between 2010 and 2014 suggests that some 80% of those in judicial youth detention facilities are from the Netherlands, for instance, in 2014, 1,380 children were placed in judicial juvenile institutions, and of this number, 19.2 per cent were of foreign descent¹⁹.

Spain: data from 2015 reveals that 18,134 children aged 14-17 years were arrested or investigated for the commission of a criminal offence, out of which 3,927 were foreigners²⁰. Moreover, the research found an over-representation of foreign children in the criminal justice system as compared to their numbers in the population, and also that foreign children were more likely to be sanctioned with custody measures as compared to Spanish children. The data shows foreigners have a higher than average involvement in crimes against property, especially thefts and robberies with violence, and a lower than average engagement with other forms of crime such as drug trafficking. According to information from the police, the most prevalent nationalities of foreign children arrested are Moroccan, Romanian, Ecuadorian and Colombian.

17 <http://tasz.hu/romaprogram> (Last downloaded: 27 August, 2016)

18 Source: <http://www.errc.org/en-search-results.php?mtheme=16>. ERRC, 2016 (last downloaded: 27 August, 2016) and also <http://tasz.hu/romaprogram> (Last downloaded: 27 August, 2016)

19 Department for Judicial Youth Detention Centers (2015), *JJI in getal 2010-2014*. The Hague: Ministry of Security and Justice.

20 Ministry of the Interior, 2015 Statistical Annual Report, p. 297, available at: http://www.interior.gob.es/documents/642317/1204854/Anuario-Estadistico-2015_126150729_VF.pdf/808a7398-2d25-4259-b450-974dc505f2e3.

3. EU DIRECTIVE 2010/64: THE RIGHT TO INTERPRETATION AND TRANSLATION IN CRIMINAL PROCEEDINGS

3.1. CONTENT OF THE DIRECTIVE

The Directive 2010/64/EU concerning the right to interpretation and translation contains minimum provisions on the right to interpretation and translation in criminal proceedings and procedures for the execution of a European Arrest Warrant. The goal of the Directive is to ensure that the fairness of proceedings is safeguarded by providing free and adequate linguistic assistance to suspects who need it so that they are able to launch a proper defence. The Directive applies to all persons including children.

The right to interpretation and translation takes effect at the moment someone is informed of the fact that he/she is suspected or accused of a criminal offence. This right applies until proceedings have completed, that is, until there is a final determination on whether the person in question has or has not committed a criminal offence, this includes sentencing and the outcome of possible appeals. The costs of interpretation and translation shall be borne by States. The description below identifies the key elements of the Directive:

Right to interpretation

- A suspect who does not speak or understand the language of the criminal proceedings must be assisted by an interpreter without delay, at all stages of the proceedings.
- Appropriate assistance should be provided to persons with hearing or speech disorders.
- Procedure must exist and be used to determine whether the assistance of an interpreter is needed i.e. to test whether the suspect speaks and understands the language of the criminal proceedings.
- Communication technology may be used.
- A complaint may be initiated, against failure to provide the assistance of an interpreter or to challenge the consequences of interpretation of inadequate quality.
- Costs of interpretation are to be borne by the State.

Right to translation of essential procedural documents

- A suspect who cannot understand the language of the criminal proceedings, must within a reasonable period of time, receive a written translation of all essential documents.
- Essential procedural documents include the detention decision, the indictment or subpoena decisions and judgments.
- With regard to other documents the authorities may decide, on a case by case basis, if these are marked as essential.
- If a request for translation of procedural documents is rejected a complaint may be initiated.
- In exceptional cases an oral translation or summary of the essential procedural documents can be provided. This may only occur if it does not impede the fair conduct of the proceedings.

Quality of interpretation and translation

- The interpretation and translation must be of sufficient quality so that the suspect is well informed and is capable of exercising his/her right to a defence.
- For this purpose, States should strive for the establishment of a register or registers of independent translators and interpreters, who are properly qualified.
- Consideration must be given to ensuring confidentiality.
- A complaint may be initiated if the quality of interpretation is not sufficient.

- Those responsible for the training of judges, prosecutors and other judicial personnel involved in criminal matters, must pay special attention to communication with the assistance of an interpreter.

Registration obligation

- When a suspect is questioned or interrogated (a) with the assistance of an interpreter, (b) has received an oral translation or summary of the essential procedural documents, or (c) has renounced the right to translation, this should be registered in accordance with the provisions of the registration procedure by the relevant State.

3.2. TRANSPOSITION STATUS

Overview

The deadline set for the transposition of Directive 2010/64 into national law was 27 October 2013.

France and Netherlands met the deadline. Transposition into Hungarian law was slightly delayed by a month or so and considerably delayed in Spain by two years. Belgium has not yet transposed the Directive but it has direct effect in any case now that the deadline for transposition has passed, and in addition Belgian law already has several provisions relating to the right to interpretation and translation. The text below provides a brief summary of the situation in each country; the national reports should be referred to for more details.

Country information

Belgium: Directive 2010/64/EU has not yet been implemented in Belgium. However, it has direct effect and must be respected by Belgium now that the transposition deadline (20 October 2013) has passed²¹. Despite the lack of implementation of Directive 2010/64 in Belgian law, several provisions of the Code of Criminal Procedure ensure the right to interpretation and translation.

France: The transposition of Directive 2010/64/EU occurred under law n° 2013-711 of 5 August 2013 and implementing decree n° 2013-958 of 25 October 2013. Law n° 2013-711 allows for the transposition of the Directive, among other provisions. It is not, therefore, a law that deals specifically with translation and interpretation in criminal proceedings. Article 4 of this law give effects to Directive 2010/64 by modifying § III of the preliminary article of the Code of Criminal Procedure and article 803-5 of the same code.

Hungary: Directive 2010/64/EU was transposed by Act CLXXXVI of 2013 on the Amendment of Certain Criminal Law Acts and Other Related Acts on 18 November 2013. Hungary failed to meet the deadline by a margin and was one of the 16 Member States that failed to transpose its implementing rules under this Directive and/or to send a notification about it²². As part of the transposition, various following rules, provisions and regulations were amended.

Netherlands: Directive 2010/64/EU was incorporated into national legislation on the 28 February 2013 through the law "Implementation of Directive Nr. 2010/64/EU of the European Parliament and of the Council of 20 October 2010 concerning the right to interpretation and translation in criminal proceedings (OJEU L 280)". This law came into effect on the 1 October 2013.

Spain: Organic Act 5/2015 of 27 April which amends the Criminal Procedure Act and the Judiciary Act 6/1985 of 1 July is the means by which most of the content of Directive 2010/64/EU has been transposed into national law, albeit with some delay, almost two years after the deadline.

²¹ The Court of Justice of the European Union has in fact established in its case law that a directive has a direct effect if it is clear, precise, unconditional and if the EU country has not transposed the directive by the deadline (ruling of 4 December 1974, Van Duyn).

²² European Commission (2014) Report from the Commission 31st Annual Report on monitoring the application of EU law (2013). COM (2014) 612 final. Brussels, 1.10.2014.

3.3. APPLICATION IN PRACTICE

Art 2 (1) - Right to interpretation

Key finding: This right is systematically applied across countries – efforts are made to assist suspects who do not understand or speak the language without delay by the provision of interpretation services in a timely manner. However, there are challenges in provision, especially for lesser known languages.

The right to interpretation is systematically observed across all countries. For example, the Netherlands report cites criminal justice professionals as saying, it is better to “*err on the side of caution*”, “*when it comes to interrogation, you must ensure that there is no room for doubt*”. There is awareness that prosecutors may exclude evidence or cancel hearings if the suspect does not understand proceedings well enough, a legal guardian told the Hungary report:

“The interpretation was ensured each time, and if there was not any proper interpreter, the hearing was cancelled. It could not have any financial or other barriers, for instance the Somali interpreter used to come to Budapest from far away at dawn to arrive to the hearings on time.”

There are efforts in all countries to allocate interpreters in a timely manner. For instance, the France report says the 1-2 hour statutory deadline is generally respected. Timeliness is particularly well-observed in the Netherlands being a small country with a large network of interpreters operating through a telecommunications network.

Interpretation appears to be used from the time the accused is brought into custody and at all key points throughout although this is not clear in all reports. The France report goes into some detail stating that the interpreter is present from the first moments of custody, at the time when the rights are read, during interviews with social workers, and during indictment, investigative and judgement hearings. The strict application of the rules means that interpreters are not present at other important moments such as before or after the judgement, for additional interviews with lawyers, and for placement measures when social workers do not speak the same language as the child. The Spain report says that the lack of provision for interpretation for parents is a constraint especially as they are required to attend under Spanish law. The Spain report quotes a technical team member as saying,

“you often just end up asking for a translator because it is the mother or father who accompanies that teenager who does not understand.”

The main gaps are for lesser known languages according to reports from Belgium, Hungary and Spain and include languages like Syrian, Iraqi, Fula (Guinea), Wolof, Urdu or dialects from the Caucasus. Even in the Netherlands where there is good availability, there are always some minor languages that cannot be accommodated highlighting this will inevitably be a problem in some cases. In such circumstances, an intermediary language, usually English, may be used. This is despite children and interpreters having limited understanding and lacking fluency in the intermediary language, according to both the France and Hungary reports, resulting in mis-communication. Also despite the generally good efforts to adhere to the right to interpretation in some form, there are inevitably exceptions to the rule, due to differences between regions or police stations meaning that the national studies did encounter cases of foreign children who did not have the assistance of an interpreter as required.

Art 2 (3) - Provision for hard of hearing

Key finding: There is a lack of appropriate assistance in all countries for persons who have speech or hearing impediments. The situation is further exacerbated for foreign children with such conditions as they require even more specialised support.

Provision for the hard of hearing appears a gap across the board. The Netherlands report is the only one to expressly address this issue, noting that this group is not served well and usually family members or acquaintances are called in to sign interpret instead of qualified and specialised legal language interpreters. The comparative report notes that as Directive 2010/64/EU refers to all hard of hearing persons, the problem is naturally compounded in the case of children and particularly foreign children, who are in need of foreign language sign interpreters.

Art 2 (4) - Use of determination procedure

Key finding: The lack of standardised procedures for determining whether the assistance of an interpreter is required by testing whether the suspect speaks and understands the language of criminal proceedings is a weakness in most countries. Only one country has a systematic approach; elsewhere needs are identified on the basis of subjective assessments and “gut feeling”.

The process for identifying the need for an interpreter requires more attention in all countries except perhaps in the Netherlands where a more standardised approach exists. In the Netherlands, the reporting officer is required to make the following determination: that *“the suspect understands the questions asked or notifications made, the suspect is able to give his own version of events on which his statements are require and the suspect is able to include enough nuances in his version of events”* When the questions are only answered “yes” or “no” it must be assumed that the suspect has insufficient command of the Dutch language.

Elsewhere the process is less systematic. In Hungary respondents gave conflicting accounts with the police claiming that checks were made but other professionals saying that proficiency was not properly tested and interpreters were not being used even in cases where the accused only spoke a little Hungarian inadequate for a legalistic process. As one child told the Hungary study:

“It was two years ago. Back then, I did not speak Hungarian well. I did not have an interpreter, just an appointed lawyer.”

In Spain, researchers found a lack of clear criteria, according to a judge:

“The assessment whether the child understands the language is a subjective assessment”.

Furthermore there were concerns expressed by some respondents to the Spain study that the police regard the involvement of interpreters as an annoyance and may avoid appointing them. However, this was disagreed by police informants to the study. Feedback from foreign children to the Spain study suggests that interpreters are offered but that children themselves may decline believing they can manage by themselves only to realise afterwards that they can't and are unable to follow the process or recount their side of the story. The Belgium report says there is no official procedure at all to determine whether or not the person questioned needs an interpreter and that police take this decision on gut feeling, as one said:

“There is no formal process aimed at determining whether the child needs an interpreter. We do that by gut feeling. Sometimes, however, to save time, at the front line we ask the person accompanying the child to translate. It does have to be an of-age adult, though. It's an issue of the reality on the ground: it's done on a case-by-case basis according to the circumstances.”

The France report was unable to comment on this aspect due to the lack of interviews with police investigators.

Art 2 (5) - Right to challenge and complain

Key finding: Insufficient use is being made in all countries of the right to challenge the refusal of interpretation or to complain that the quality of interpretation is inadequate for safeguarding the fairness of proceedings.

The right to complain and challenge outcomes arising from inadequate interpretation appears insufficiently exercised according the country reports. This is despite evident concerns about quality across the board - see discussion under Art. 5 (1). Complaints by professionals are uncommon and complaints by the child him/herself unheard of. The Belgium report quotes a magistrate as saying:

“It's rarely the person being heard at the hearing who makes complaints about the quality”.

Where concerns are raised, they are normally dealt with by asking for a new interpreter: the Netherlands report cites one interpreter as saying that the police regularly send interpreters away due to the poor quality of their interpreting work. The Hungary report also quotes an interpreter as saying:

“The quality of the interpretation is taken seriously. I also happened to be the third interpreter in a certain phase of a sole case because the interpreter was unprepared and the parties could not communicate properly.”

There are cases of interpreters being fired, as a police officer told the Spain report,

“...a translator who was finally fired because he translated as he saw fit and said whatever he wanted.”

Furthermore the Belgium and France reports cite interpreters being struck off official registers if they are found in breach of their duties. In Spain, where interpretation is outsourced, the report says that complaints to private companies about their interpreters rarely have major consequences:

"... This person does not work because there were several complaints from a particular judge who he lied to, i.e., in some statements that he was taking from the detainees, the interpreter did not speak clearly into the microphone and, moreover, he had asked the detainees for money, telling them 'if you pay me, I'll say whatever you want'. One of them reported him and of course, a report was [filed] to the company. Now you will say... the report was sent and the man was fired?... No! The report was sent and the man continued to work because I saw him several times after that...."

In any case, although the Directive allows judicial decisions to be challenged in case of inadequate interpretation, this does not seem to happen. The Spain report says that despite deficiencies complaints are not formalised via an avenue that can have a genuine impact. Rights of appeal are available under the law, as one lawyer indicated:

"the means for bringing a legal challenge due to a violation of fundamental rights [...] are more than sufficient if properly applied".

However, these rights are not exercised because lawyers often do not consider that the poor quality of the interpretation has been significant enough to impair the right to a fair trial. In France too, lawyers can point out interpretation difficulties and request annulment, as one told the study:

"However, they will only be brought up if they are flagrant and if the child's statements are decisive for the ruling. If no other documentation has been brought forward to assist the judge in making the ruling, the dispute is limited to an indication that is mentioned in the transcript".

Professionals speaking to the Spain study welcomed the Directive and its explicit emphasis on quality,

"The Directive was [a] godsend for us because we said 'at last someone is talking about quality' because, until now, it seemed that what the Ministry wanted was that it might be complied with, right? This is what the law says and, of course, I cannot [confirm] your statement if you don't have interpreter; so I will comply with the law and provide you with an interpreter, that is, if interpreter does his job properly..."

None of the reports were able to fully investigate why complaints are not filed but it is assumed that this is not because interpretation is of sufficient quality, rather that children and their representatives either do not know about the right to challenge or consider it not worth the effort. Whatever the case, this is an area that merits further research.

Art 2 (6) - Use of communications technology

Key finding: Little use is being made of the opportunity to use communication technology to facilitate the interpretation process. There is only one country where communications facilities are being used as a matter of course.

Netherlands is the only country to make use of communications technology which gives the advantage that interpreters are available on the phone within a couple of minutes. There are further plans to expand this to video connections. Elsewhere, for instance in Hungary and France, communications technology is not being used, even though the law permits use. The Netherlands report notes that there are inevitably some trade-offs between the ease/speed of access vs. possible greater understanding through face to face communication and non-verbal cues.

Art 4 - Duty to bear costs

Key finding: Costs are borne by the State in all countries but there is a lack of sufficient financial resource which puts a downward pressure on costs which in turn undermines quality.

Costs are an underlying constraint. While States officially accept responsibility for interpretation, there appears an emphasis on keeping costs low in all countries. The Hungary report says the emphasis on cost efficiency undermines quality as interpreters with lower fees tend to be selected - it quotes a defence lawyer as saying:

"The authorities basically employ interpreters based on economic considerations. You can apply to be listed in a register by making a bid and it is up to that whether you can get on the list or not".

In Spain, it is reported that the State outsources the work to private companies who take large cuts and subcontract interpreters on less than minimum fees e.g. interpreters are paid 8 Euros/hour as compared to 35 Euros/hour they are entitled to which deters the best and most able interpreters. Furthermore, interviewees in the Spain report indicate that the transposition of EU Directive 2010/64/EU has not come with budget commitments:

"If you look at the reform, 4/2015, the legislator says that everything is zero budget..."

In the Netherlands too, funds for translation, in particular, are an area of contention. The law allows the defence lawyer to file a request for a translation with the Public Prosecutor or the court and it seems that such requests are often declined meaning that much time and effort is needed to substantiate the request. The current Dutch policy is that requests for translations exceeding 2500 words always need to be thoroughly substantiated. Some lawyers indicate that it is sometimes a task in itself to arrange for translation and report having to "beg" for translations in larger cases.

Overall the emphasis on low cost has the effect of undermining the available pool of qualified interpreters. In Belgium the issue of payment scales is compounded by delays in State payments which mean that interpreters are unwilling to take on legal aid work. While costs are inevitably a consideration, the studies raise concerns that costs are being reduced to a level where they impair the defence of foreign child suspect/accused.

Art 3 (1) - Right to written translation

Key finding: The provision of written translation is limited in all countries and in some places, information is habitually only provided through verbal translation.

The provision of a written translation plays a very marginal role. The Netherlands report typically criticises the lack of availability of written translations (also see point related to costs above). The France and Spain reports say the process relies on in situ verbal translation which can speed up the process but risks improvisation and inaccuracies. The Spain report quotes professionals as saying *"right now, de facto, nothing is translated"* and say the application of this provision would lead to *"monumental delays"*. Some interviewees told the Spain report that this was due to lack of resources but others observed that the right was not exercised due to lack of awareness and training among lawyers:

"No, I think that is going to be done more in the courts, as courts do not skimp in that regard, but of course, if you do not get any training....how are you going to ask for it?... Yes, you could ask for it, and the court has to grant it, and if it is ex officio or legal aid then the Government has to pay for everything, the translators."

In Hungary, written translations are prepared but they take time and lead to delays which means that the accused is held longer in pre-trial detention, according to a defence lawyer:

"This poses problems because you do not understand the real reason of the coercive measure's prolongation at once. Until he/she does not receive the translation, the defendant cannot declare whether he/she accepts the decision or challenges it. Let's say a pre-trial detention is prolonged by 2 months, then the translation is very rarely provided within that 2 months".

Art 3(2) - Definition of essential documents

Key finding: The written translation of all essential documents to suspects who do not understand the language is not being provided anywhere. There is limited understanding among criminal justice professionals as to which documents count as 'essential'.

Even where documents are translated, the definition of essential is not clear. For instance, the Netherlands report says that most required documents according to the Directive (detention decision, charge, judgements) are not always in written translation. Only the summons is consistently seen as an essential document. Various other documents are habitually not translated, for instance, the statements of child suspects or punishment orders issued by authorities other than courts, such as orders for misdemeanours issued by the Public Prosecutor. In France, interviewees did not know what essential documents meant within the context of the law. In Hungary, it is reported that the European Commission opened an infringement procedure against the country claiming that the December 2015 law on fast-tracked criminal proceedings for irregular border crossings contradicts the right to translation of essential documents set out in Directive 2010/64/EU²³.

²³ European Commission (2015) Commission opens infringement procedure against Hungary concerning its asylum law. Press release. Brussels, 10 December 2015. http://europa.eu/rapid/press-release_IP-15-6228_en.htm (last downloaded: 26 June 2016)

Art 5 (1) - Provision of quality interpretation/translation

Key finding: The provision of interpretation of sufficient quality for the suspect to be well-informed and capable of exercising a right to a defence is a major weakness in all countries. Quality control systems are lacking; the lack of benchmarks and means of redress results in an ad hoc system of quality control which serves to undermine the fairness of the criminal justice system.

Quality issues

Quality is a major issue in all countries. Linguistic knowledge and the accuracy of interpretation especially of legal language is a concern, as a judge told the France study:

"Sometimes the translators have trouble phrasing certain concepts that they do not necessarily master, which leads us to simplify the explanations we give to a large extent, but I think I have always given the essential information required for translation. I can't give them a lesson on what a judicial investigation is, but I can summarise it in a sentence and ask the interpreter to translate that. Sometimes it is clear from watching that it can be complicated: I say something in thirty seconds and it can take up to three or four minutes to translate it".

However, the main issue affecting quality and raised by all reports relates to the ethical conduct and role of interpreters. Both the France and Belgium reports cite examples of interpreters overstepping their role – interfering, giving advice, expressing value judgements, making discriminatory remarks, applying pressure etc. For instance, a child told the France researchers:

"At the police station, the first time, it was a female interpreter who was called. The custody was filmed on video and the interpreter passed a note she had written on a piece of paper to the police officer under the table, so that it wouldn't appear on the camera. The first time, I didn't say anything. The second time, I asked her why she was doing that. She replied that it was because the police officer had forgotten a question. I asked her: 'But are you an interpreter or are you an investigator? How do you know that the investigator forgot a question?' "

Another child told the France research team:

"Once, I was with my sister-in-law who could speak French, but she didn't understand everything. There was an interpreter. The interpreter didn't know that I could speak French. She wasn't saying what I was saying, she said the opposite. I told her: 'That's not it. I'm saying this and you're saying that. Why are you saying that?' That was the first time. After that, I didn't need an interpreter".

Children in Spain reported the same experience, as one said:

"He changed some things... you ask him one question and he answers a different one [...] An interpreter 'in the middle' can say whatever he wants... you know?"

The Spain research team cited examples of children being pressured to settle by the interpreter, in one case, when the lawyer advised the child to settle, the interpreter repeated it several times to the child, recommending that he think twice about it, which led him to seriously doubt his lawyer's defence. The child finally did what the interpreter said, after asking the lawyer to clarify the terms of such settlement. Similar evidence of inappropriate interference was provided to the Belgium study by a lawyer:

"A recurring problem, which we also have with adults, is the interpreter interfering in the discussions, giving their own opinions".

The Belgium report further highlights various cultural and ideological issues such as interpreters being known members of the community and lacking independence, for instance, children raising concerns about impartiality and confidentiality on the basis that the interpreter has been seen drinking with the head of the community that the child comes from. There may be religious issues, for instance in the Muslim faith, where a male interpreter is assigned to translate for a young Muslim girl or ethnic and political differences that need to be taken into account to assure impartiality, as a programme coordinator told the Belgium study:

"There are many problems with regards to quality, particularly those linked to ethnicity and religion, for example oppositions between Shiites and Sunnis, or even if the person is from Rwanda, it will depend on whether they are Hutu or Tutsi... As social interveners, how can we know what is true out of the interpreter's words? Unfortunately, there is no code of ethics."

The testimonies signal the need for a code of ethics and clearer boundaries, particularly bearing in mind the power relations and the difficulty for a child, especially a foreign one to assert themselves and have a voice, as a child rights professional told the Belgium study:

“There are no processes that allow the reliability of the translation to be verified. For example, it has happened before that what the young person had said to the interpreter was not what had turned up in the transcript. What’s more, for a child to find themselves with an adult who speaks their language, and who can therefore exert authority over them, makes the child feel less at ease.”

Sometimes, these behaviours, may be well-intentioned, encouraging the children to cooperate with the justice professionals; other times the attitudes displayed are clearly inappropriate and unprofessional. For instance, the Belgium report cites a research study which observed interpreters adopting a judgemental or mocking tone towards children. The Spain report suggests that these problems are exacerbated through the use of informal interpreters, for instance, interviewees said that a domestic worker, carrying out interpretation on the side for extra income, *“instead of translating, she was more concerned with scolding the children”* or that another male interpreter was also *“focused on scolding the children”* and was subsequently discovered to be a former prisoner.

Interpreters themselves recognise the difficulty of managing boundaries when it comes to interpreting for children, as one told the France report:

“It’s hard, because you identify with your personal life and it’s very tough emotionally. There’s a difficulty in keeping your distance”.

Likewise in Spain, a child recalled that one interpreter had become so overcome with emotion herself at his plight, seeing him so small and alone, she began to cry and found it difficult to calm herself *“she tried to give me advice as if she were my mother”*.

Perceptions of justice

These types of bad practices clearly have a negative impact on the administration of justice. As one interpreter told the France report:

“Justice cannot be served, because the parties’ statements during the proceedings, whether it’s the defendant, the victim or a witness, won’t be interpreted properly which results in a mockery of the proceedings”.

The impacts of poor or absent interpretation can have a very real impact on the lives of children. The Belgium report cites two cases of children who did not speak the language, were not assisted by interpreters, could not explain anything about their circumstances or their age, and ended up in adult prisons until they were released months later after being shown to be under-age as a result of age tests carried out through the measurement of their wrists.

Interpreters play a key role as an intermediary in bringing all sides to a common understanding. The Spain report highlights that the presence of an interpreter is seen as vital by children themselves, and can give them confidence and peace of mind especially given that they are in a foreign country faced with an unfamiliar and threatening system, as one child said:

“When the interpreter comes, you know? Everything gets sorted out. When I’m alone they ask questions but I don’t know what to say, or how to explain”.

Lack of standardised approaches

The lack of standardised approaches and clear codes of conduct comes across in the reports. The Hungary report illustrates this well with a quote from an interpreter imputing an expanded role for his/herself:

“A good interpreter primarily needs empathy and tolerance. The language proficiency comes just far after those. Let’s imagine a child or an under-educated adult. He/she simply cannot understand a complete and accurate translation. To this regard, we can say that the task of interpreter is dual: not just to transpose the text to another language, but also to adjust it to the mental capacities of the person. I don’t believe this can be taught. You either know it or not. Of course language skills are important as well, but that is the starting point where you can begin working from”.

On the other hand social and linguistic experts disagreed with such approaches saying they risked altering the meaning and introducing subjectivity, as a legal guardian told the Hungary researchers:

"It happens many times that the interpreter starts explaining the things to the children. An ideal interpreter would work like a robot, interprets what is said in both direction, but he/she does not start communicating or reasoning. Creating child-friendly texts from legal documents would not be the task of the interpreters, but that of the defender".

In addition, there are other more practical aspects which would benefit from standardisation and consistent approaches, for instance, whether and when simultaneous or consecutive interpretation should be used or where interpreters should sit.

Lack of quality assurance systems

Directive 2010/64/EU calls for quality assurance but does not detail what this means. All reports cite concerns with the lack of adequate quality assurance processes for checking qualifications, regular reviews and objective quality criteria. The systems rely on ad hoc checks by others present who happen to be bilingual such as other professionals in the criminal justice system or children and their families. The Netherlands reports quotes a judge making checks to ensure adequate interpretation is in place:

"I supervise that the child has an adequate defence and adequate assistance by an interpreter during court sessions and I observe whether the child and the interpreter understand each other well. I check in the criminal file if the child, in the previous phase, also had appropriate legal assistance and assistance of an interpreter. And if I discover elements that are not sufficient or receive comments from lawyers about this, I will inquire with, for example, the Public Prosecution Office".

Another added: *"I also check in the criminal file, if, in the previous phase, adequate legal assistance was provided with an interpreter".* The Belgium report says that judges do not usually take the case if they observe that the child does not understand.

The France report reiterates that quality checks carried out by other professionals present during proceedings, particularly the lawyer, seem to be the best solution. However, professionals across countries express reservations about their ability to judge the quality of translations in this way as they may not have a command of the languages involved. As one interviewee told the Spain report:

"... how does the judge, the prosecutor or the lawyer know whether that things are being done properly or not, if they have no knowledge of the language?" You can't, if you don't speak the language, you're blind".

All reports identify the need for more training of interpreters in specialised areas such as child development and working with children; knowledge of the law, legal processes and jargon (especially in the field of juvenile justice); multicultural issues and migratory processes. As one lawyer told the Belgium study:

"Personally, I find that there are very few interpreters, which means that you can't choose the quality but you can choose the efficiency. The first one available will be chosen. In general, they do not have any awareness training regarding children. We need more professional interpreters and for children, interpreters more sensitive to children (simpler words, not a linear interpretation but a true explanation). In my experience, children, foreign or not, are not usually aware that they have not understood, or they are aware but they want to be left in peace so they do not mention it. This is very bad for them because this impedes the lawyer in working through the fuzzy areas with them. This lack of understanding can also have repercussions later on. There is a risk of saying things that would be detrimental to them. More fundamentally, they lack confidence in the adults surrounding them".

The France report identifies some good practices in this regard including the creation of groups of social workers who speak the languages most commonly spoken by foreign children in the criminal court in Paris (Arabic and Romanian speakers). This provision has proven to be highly beneficial in forging stronger connections with the children, although this pertains to educational measures and not criminal procedure in itself. In addition, there is a reflection within groups of interpretation and translation professionals regarding the quality and the conditions for exercising their profession²⁴. They have developed some actions to improve professional conditions and the quality of their services (professional training, ethical codes, database of legal fees); however, more concrete actions are necessary which require the support of public institutions.

²⁴ According to the France report, this reflection is noted during discussions within the profession. UNETICA, CETIECAP and the SFT have organised a round table discussion on the subject of the directive. In addition, the SFT has put together an enquiry, and research work on the most sensitive points of the directive has also been carried out by these organisations.

Art 5 (2) - Maintenance of registers of interpreters/translators

Key findings: Most countries have striven to establish registers of properly qualified independent translators and interpreters. However, the systems are being undermined by weaknesses in the vetting and registration process, the lack of suitably qualified persons as well as a reliance on parallel unofficial listings which use interpreters without the skills and knowledge required.

The use of official registers as required by Directive 2010/64/EU is also not being applied consistently across the board. The situation varies from countries with functioning registers through to those with no register or ad hoc informal listings. Hungary does not have an official national register of qualified persons, the police and other professionals in the justice system use their own databases which include interpreters without formal qualification or who operate through intermediary languages. This opens up the process to temporary interpreters, colleagues who happen to be present in police stations without official training or are only able to use intermediary languages. The report cites one county where a register is based on a tender process but elsewhere interpreters are unaware of which register they are part of, as one guardian told the Hungary researchers:

The interpreter shall be appointed case by case. However, all of these are procedural tasks that you would prefer avoiding. If you can find a colleague who speaks the language, he or she can also help, but if this is not an option, an interpreter is employed, as last time a Nigerian one through BÁH [Office of Immigration and Nationality], which has a register. The colleagues do not receive any special training, but they have language exams, mostly in English, German or Russian".

In Belgium, police and prosecutors have access to lists of sworn interpreters who have taken the oath before magistrates but if such persons are not available, then recourse is made to unsworn interpreters. France has a three tier system of professional sworn interpreters who have studied the language and are on the national list of court interpreters; individuals who are on the list because they meet certain conditions contained in asylum codes; and finally individuals who speak the language but without formal qualifications or familiarity with the criminal justice system at the bottom and who are asked to assist due to the lack of qualified interpreters. The sworn interpreters carry out additional training and comply with a code of ethics but otherwise all interpreters are bound by the same remuneration and confidentiality requirements as soon as they take the oath. According to the France report, the deployment of translators depends on the availability of persons speaking rare languages, the lack of sworn interpreters, and the habit of police in choosing those who are known and familiar. Training on Legal and court interpreting or in working with children do not appear to be essential criteria.

In Netherlands, the report likewise shows a similar picture: while there is a formal register and an obligation on the authorities to use registered interpreters, its operation is undermined by various aspects, according to interpreters interviewed, namely that the requirements for registration are too low and make it too easy to be on the register, and to graduate from unofficial alternate lists. In addition the policy allows a deviation which enables the use of unqualified persons if no-one is available from the official register providing an explanation is recorded.

In Spain, the situation operates differently as interpretation is provided by private companies under contract to ministries and not by court interpreters. Interviewees expressed concern at the lack of control as they did not know if the persons sent were sworn interpreters with specialisation or training and also that the way the system is managed, via competitive bidding to the lowest bidder, undermines quality, as one interviewee told the Spain research team:

"The service is mostly awarded by tendering and this often means that the lowest bidder wins the contract".

The companies are then said to take large cuts for themselves, leaving interpreters with lower than average pay, as one interviewee explained:

"The State pays, or can pay, up to 35 Euros per hour. Up to 35 Euros hour as far as we know; the problem is that the company pays up to 8 [Euros/hour] The vast majority of qualified professionals reject them because they need to make a living. Lots of money is being lost because the companies providing this service are pocketing more than 60% of what the Administration is paying per hour of service, and price per word".

The Spain research found that the rates paid by these companies are so low that specialist professionals with degrees do not want to work for them with the result that unqualified persons are used. As one interviewee put it:

"The problem is that nobody would ever countenance a lawyer who is not a professional, right? The lawyer must be registered professional. Nobody would ever think that the lawyer is just as a man who likes to watch courtroom dramas...no, and the judge also must be a professional, right? The coroner, the coroner is not a student

of medicine, is he? He is another specialist in the field. But with interpreters, this seems to be the only case where non-professional people are allowed to participate... why? That is our struggle".

Art 5 (3) - Duty of confidentiality

Key finding: Safeguarding confidentiality of interpretation is not being adequately considered in criminal justice processes. This important aspect is only identified and addressed in two country reports even though it is likely to be an issue everywhere.

The duty of confidentiality is expressly mentioned in Directive 2010/64/EU. Both the Netherlands and Hungary report raise the issue of the independence of the interpreter especially where the same person is involved in both the interrogation and confidential meetings between the accused and his/her lawyer. Interpreters recognise that this should not be an issue for a good interpreter but agreed that further safeguards are needed. The other reports do not mention confidentiality but this does not mean it is not an issue in other countries.

Art 6 - Training

Key finding: There is no evidence from the reports that the training of judges, prosecutors and other judicial personnel involves special attention to communication with the assistance of an interpreter.

There is little mention in the report for training of other professionals in the criminal justice system despite an article on this in Directive 2010/64/EU. The Belgium report highlights the need for training guardians on juvenile law, criminal procedure and the right to information. The Spain report emphasises that professionals are not fully aware of the rights available and need training e.g. they talk about the right to translation in future terms without realising that it exists. The training needs of interpreters are discussed earlier under Art 5 (1) on quality.

4. EU DIRECTIVE 2012/13: THE RIGHT TO INFORMATION IN CRIMINAL PROCEEDINGS

4.1. CONTENT OF THE DIRECTIVE

Directive 2012/13/EU concerns the right to information in criminal proceedings and sets minimum standards regarding the provision of information to persons accused or suspected of a criminal offence. The aim of the Directive is to ensure that accused or suspected persons have the information needed to prepare a defence and thereby be ensured of a fair trial. The right to information shall take effect at the moment when someone is informed of the criminal offence that he/she is accused of until such time that the procedure is completed i.e. until there is a final determination. This includes the sentencing and the outcome of possible appeals. The Directive applies to all persons and therefore also covers children. The key elements of Directive 2012/13/EU are summarised as follows:

Information with regard to rights

- Suspects should immediately be provided with information he/she needs to prepare his/her defence in order to ensure the fairness of proceedings. The Directive determines that a right to information exists at least with regard to the following procedural rights:
 - right to access to a lawyer;
 - right to free legal assistance;
 - right to information with regard to the accusation;
 - right to interpretation and translation;
 - right to silence.
- The above information must be provided *orally* or *in writing* and in *simple* and *accessible* wording.
- It shall take account any specific need of vulnerable suspects.

Written declaration of rights upon arrest

- In addition to the above information which can be provided orally or in writing, suspects who are arrested or detained should be provided a *written declaration of rights* which they can keep as long as the deprivation of liberty continues. The written declaration shall, in addition, to the above rights contain information with regard to:
 - right of access to documents from the file;
 - right to inform consular authorities;
 - right of access to emergency medical assistance;
 - maximum number of hours or days in detention before they are brought before a judicial authority.
- In addition, basic information should be provided on the possibilities of challenging the legality of the arrest, to obtain a review of the detention or to request provisional release.
- The written declaration must be drafted in language that is understandable by the suspect. If a written declaration is not available in the language spoken and understood by the suspect, then the content of the declaration must be provided orally in a language that is understood. An interpreter may be used for this purpose.

Right to information with regard to the accusation

- It is important that the suspect receives information as soon as possible with regard to the offence of which he or she is accused of.
- This includes information with regard to:
 - nature and legal classification of the offense;
 - nature of the involvement of the accused;
 - right to information about the reasons for the arrest or detention;
 - right to receive information without delay if changes occur in the provided information.

The right of access to the documents in the file

- Suspects have the right of access to supporting documents in the file.
- This is a right to all the essential supporting documents which the authorities have and which are incriminating or exonerating of those involved.
- The information from these procedural documents shall be provided and with the detail necessary to ensure the fairness of the proceedings.
- It is possible to refuse access to certain documents. However, this can only occur if the right to a fair process is not violated and if providing access to the documents seriously compromises the life or rights of another person. Access can also be refused if it is strictly necessary for the protection of a compelling interest. The decision to refuse must be taken by a judicial authority or at least be subject to review by a judicial authority.
- Access to the file documents must be provided free of charge.

Registration obligation

- When information is provided in accordance with this Directive, it must be registered by the competent authorities.

4.2. TRANSPOSITION STATUS

Overview

The deadline for transposition into national law was the 2 June 2014. France was the only country to transpose Directive 2012/13/EU into national law before the deadline; the Netherlands followed later that year in November 2014 and Spain the year after in November 2015. Hungary is said to have only partially transposed Directive 2012/13/EU. Belgium has not yet integrated Directive 2012/13/EU into national law but as the deadline for transposition has passed the Directive takes direct effect and in any case, several provisions are already reflected in existing national law. A brief summary of the situation in each country can be found below; full details can be found in the national reports.

Country information

Belgium: Directive 2012/13/EU has not yet been implemented under Belgian law. However, it has direct effect and must be respected as the transposition deadline has passed. Despite the lack of official implementation of Directive 2012/13/EU, several provisions are already in place in the existing criminal codes which guarantee the right to information.

France: Law n° 2014-532 of 27 May 2014 transposed Directive 2012/13/EU on the right to information in criminal proceedings into national law through the addition of new articles in the existing criminal code.

Hungary: the transposition of Directive 2012/13/EU was partially complied with through Act CLXXXVI of 2013. However, in connection with the harmonisation, several non-governmental reports highlight that there are still gaps, particularly with regards to the provision of written information and the lack of full disclosure of files²⁵.

Netherlands: Directive 2012/13/EU was incorporated into national legislation on the 5 November 2015 through the law "Implementation of Directive 2012/13/EU of the European Parliament and the Council from the 22nd of May, 2012 concerning the right to information in criminal proceedings (OJEU L 142)"²⁶. This law came into effect on the 1 January 2015²⁷.

Spain: The right to information was transposed into national law by the Organic Act 13/2015 of 5 October 2015 which amended the criminal procedure codes and entered into force on 1 November 2015.

²⁵ Practitioner Training on Roadmap Directives project – training of the Hungarian Helsinki Committee, June 2015.

²⁶ Staatsblad (Stb), 2014, 434.

²⁷ This is before the deadline of 27 October from article 9 Directive 2010/64/EU.

4.3. APPLICATION IN PRACTICE

Art 3 (1) - Right to information

Key finding: The reports indicate that suspects or accused persons in all countries are promptly provided with information concerning key procedural rights either verbally or in writing. The key issue for foreign child suspects/accused is whether this right is realised in practice through specific adaptations to their needs.

This right applies to all persons and the law does not generally distinguish between nationals and non-nationals, as expressly stated in the Belgium, France and Hungary reports. The key issue is that the realisation of this right is inevitably diminished among foreigners due to their more vulnerable status and the lack of adequate financial and human resources for interpreters, trained guardians etc. Moreover, as the Hungary report points out, there is a close relationship between Directive 2010/64/EU on interpretation and this Directive 2012/13/EU on information; as the right to information is only effective if the information is understood by the person at the receiving end; comprehension is a complex process which involves information that is adapted to the age and discretionary ability, and the circumstances of the accused. The France report adds that while not directly linked to the right to information; the way in which information is presented and the attitudes expressed in terms of examples of verbal mistreatment, contempt, and discriminatory remarks, all serve to impact on the way children understand and perceive information provided to them about the criminal justice system.

Art 4 (1) - Right to written letter of rights

Key finding: Arrested or detained persons are not promptly provided with and able to keep a written Letter of Rights in all countries: some authorities provide comprehensive statements in multiple translations; others only provide verbal information.

Three of the country reports, Netherlands, Hungary and Belgium refer to the provision of a written statement of rights to accused persons. The Netherlands has recently produced a brochure available in multiple languages in digital form. The Netherlands brochure goes beyond the Directive in terms of giving procedural information but is not fully accurate in other respects in terms of stating that families need to be informed when the child is first detained not when detention is extended; and also that it is for the child to decide who to inform, not the police.

Belgium likewise provides information on rights in 27 languages; and if the language of the accused/suspect is not among them then the declaration is given in English. Children interviewed confirmed receiving, "a sheet" or "a piece of paper", including in translated form as appropriate. The report goes on to say that two important rights are missing from this information: that a counsel is available free of charge and that the child can contest the deprivation of liberty. According to the statement of an expert to the Belgium study:

"In practice in Belgium, the police will generally give the written rights declaration but this does not mention the fact that they have the right to free legal counsel (it only mentions the fact that they have the right to the assistance of a lawyer if deprived of liberty and to a confidential meeting if invited to a hearing, but that the lawyer must be consulted beforehand), nor that it is possible to contest the legality of the deprivation of liberty. Access to material proof in Belgium is also not mentioned".

In Spain, written rights information is not customarily provided to foreign children and the emphasis among practitioners is in explaining rights in everyday understandable language. Professionals told the study, "the reading of rights is the first stage", in the case of a foreign child, "Rights are orally read at the time of the arrest and then [...] when the translator comes, they are again read in their language". The authorities themselves have copies of the rights in different languages, as one lawyer told the study:

"The [police] have copies of the rights to be read in different languages... There is one in Arabic, French, English, I think in Romanian... There are none in Wolof, or Urdu languages which are also languages quite widely spoken in Barcelona".

However, there appears conflicting evidence as to whether this declaration of rights, whether translated or otherwise, is given to the child to have in his/her possession, with police interviewees saying this happens but other professionals saying it does not, as one interviewee commented:

"I do not remember any child ever receiving a copy of the letter of their rights at a police station, I mean, before there was

a reading of rights, it is now mandatory that this letter be actually given to the child. I have not seen any child, coming out of the interview with the lawyer, with the sheet of their rights in case he/she needs to consult anything”.

The Spain report goes on to cite a recent visit by the Office of the Ombudsman who found similar inconsistencies in practice.

In France too, the procedure allows for the right to a lawyer/doctor/notification of third party to be verbally expressed at the beginning of custody with the help of an interpreter, either on the phone or in person. All professionals interviewed confirmed that children being taken into custody are not provided with any documents, and some were unsure of the possibility of providing them with documents at this stage of the proceedings. Once the notification is complete, the child in custody signs the transcript. Furthermore, doubts were expressed as to whether police give proper notification of the right to a lawyer, according to a judge interviewed by the study:

“They never want a lawyer; it’s not in their best interests, because they don’t trust them, but still, it’s quite systematic coming from isolated foreign children and I’m not sure that the police officers are asking them systematically, but at the same time, I’ve never heard a hint of this from the interpreters, whom you end up getting to know; no interpreter has ever told me that the police officers are neglecting to tell them that they have the right to a lawyer”.

Children interviewed by the France study were divided over whether young people were informed of their rights at this stage of the process, with some reporting a total absence of information, others considering themselves well-informed, and others being completely unaware. Rights are also read again at the beginning of hearings where three rights are read by the magistrates but again there is no indication that this information is provided in writing.

Art 3 (2) - Provision of information in understandable terms for vulnerable persons

Key finding: The information provided is usually not in simple and accessible language and does not take into account the needs of foreign children as vulnerable persons considering their age, language, culture and so on.

Even where information is provided, the requirement to provide it in an understandable way to vulnerable persons is not being met anywhere. The Netherlands brochure mentioned above contains comprehensive information; however it is questionable whether children can sufficiently understand this information given the way it is presented. It is left to the lawyers and court officials to further check and explain these rights as necessary. The report also points out that there is no provision for sign language to cater for those who have speech or hearing impediments.

The Belgium report confirms the same and found that youth respondents while provided information, were not aware of the scope of information provided. The report cites an example of a child who did not understand the consequences of a case being declined by the juvenile courts, i.e. that it would be heard in adult court; and another case where a child had renounced his right to a lawyer without being informed that as a child he was unable to renounce this right. Child interviewees themselves gave varying feedback to the Belgium report as to whether they felt they understood the rights read to them. Those who had been through the system before, appeared to have a good understanding of them, as one said:

“Yes, that I can have a paid lawyer, legal aid, that I can call my parents or ... You know?” Any of those. They tell you that when we are at the station, not when you are arrested”.

Another added: *“You have right to not declare until your lawyer is present, I do not know what else...listen, my rights I don’t know what I was told, or something like that”.*

The France report expresses concerns that there is a quick and formal reading of rights without any verification of comprehension. Professionals are doubtful as to whether children actually understand. During hearings, judges are seen as playing an essential pedagogical role; they do not limit themselves to reading the rights, but constantly explain measures, situations and rights. Using clear and accessible language as far as possible, a large proportion of the judges also try to explain elements of French legal culture: *“that is not allowed in France,” “do you understand what that means?”, “in France, we do this”.* As in Spain, children with prior experience of the system expressed a better understanding of their rights.

The Hungary report highlights that information is provided in standardised formats, with no child friendly adaptations and highlights the lack of training on child friendly communication techniques or child development:

"When it comes to the right to information, we are in fact talking about forms that exhaustively cover everything. There are also adult and child versions (investigative authority document), but there are only slight differences between the two. The minutes are a warranty of the procedural protocol – we cannot verify the information provided orally".

The Hungary report goes on to add that even though child friendly questioning rooms were established in 2012 these are only available for child victims and not accused or suspected children.

In Spain, where information is habitually provided in verbal form, the report shows that professionals have a sound understanding of the need to make information accessible and make considerable efforts to explain matters in a way that can be understood by foreign children. For example, the police said:

"Yes, we inform orally...orally on their rights, but we always explain, and this has to be the case, that as he or she is a child, we cannot indulge in verbiage...no, we must tell them and explain to them, right because sometimes children have more problems in understanding".

The responsibility of lawyers and other criminal justice professionals to explain was also emphasised:

"... we're talking about children, I mean, even if they could speak our language perfectly, it is to understand the criminal process, the criminal process for children may be easier to understand, but also is difficult to understand. Then, from this perspective, it stands to reason that the more cultural, language and other difficulties you add, the more difficult the process will be".

Interviewees were doubtful that the provision of a written statement of rights would serve any purpose saying that although the letter of rights is translated into most common languages, it cannot reach all since *"the majority of the minority languages are omitted. It is very difficult to reach everyone"*. Even if these documents are provided, the question as to whether the child can read and also understand legal texts is questionable especially for a foreign child in vulnerable circumstances. The police called for more efforts to adapt information in understandable ways:

"...For an adult [it] is difficult already to understand legal language, well, you can imagine, it is a translation of the articles of 520 of the criminal procedure act, I mean... it is not something explained with words that are understandable to a child, which perhaps should be what we should have, or even work in a different way, like making pictograms, which is a universal language, right?"

There is an initiative in Spain called the "easy reading project" being developed across the administration which aims to *"adapt all administrative procedures to a more everyday language"*. Professionals interviewed by the Spain report therefore tended to skip the formality of written communication believing it was more important to explain the meaning of rights to the detained child in question.

Another point raised in the France and Spain reports was not so much about the information provided but the way information is presented and general attitudes towards foreign children. Several individuals in the France report alluded to verbal mistreatment, contempt and even stigmatising and discriminatory comments towards children. In the Spain report, children indicate that they did not feel listened to or supported. There were complaints about the police:

"The Police, I mean, all they do is talk about you, what you've done and without knowing anything, they accuse you without knowing anything, without evidence or anything, and from there all the judge does is sign [...] and without having any evidence or anything. I mean, it's not the fault of the judge, but of the police".

Prosecutors and judges were also described as dismissive, *"sometimes you tell the judge your version and they don't listen to you, you know?"*

To sum up this point, it seems that, contrary to what professionals say, children, or at least those who participated in the study, do not understand the criminal proceedings in which they are involved and do not always believe they are treated appropriately. Although this experience is not intrinsically linked to the right to information, it conditions their understanding and perceptions of justice and the law.

Overall, the country reports highlight that a child's misunderstanding of his/her rights can have important consequences: not reacting in case of illegal decisions or decisions contrary to their interest, not being able to direct the defence by giving instructions to their lawyer (who then has to determine alone what the interests of the child might be), not knowing what to do to ask for a revision of the measures, etc. Given that the authorities are dealing with foreign children who are in a new country, experiencing a different legal system, being talked to in a new language, and in circumstances of stress, emerging from situations of trauma and abuse such as trafficking and exploitation, and surrounded by adults in positions of authority who they are fearful of challenging, the evidence from the reports suggests the need for stronger efforts to provide information of a suitable quality and in an appropriate manner.

Art 7 - Right to case materials

Key finding: This issue is little addressed in the national reports; only one country report mentions that professionals welcome the increased rights under the Directive to documents in the possession of the authorities that are essential to challenging effectively the lawfulness of the arrest or detention.

This article was little addressed in the national reports except for the Spain report which says that the Directive has made a difference as previously lawyers experienced difficulty in obtaining the police report. A lawyer told the study, stating that in the past:

"he could speak with the police, with the investigating judge, and say 'okay, give me an outline', and yes they gave me plenty of details [...] Yes, that was one thing, something they gave you as a gift".

Now, on the other hand, that right of access is recognised, although for the police it is not "access to copy, simply to see". However, interviewees saw it as a positive development as it made for a fairer and more equal process. One lawyer explained the advantage of having access to the documentation that the prosecutor has (i.e., the police report, the report of the technical team, documentary material of the investigation, the written allegations of the prosecutor, etc.) in order to prepare the case, as follows:

"Yes. There is a change, small perhaps, but it seems important to me, as at the prosecutor's office we did not have access, the lawyers were not permitted to copy the case records, you called, and they said, you sit there and you copy what you want, then they gave you the papers, and you made notes, creating a structure or an outline of what mattered to you. I thought it was an unnecessary annoyance, when in all the, I mean it is just the opposite in the investigation of adults; you could almost take the documents home... I found this absurd in juvenile proceedings which were meant to be far less rigid, and that in theory should be... such an absurd stance on the part of the prosecutor's office, and it was a problem in the sense of that if I had not taken notes or something was unclear, I had to go back to the prosecutor's office and that was time consuming or you were not always available... and that has changed, now in the prosecutor's office you can ask for copies".

Art 8 - Right to challenge non-provision of information

Key finding: This right of the suspect or accused to challenge the possible failure or refusal of the authorities to provide information is not addressed in any of the reports. This at least suggests that challenges are not being made even if it is not known why they are not made.

The consequences of not adhering to this right are not clear and little mentioned in the reports. The Hungary report is the only one to state that it did not find evidence in any case for interrupting or suspending hearings or other consequence because the child indicated that they did not understand the proceedings.

5. EU DIRECTIVE 2013/48/EU: THE RIGHT OF ACCESS TO A LAWYER, THE RIGHT TO HAVE A THIRD PARTY INFORMED UPON DEPRIVATION OF LIBERTY AND THE RIGHT TO COMMUNICATE WITH THIRD PERSONS AND WITH CONSULAR AUTHORITIES

5.1. CONTENT OF DIRECTIVE

Directive 2013/48/EU contains minimum rules concerning (a) the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, (b) the right to have a third party informed upon deprivation of liberty (c) to communicate with third parties and consular authorities during deprivation of liberty. These minimum requirements assure fairness of proceedings pursuant to article 6 of the European Convention on Human Rights. The Directive applies to all persons and therefore also to children.

The rights from the Directive 2013/48/EU are valid from the moment someone is informed of the fact that he/she is suspected or accused of a criminal offence. The right applies until proceedings are completed, that is until a final determination as to whether the person has committed the criminal offence. This includes sentencing and the outcome of possible appeals. The Directive also applies to persons against whom a European Arrest Warrant has been issued. The key elements of Directive 2013/48/EU are summarised below.

Use of term 'lawyer'

- Directive 2013/48/EU refers to access to a lawyer. This means *"a person who is qualified in accordance with national law and is competent to give legal advice to suspects and to provide legal assistance"*. [The terminology in national law in different countries may differ, for instance, the term 'counsel' may be used]

Right of access to a lawyer

- The suspect has right of access to a lawyer:
 - prior to an interrogation (consultation assistance);
 - when investigations - or other measures are performed in the context of gathering evidence;
 - as soon as possible after deprivation of liberty;
 - within a reasonable time period before he must appear in court.
- Suspects should have access to a lawyer without undue delay. In any case, there has to be access to a lawyer during criminal proceedings before a court. Moreover Directive 2012/13/EU mandates that suspects obtain information,

without delay, on the right of access to a lawyer. States are required to provide general information to help suspects find a lawyer.

Confidentiality of communications

- The right to privacy in communications between the lawyer and the accused/suspect is paramount. The safeguarding of confidentiality is essential for the effective exercise of the right of defence. The confidentiality of communications applies to meetings in person and also to letters, phone calls and all other forms of communication that are allowed under national law.

Renouncing the right to a lawyer

- Clear, understandable and sufficient information must be given, orally or in writing, on the right to a lawyer and on the possible consequences of renouncing that right.
- Renunciation of the right to a lawyer can only occur if this is done voluntarily and unequivocally. This can be done orally or in writing, provided that it is documented that this has occurred and the opportunity exists to revoke this decision, at any time.

Exceptional circumstances

- In very exceptional cases, the authorities may in the preliminary investigation stages, temporarily deviate from the obligation to provide without undue delay the right to access to a lawyer, after deprivation of liberty. This may occur when the geographical distance between the suspect on the one hand and the lawyer on the other hand, make it impossible to exercise this right immediately after deprivation of liberty. In addition, it is possible – once again in the preparation phase – to temporarily deviate from the right to a lawyer when this is (a) compellingly necessary to prevent serious negative consequences for the life, freedom or physical integrity of a person or (b) where urgent action by the authorities is necessary to prevent that substantial damage occurs to the criminal proceedings.
- It is important that temporary deviations only occur when they are strictly necessary, they should have a limited duration, may not only be based on the type of criminal offence or its severity and may not impinge on the overall fairness of the proceedings. In addition, temporary deviations can only be allowed if the decision is taken on an individual basis, is properly motivated and is open to judicial review.

Right to inform a third party

- Suspects must – without undue delay – inform at least one person of the deprivation of their liberty.
- For children, the person who has parental responsibility for the child, must be informed as soon as possible of the deprivation of liberty and the reason thereof.
- An exception only applies when it is not in the best interests of the child to inform such a person. If this exceptional situation occurs, then another adult must be informed and communicate with the child, such as another family member. The authorities may deviate temporarily for the purpose of compelling operational requirements – in the same circumstances in which a deviation to the right to a lawyer is allowed i.e. when (a) compellingly necessary to prevent serious negative consequences for the life, freedom or physical integrity of a person or (b) where urgent action by the authorities is necessary to prevent that substantial damage occurs to the criminal proceedings.
- If the suspect is a child and such a deviation occurs, then the authority who is responsible for the protection and the welfare of children is to be urgently informed of the deprivation of liberty. It is important that deviations do not occur unless strictly necessary, they should have a limited duration, may not be based solely on the type or severity of the offence and may not impinge on the overall fairness of the proceedings. In addition, temporary deviations can only be allowed if the decision is issued on an individual basis by a judicial authority or any other competent authority, on the condition that there is a possibility to test the decision by the judge.

Right to communicate with consular authorities

- Persons who are non-nationals of the Member State, in which they are deprived of their liberty, have the right to inform consular authorities of the Member State of which they have nationality, of their deprivation of liberty and to communicate with them. They have the right to be visited by their consular authorities, to maintain contact with them and to correspond with them. They may also be represented by their consular authorities, if they so desire.

Children

- With regard to children, the Directive contains a few specific provisions that have already been mentioned above. It is also important that the recitals of this Directive state that the provisions of the Directive serve to promote the protection of the rights of children; taking into account the *Guidelines for child-friendly justice* of the Council of Europe.

5.2. TRANSPOSITION STATUS

Overview

The deadline for transposition is 27 November 2016 and all countries except Belgium are in the process of integrating the provisions into national law. Directive 2013/48/EU will have direct effect in Belgium even if a specific law is not passed. In addition, most countries had similar provisions in their national laws already. Brief summaries of the situation in each country are provided below; further details are contained in the national reports.

Country information

Belgium: Directive 2013/48/EU has not yet been implemented in Belgium but it will have direct effect and must be respected by Belgium once the transposition deadline (27 November 2016) has passed²⁸. Despite the absence of adequate implementation of Directive 2013/48/EU, Belgian law already has provisions that guarantee the rights covered by it.

Currently, no transposition measures are in place. There are already national laws in place covering certain provisions such as the right to access a lawyer.

Hungary: The process for transposition into national law is ongoing and is being given effect by Act CCII of 2015. However, the rights contained in Directive 2013/48/EU are already ensured by several national laws.

Netherlands: On 19 February 2015, a law proposing the transposition of Directive 2013/48/EU was put before the House of Representatives and unanimously adopted by it on 31 May 2016. The preliminary examination by the Senate's commission for Security and Justice took place on the 12 July 2016.

Spain: LO 13/2015 has amended articles of the criminal code in accordance with Directive 2013/48/EU.

5.3. APPLICATION IN PRACTICE

Art 3 (1) - Right to a lawyer

Key finding: all countries grant access to a lawyer so that the accused or suspected person can exercise their right to defence. However, the implementation of this right is problematic in all places and does not operate in an optimal way due to various administrative constraints.

Access to a lawyer is standard practice across all project countries. In Hungary, as in other jurisdictions, a lawyer is obligatory in the case of accused children and a public defender is appointed if the child does not have his/her own lawyer. In the Netherlands and Belgium it is reported that this right is not dependent on nationality. The right to renounce a lawyer is not addressed in any report except the Netherlands which says that renunciation only allowed under certain circumstances and never for children implicated in serious offences. Generally speaking, despite the right to a lawyer being commonplace, actual access is not optimal and suffers from various constraints.

²⁸ The Court of Justice of the European Union has in fact established in its case law that a directive has a direct effect if it is clear, precise, unconditional and if the EU country has not transposed the directive by the deadline (ruling of 4 December 1974, Van Duyn).

The main issues arising are as follows:

Delays: Lawyers are usually required to attend within a short time limit but the arrival of a lawyer especially for overnight cases may be delayed as mentioned in the Spain report. Remuneration and differential legal aid rates for attending at night as compared to day times may also have an effect. As the Belgium report explains, by law, the lawyer must be present within two hours. Nonetheless, lawyers generally do not attend due to availability issues (they must be on-call 24 hours a day) or mobility issues (they would have to be able to move around urgently), but also due to the fact that they receive only two points in legal aid for services to the police. Conversely, they will usually be present during office hearings, as this service entitles them to six points. The remuneration that the lawyer will receive for services to the police is thus entirely disproportionate to the lawyer's investment. According to the statement of a lawyer specialising in juvenile law made to the Belgium study, the remuneration he receives from the State for attending, sometimes in the middle of the night, to assist the young person during questioning, which can sometimes last several hours, will be of an absolute maximum of 150-200 Euros. Some lawyers thus have the impression that they are operating at a loss. As one lawyer said:

"Lawyers are underpaid. The service is generally long and few lawyers can allow themselves to dedicate so much time for free".

Limited time availability: the law may only allow the lawyer to be present for fixed periods. For instance, the Netherlands report says the standard half an hour is too short where interpretation is involved. The France report makes a similar point, while lawyers can access interpreters at court before the start of the hearing, logistics may make this impossible if the interpreter in question is tied up in another case. The Hungary report too says that in many cases, the relationship between the lawyer and the child is limited to having a quick word before the procedural hearing. Likewise in Spain, it is standard practice for children to learn the defence strategy being adopted by their lawyer on the morning of the hearing. This is compounded in case of foreign children as the presence of the interpreter is only provided for in the official premises. Some lawyers described this constraint to the Spain research team as follows:

"If that child, as is sometimes the case, speaks Belarusian or speaks Urdu, or is Pakistani, or speaks Swahili, we find that if I want to interview the child, I cannot. I mean, I can do it in my office, ok, but the translator will not come to my private office even if I am working on a legal aid basis.... The agreement they have with the regional government of Valencia is that they only go to official premises, that is, to police stations, the prosecutor's office and the courts....and the day of the trial, to the trial. Nevertheless, if I need to talk to that boy, so he can tell me things [...] I cannot go everyday to the court and talk to the translation department so that they provide a translator. Because those translators, of which there are not many, are specially intended to translate on the day of trial. Then if... of course...if I tell them to come to my private office they laugh their heads off, or... if for example I want to present an appeal and I need more information on the child, I cannot obtain such further information because I cannot have a clear and understandable conversation with him".

Restrictions on role: The law may also inhibit the intervention of lawyers at certain points which some may consider detrimental, for instance, the Netherlands report says current policy is for the lawyer's participation to be restrained during interrogation. This is a matter of discussion and there are proposed legal amendments underway to allow lawyers to participate more actively. Another limitation mentioned in the Netherlands is that out of court settlement processes which are used quite widely in the country do not guarantee a right to access a lawyer. Moreover, amendments have been proposed raising the threshold for the appointment of a lawyer which raises serious concerns regarding the right of access to a lawyer for children. In France, assistance of a lawyer is not obligatory during custody for children over the age of thirteen, some professionals referred to dissuasive techniques used by the police when making contact with the lawyer, for instance, one interviewee is quoted as saying:

"The police officer is set on not calling a lawyer, because that will take more time and sometimes there's no point to it. The child doesn't request a lawyer, but when the commissioner calls the family, they can request a lawyer. If the child doesn't have a family, nobody requests a lawyer".

In addition, the presence of a lawyer is not required at certain stages in the judicial proceedings and the absence of legal assistance at these moments may have severe consequences for a child and even more if he/she is an unaccompanied child.

Alternating lawyers – It is common for lawyers to change over the course of the case, the lawyer who attends during custody is not the same one who was present during the hearing. They are often on call lawyers who meet the accused

child several minutes before the hearing. As one child told the Belgium study:

"I've switched at least four or five times. Every time the case changes, I need a new lawyer who knows my case file well...".

In France, the assistance of a lawyer is obligatory during the court appearance as well as the hearings. In fact, the child must be assisted by a lawyer at these points, but if the child is a repeat offender it may be difficult to ensure that they are represented by a single lawyer. Often, they are attended by two different lawyers for different cases, or even several lawyers, depending on the duration, within a single case. This situation has severe consequences, particularly on defence strategies and on sentencing. Assigning a lawyer of reference to follow the child through all cases is one possible solution for this type of situation, but this solution is subject to difficulties linked to the identification of the child (for instance, if the child has various aliases or has refused to provide fingerprints) and in communicating information (databases are not centralised between the different services which means it may be difficult to obtain an overall picture of the child's legal situation and particularly other pending cases).

The bars of some courts in France have mitigated these difficulties by organising their juvenile committees to ensure a specialised legal service and the presence of lawyers to assist, within a short period, in the defence of accused children from the first moments of proceedings. Some bars thus implement methods to ensure that each child has a lawyer of reference, which avoids children having several lawyers in the event of repeat offences. In addition, some measures include transversal legal aid involving lawyers who specialise in juvenile law, but also working across different legal domains (civil, criminal and administrative). These holistic legal service mechanisms, best demonstrated by the Juvenile Branch Office of Paris (Antenne des mineurs de Paris)²⁹, ensure an efficient access to legal assistance.

Quality of lawyers - The reports also raise questions about the variable quality of the lawyers in attendance, the lack of specialised knowledge and the need for training. As one lawyer told the Spain report:

"I think that it is important, regarding access to a lawyer for foreign children, that lawyers have, apart from knowledge on the law of criminal responsibility, a familiarity with immigration law, permits, authorizations. [...] in the training, the training that qualifies one for this specialized area of juvenile justice, some kind of unit or topic relating to the area of immigration [...] there are cases in which [...] there is an immigration component that you need to address and for many lawyers it sounds like double Dutch".

The Belgium report also highlights the lack of training of lawyers in cases involving children who are accused/suspected, as a professional told the study:

"It makes no difference if the child is foreign or not. Being a foreign child does not pose a problem in itself because the lawyer is designated for all children. The designation of the lawyer has to be done quickly. The young person must be assisted during the police interview and before the juvenile court judge. The recriminations regarding the child's lawyer are for all lawyers, not specifically for the lawyers of foreign children".

The children contributing to this research in various countries had mixed perceptions on the quality of lawyers, some thought they were good, others that they were not effective. The Spain report notes a high percentage of guilty pleas and the implication from children that they are under pressure to plead guilty:

"...they come and tell you 'look, is this charge, this is the situation, and see if you plead guilty, they'll reduce the time, I think that you should plead guilty and so on... he starts to try to convince you, saying that you have to plead guilty, and that's it".

Similar words were echoed by a child in Belgium:

"I was able to talk to the lawyer before my hearing, a little. I had the impression that she wasn't defending me, that she didn't agree with me".

²⁹ The France report says that the juvenile office comprises one hundred and fifty lawyers, twenty-nine of whom are part of the foreign children branch. The juvenile office has put in place a system of office hours. Every afternoon one or even two lawyers are available to minors; however, certain defenders are aware of the difficulty of attracting young people to spontaneous legal counsel sessions, as these office hours take place at the courthouse. In this regard, one of the lawyers said that the minors prefer to see their social workers for criminal cases and that in any case he regrets that the office hours take place at the courthouse, as this can evoke bad memories of when the minors were in custody. The Lyon bar also runs a similar initiative. The commission of foreign minors is composed of ten specialised lawyers.

There were differing views as to whether legal aid or private lawyers are better. In France, professionals notice a lack of motivation among public defence lawyers in criminal matters due to coordination and administrative issues. In Spain, while all professionals interviewed were clear that legal aid lawyers were best, because they are better trained, children expressed the opposite view and favoured private lawyers paid for by themselves. Children expressed concern at the neutrality of the legal aid lawyers:

"the legal aid one is bound to be on the side of the judges [...] because the State pays them, you know? Who knows what side they are on?"

In addition, children interviewed by the Spain study believed that legal aid lawyers have less time to prepare the case and that private lawyers are able to secure less harsh sentences from judges *"they give you less time"*. Children from different countries said they believed that private lawyers acted differently, were more involved and proactive. A child told the Spain study:

"I'm paying, and if they don't do their job ...then I'm not going to pay them [...] so he works, and moves a little".

Many children in Belgium were not content with their lawyers. They often had the impression that the lawyer was not truly defending them, that they were siding with the judge, that they served no purpose, etc, as one told the study:

"For us young people, we often say here that the pro bono lawyers are no use to us because they often share the opinions of the judge, it's not as though they are defending us or telling the judge what needs to be made better for us. They always agree with what the judge is going to say".

In France, feedback from children was more mixed, half of the children interviewed found the work of the lawyers to be of good quality, because they believed that they had taken the time and that they had explained the information well. The other half believed that the lawyers had not been very effective, because they felt they had not received all the information they would have liked (even if they are not sure what information they could have requested) or because they were only entitled to a very short interview before the hearing.

Art 4 - Right to confidentiality

Key finding: Confidentiality of communications between accused/suspected foreign children and their lawyers may not be sufficiently respected due to lack of private spaces, or the presence of interpreters who are not properly bound by codes of ethics.

Confidentiality of communications between the accused child and his/her lawyer is not being sufficiently safeguarded. While some countries do assure the availability of private rooms e.g. Spain and Belgium, the Hungary report says the lack of child friendly private spaces for client-lawyer consultations is a constraint. Netherlands also says that there isn't always a room for consultation which means that the lawyer is forced to sit with the suspect in the cell or in non-private spaces in court. As a general observation, the use of telecommunications equipment for interpretation, while bringing many advantages, also brings unique challenges with respect to confidentiality and data protection.

The other main impediment identified in the reports is the lack of assurance of the independence of the interpreter. The Hungary and Netherlands report both raise concerns that confidentiality is compromised due to the interpreter being present especially where this is the same interpreter used in the police interrogation and given that clear codes of ethics are usually lacking. The Hungary report cites an advocate as saying:

"The interpretation also makes the communication with a lawyer more difficult. It is hard to ensure communication based on a relationship of trust".

The Netherlands report also points out that the presence of parents can inhibit children from speaking freely.

Art 5 - Right to inform a third party

Key finding: The right to contact at least one third party is granted in all countries and is usually taken to mean parents or guardians in the case of children.

The right to inform a third party is usually observed though there are variations between countries in terms who can be informed and who decides who should be informed. The right in Spain, Hungary and France involves decisions by the police to inform parents and/or legal custodians. In Hungary and France, if parents are not available, temporary guardians or care workers are assigned. The France report notes that the system can be ad hoc and arbitrary.

Moreover, the Hungary report says that the appointment of a temporary guardian always takes place but appears a mere formality as they may not be present during questioning – however, when they do participate, they can play an important role in providing moral support to the child, as one Guardian ad litem told the Hungary researchers:

“A temporary guardian has the important role of strengthening the children’s mental status because appearing in front of an official body definitely means a lot of stress for a child”.

The Hungary report goes on to point out that special training can be useful for guardians, quoting one Guardian ad litem as saying:

“We did not get any help to work with foreign children. There is no training, not even language training. There is no training or special preparation for the work with children either”.

The report also points out that professional cooperation between different institutions works well in some cases. However, some factors hinder collaboration such as the lack of information and sometimes cooperation is not realised at all, and depends on the initiative of those involved.

In Spain, children without parents may communicate with their legal guardians, although the law allows for communication with other third parties, this right is not applied due to the potential interference in criminal proceedings, as one prosecutor pointed out:

“they have the right to a phone call that is difficult to manage, because of course the law says that have right to call to whoever they want ...to talk about what? Because if I want to tell my accomplice to get rid of the drugs somewhere, I pick up the phone and say ‘just throw away you know what...’, should I let him say that? Or how does this work?”.

The Netherlands report states that in the case of children, legal representatives, as the third party, are informed as soon as possible, without the child having to request this.

Art 7 - Right to inform consular authorities

Key finding: all countries respect the right to inform and communicate with consular authorities but foreign children rarely ask to do so. One country obliges contact with the consulate which may pose a risk to those seeking asylum.

The national reports say that children are allowed to contact the consulate and are informed of this right when taken into custody but rarely ask to do so either because they see no point or because they are fearful. In Spain, there is an obligation to inform the consulate which could have detrimental consequences if the child is a refugee or otherwise fearful of being known to the authorities of his/her countries of origin. As an interviewee points out:

“On the subject [...] of asylum, I have had conflicts because of the consulate issue, because we inform them of this right, but of course, [...] have that tell them ‘no, no, you cannot talk to consuls. You are requesting asylum, by nature, by definition... so forget it, if the consul comes here to take your details, they can kick you out, especially if the consuls is from the country to which, precisely, you don’t want to belong. So it is true that there is an issue here: you inform them of the right because rights must be safeguarded, but as they are children, I believe that [the do not have] this ability to plan for the consequences. Unless your lawyer is on the ball, there can be a violation of the right”.

There is no information in the Netherlands report about how the right to inform consular authorities is being implemented.

6. CONCLUSIONS

The three Directives have been or are in the process of being transposed into national law in all five countries. In many cases, the rights in question already existed in national laws and have been reaffirmed or refined by the application of the Directives. In addition, Directive 2010/64/EU on the right to interpretation and thus the most relevant to the situation of foreign children as it underpins the ability to enjoy the rights set out in the other two Directives 2012/13/EU and 2013/48/EU, is the oldest of the three and has had several years to be embedded into national law. Therefore integration into national law is not the issue for the most part; the critical question is the extent to which these provisions are being applied in practice.

The context in which these Directives are applicable is an uncertain one. Due to the lack of reliable data, the numbers and characteristics of foreign child accused/suspects whose rights require assurance in line with the Directives is unknown. Available data suggests the numbers of foreign children who are convicted are small; and further indicate that not many foreign children enter criminal proceedings in the first place. Most of the study countries, bar one, have well-developed juvenile justice systems with specialised laws and institutions applicable to children; while these provisions do not discriminate against foreign children; nor are they adapted to the special and enhanced needs of non-national children caught up in the criminal justice system.

The three Directives are interconnected in the sense that Directive 2010/64/EU on interpretation needs to be applied for the other two Directives on rights to information (2012/13/EU) and lawyers (2013/48/EU) to have meaningful effect. The study found that the right to interpretation is systematically observed across all countries with efforts made by the authorities to provide support in a timely manner. However, there are considerable challenges particularly for lesser known languages and to those who are especially vulnerable, for instance, children who have speech or hearing impediments. The lack of standardised procedures for identifying interpretation needs is a principal concern. The major weakness lies in the quality of interpretation, both in terms of linguistic and technical accuracy but also due to concerns about the unethical and unprofessional conduct of interpreters, reported across all five countries. The lack of properly functioning registers and systems for quality assurance means that interpretation is too often being carried out by persons without the relevant qualifications or skills needed to provide a quality service.

The right to information contained in Directive 2012/13/EU applies to nationals and non-nationals alike but its application to foreign children is hindered by language impediments, and the relevant information is generally not being provided in written form in a language that is understandable to them. Directive 2013/48/EU with its rights to access lawyers and third parties also applies to nationals and non-nationals. All children, foreign or national, are impeded in their enjoyment of these rights by various obstacles such as lawyers lacking the skills needed to work with children, bureaucratic and organisational limitations, for instance, delays in access or constantly changing lawyers at different stages of the process, or insufficiencies in legal aid. These problems are further compounded for foreign children by language barriers and the need for timely and quality interpretation to enable the child to communicate with his/her lawyer. The core principle of lawyer/client confidentiality is particularly compromised by the involvement of a third party interpreter, especially if clear codes of ethics are not in operation. The unaccompanied foreign child is also disadvantaged in terms of access to third parties; unable to call on parents as a child who is a citizen of the country might do, foreign children are dependent on the support of unknown guardians and carers appointed by the authorities. Although the Directive allows contact with consular authorities, this is unlikely to be of much use to foreign minors seeking to escape their countries of origin for whatever reason, and may be a risk if the child is an asylum-seeker.

The overall picture to emerge from this research is that the procedural rights in question are observed in a formal sense but challenges remain in implementation. The lack of assured access to quality interpretation is a key impediment to foreign children in terms of their ability to exercise other important rights. Poor or absent interpretation can have a very real impact on the lives of foreign children who are accused or suspected of crimes if they are unable to convey a proper defence or have a fair trial. The study found disturbing cases of foreign children who were not assisted by interpreters, could not explain anything about their circumstances or their age, and ended up being wrongly confined to adult prisons for months at a time. On the other hand, a failure to provide adequate interpretation may also undermine the effective prosecution of a case and undermine the rights of other parties involved. It is therefore in the interests of a fair and efficient criminal justice system that the procedural rights contained in the Directives are observed.

The task of assuring proper interpretation support at any point in time across all EU countries is a formidable one given the almost limitless permutations that may arise from trying to match up foreign children speaking any number of the world's languages and dialects with interpreters who are able to speak the language of the child as well as the country in which the criminal procedure is taking place to a sufficiently high level to ensure a fair process. The challenge is considerable and further exacerbated by the lack of adequate financial and human resource needed to meet these needs. While the Directives assert important and essential rights, and the study identifies critical gaps in provision, the key conundrum facing practitioners is what strategies and methodologies can be devised that are manageable, proportionate and realistic and yet able to meet the needs on the ground.

7. RECOMMENDATIONS

The report takes as a given that the Directives must be implemented in full; it does not therefore seek to reiterate the requirements of those Directives but instead aims to focus on practical recommendations that can help improve the situation. Key recommendations are listed below accompanied by brief explanatory text and implementation ideas.

a) Set up systems of quality control for interpretation

This is a major gap in all countries. While this report cannot provide guidance on the details of how such quality assurance systems should work since this involves setting up benchmarks, processes for review, and systems of reward and punishment; it can point out that quality control need not be complex and could be done through relatively simple spot checks, for instance, taking ad hoc recordings of interpreters at court hearings and then checking the quality post facto, while ensuring adequate safeguards for confidentiality.

b) Strengthen official registers of interpreters

Although all countries have official registers, they are not functioning adequately and are being undermined by insufficient vetting or the running of parallel lists of unofficial interpreters. This problem is largely one of supply and demand and is thus not easy to solve i.e. the need for interpreters is greater than the availability of qualified interpreters. Nevertheless, some tightening up of criteria and the management of such lists as well as better pay scales can help ensure that properly qualified interpreters are deployed. It is also worth pointing out that according to the findings of the study, quality appears better controlled where the interpretation process is managed by the authorities rather than outsourced to private companies (as in the case of Spain).

c) Require interpreters to sign a code of ethics

Given that much of the concern about quality derived from questions about the ethical and professional conduct of interpreters, it is imperative that codes of ethics and conduct are adopted as a matter of course.

d) Establish clear protocols for the use of intermediary languages for interpretation

Creating a system which ensures the provision of interpreters for any language or dialect at any given time in any given location is an impossible task. The use of intermediary languages may be unavoidable. The key assurance that is required is that interpreters have a strong enough command of both the intermediary and translated language. This entails clearer guidance on when and how intermediary languages may be used.

e) Utilise standardised procedures for determining the need for interpretation

Systematic determination procedures are not being used anywhere except the Netherlands. Standardised approaches need to be rolled out across countries to ensure that interpretation needs are promptly and accurately identified. The Netherlands procedure is the best available practice according to the findings of this study.

f) Provide a standard written and translated letter of rights

This important right is not being observed in most countries. Only two countries, the Netherlands and Belgium have a template of rights translated and available in digital form in up to 27 languages. While a written translation is in itself insufficient for ensuring that a foreign child understands the situation he/she is in, it is an important procedural right which can be relatively easily met by the creation of standard templates in each country. Furthermore, this could be supplemented by audio-visual materials which do not rely on spoken or written language and use photographs, graphics, short videos etc. to convey general information about the situation facing the child – such information could be shared across countries if it is not language specific.

g) Make greater use of communications technology

There is very limited use being made of phones let alone other forms of commonly used communication modalities such as skype/video-calls. There is also much scope for exploring how voice recognition and automated subtitling technologies can be used to facilitate the translation process. The agencies involved in this project may consider approaching technology companies with expertise in such matters to see if they are willing to provide pro-bono support to develop specialised applications and tools. The increased use of technology will need to be accompanied by adequate safeguards ensuring confidentiality and child protection.

h) Provide multi-faceted training for professionals involved in the criminal justice system

There is an extensive need for training of all professionals involved, including interpreters but also judges, prosecutors, lawyers, guardians, police etc. The most common training needs (to be adapted to the needs of different groups) include: contents of the Directives; child development; legal systems and legal terminology especially as it applies to juvenile justice; migration and asylum issues.

i) Increase data collection on the scale and characteristics of the phenomenon

The lack of reliable data on the numbers of foreign child accused/suspects in European Union countries is a constraint in being able to develop an effective response. Data based on common indicators is needed in order to assess the scale of the problem and to make comparisons across countries.

j) Encourage coordination between professionals involved in the criminal justice process

Improvements can be made by having interpreters, lawyers, social workers etc. coordinate amongst themselves in order to better deal with cases involving foreign minors. The France report has some good practice examples of interpreters organising themselves to be available for cases involving foreign minors; likewise lawyers in some French courts have organised themselves according to experience with juvenile justice and sought to plan cases so that one lawyer oversees the case of a child through different stages of the proceedings to ensure a coherent defence strategy.

k) Ensure greater coordination between different parts of government

Cases involving foreign minors require multi-disciplinary support and will require the involvement of different branches of government – aside from criminal justice, child protection as well as migration/refugee departments may need to be involved. This type of inter-department coordination could be strengthened in most countries.

l) Encourage greater cross-border cooperation and sharing of tools and methodologies

The provision of appropriate and tailored interpretation support to foreign child accused/suspects is a challenge in all countries. There is much to gain from pooling resources to find common solutions, for instance, in terms of the use of communications technology, or standardised procedures and tools. The facilitation of trans-European sharing of practices would help overcome the current deficits in interpretation support and share the burden of cost.

Bibliography

Belgium National Report, 'Procedural Rights Of Foreign Children Suspected Or Accused In Criminal/Protective Proceedings In The European Union', 2016, Defence for Children

France National Report, 'Procedural Rights Of Juveniles Suspected Or Accused In The European Union', 2016, Hors La Rue

Hungary National Report, 'Procedural Rights Of Juveniles Suspected Or Accused In The European Union', 2016, Terre des Hommes Hungary

Netherlands National Report, 'Procedural Rights Of Juveniles Suspected Or Accused In The European Union', 2016, Defence for Children International The Netherlands

Spain National Report, 'Procedural Rights Of Juveniles Suspected Or Accused In The European Union', 2016, Rights International Spain



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