



## Importance of the right of access to a lawyer for children

The right to access legal counsel and representation throughout the whole criminal judicial proceedings is essential because it enables children to effectively enjoy and exercise their rights. Providing children with the assistance of a lawyer is a fundamental safeguard against violations and abuses of their rights. Moreover, the lawyer has an important function in supporting the child and communicating with him. This ensures that the child has a good understanding of his situation, as well as the possible consequences.

The right of access to a lawyer is enshrined in different fundamental rights instruments, such as the European Convention on Human Rights (Art. 6 §3 (c)), the Charter of Fundamental Rights of the European Union (Art. 47 and 48), and, at a more universal level, the International Covenant on Civil and Political Rights (Art. 14) and the Convention on the Rights of the Child (Art. 37 and 40).

In its General Comment No. 32, the Human Rights Committee affirms that « Juveniles are to enjoy at least the same guarantees and protection as are accorded to adults under article 14 of the Covenant. In addition, juveniles need special protection. In criminal proceedings they should, in particular, be informed directly of the charges against them and, if appropriate, through their parents or legal guardians, be provided with appropriate assistance in the preparation and presentation of their defense; be tried as soon as possible in a fair hearing in the presence of legal counsel, other appropriate assistance and their parents or legal guardians ».

The Directive 2013/48/EU of the European Parliament and of the Council has also incorporated the right of access to a lawyer for all suspects or accused persons in criminal proceedings. This Directive is applicable to adults, as well as to children.

Despite the fact that this Directive has to be transposed into national legislation by November 2016, the measures taken at a national level, especially those aiming at promoting a child-friendly justice in this context, are not sufficient.

The right to legal representation for child suspects is recognized *de iure* in all Member States of the EU. However, its application on a mandatory basis is, in practice, depending on different factors such as, the gravity of the charge and the age of the child suspected.

- In Germany, the obligation to have an advocate appointed immediately exists only for children placed in pre-trial detention.



- For children aged 16 and 17, mandatory defense only exists for the most serious crimes in the Netherlands.
- In the Czech Republic, no advocate is ensured for children under the age of 15 in pre-trial proceedings, as opposed to children over 15 years for whom the right to mandatory defense is secured from the first contact with the prosecuting authorities.

Another important factor is the provision of legal aid. The right to free legal aid and the right to legal representation are interdependent and must be simultaneously addressed, since the first one can be a prerequisite to exercise de second one.

- In Poland, for example, the principle of mandatory defense for children is only applicable in certain cases, provided for in the Juvenile Justice Act of 1982. One of these cases is when the juvenile has been placed at a youth shelter or if the juvenile has visual, hearing or speech impairments. A court-appointed defense lawyer is then assigned free of charge to the child. By contrast, if the child is not in the conditions set forth above, the juvenile has to file a motion for a court-appointed defense lawyer. The president of the court is obliged to grant the motion only if he considers that (i) the participation of a lawyer is necessary and (ii) that the juvenile and the juvenile's parents are unable to afford a lawyer of their choice without detriment to their ability to provide means of subsistence for themselves and their family. This system is based on the discretionary power of the president of the court. In other words, the incapacity to afford a lawyer is not a sufficient ground for the appointment of a free defense lawyer in Poland. This constitutes a clear violation of the children's right to access legal counsel and representation.

Another concern pertains to the Directive 2013/48/EU itself because it contains relatively few provisions improving the protection of children involved in criminal proceedings, although it refers to the COE Guidelines on Child Friendly Justice (CFJ) that recognize the need to adapt the Justice system to the rights and specific needs of children.

In this regard, for example, the possibility for suspects or accused persons to waive their right to be assisted by a lawyer (without prejudice to national law requiring the mandatory presence or assistance of a lawyer) as provided for in the Directive, seems in contradiction with the Convention on the Rights of the Child, especially with article 40 §2 (b) (ii), since this possibility is open both to adults and children. The proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings is to be welcomed because it is foreseen that children may not waive the right to have access to a lawyer.



The right of access to a lawyer shall apply as soon as a person is made aware that he is suspected or accused of having committed a criminal offence, until the end of the proceedings.

In a report of 2005 on "Protecting the rights of children in conflict with the law", the United Nations Interagency Coordination Panel on Juvenile Justice highlighted the shortage of lawyers available to handle children's cases from the moment of arrest. The report gives three reasons for which the presence of the lawyer at the police station is decisive. The first one concerns the provision of adapted and full information to the child about his rights, about the relevant mechanisms and procedures, and eventually about existing supporting services acting as intermediaries between the children and their lawyers. The second reason has to do with the fact that with a lawyer present, there is a better guarantee that questioning will take place in conditions that respect the proper procedures, as well as the rights of the children. Finally, alternatives to detention at the police station depend usually on the possibility of finding the child's family. Police officers cannot do that immediately and without the lawyer's intervention and support, the child is often taken into custody by default.

Every child has the right to make his views and opinions heard during the proceedings. The necessary counterpart to this right is the existence of safeguards ensuring that the conditions in which the child is questioned or gives testimony are child-friendly. Apart from the adaptations to the physical environment in which the child is interviewed, as well as the manner in which the child is interviewed, the presence of the child's lawyer is a fundamental safeguard against abuses. Unfortunately, only five Member States have made it mandatory for the defense counsel to be present at the child's interview. These Member States are Belgium, Finland, Croatia, Hungary and Romania.

The right of defense entails also the right to receive appropriate assistance in the preparation and presentation of the defense by a qualified lawyer, well-trained and specialized in children's rights.

The recognition of the need for mandatory and continuous training for all professionals working with and for children (lawyers, judges, public prosecutor, social workers...) seems well-established. It is even more important that Member States ensure that the child's lawyer is equipped and prepared in a way that effectively addresses the child's needs. Nevertheless, the results of the research conducted by the European Commission on children's involvement in criminal judicial proceedings in the 28 Member States of the EU (2014) show that there are mandatory training requirements for defense lawyers in only 8 Member States: Belgium, Czech Republic, Estonia, France, Croatia, Italy, Latvia and Slovenia (see Table annexed). This means that for the remaining Member States no training on child-friendly justice is provided for defense lawyers. In these countries, the child suspected or accused in criminal proceedings has no guarantee that his lawyer has received some specialized and interdisciplinary



training on his rights, needs and cognitive development, as well as on the proceedings adapted to him. Some Member States have set up continuous training programs for defense counsels. This is the case for Belgium, Czech Republic, Estonia, Spain, Finland, France, Italy, Latvia, the Netherlands, Portugal and Slovenia. Regrettably, participation in this training is mostly voluntary and another negative aspect resides in the fact that the training is provided in a one-off manner rather than as part of a structured and on-going process of professional development.

We have to remember that the Preamble of the Convention on the Rights of the Child has been adopted bearing in mind that « the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth ». This sentence stresses the importance the child's lawyer has in making the exercise of the rights of the child effective.

A UNICEF publication (2014) promoting equitable access to justice for all children in Central and Eastern Europe and Central Asia recommends that efforts must be intensified in order to address the fact that « children need independent legal allies who will acquaint them with their rights, counsel them in specific situations and represent them when necessary ».

The report on the situation of fundamental rights in the European Union (2013-2014), adopted on the 16<sup>th</sup> July 2015 by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs is also striking. The European Parliament: « calls on the Member States to ensure effective access to justice for all children, whether as suspects, perpetrators, victims or parties to proceedings; affirms the importance of strengthening the procedural safeguards for children in criminal proceedings, particularly in the context of the ongoing discussions on a directive on special safeguards for children suspected and accused in criminal proceedings ».

The need for a European harmonization in this context is strongly felt and is primordial in order to enhance the rights of defense in a child-friendly perspective. The lack of clear guidelines concerning the right to access legal counsel is a major obstacle for the children's effective enjoyment of their right to special protection. As it is said in the 'Child-friendly justice' Report of the Fundamental Rights Agency (2015), « When clear guidelines are lacking, the task of finding a legal representative often falls to the child's parents, who do not always know that it is free and do not understand that it is necessary ».



## Annex

	Mandatory training requirement as a prerequisite for taking up a post where contact with children is likely (CRIM120)	Types of professionals covered by the mandatory requirement (CRIM120)				Continuous training programmes exist for the professionals concerned (CRIM117)
		Judges	Police	Public prosecutors	Defence Lawyers	
AT	Yes	Yes	No	Yes	No	Yes – judges and prosecutors
BE	Yes	Yes	Yes	Yes	In part (S)	Yes - all
BG	In part	In part (S)	In part <sup>1</sup>	No	No	No*
CY	No	-	-	-	-	In part - only social workers
CZ	Yes	Yes	Yes	Yes	Yes	Yes – all
DE	Yes	Yes	No	Yes	No	No
DK	No	-	-	-	-	Yes – judges and police
EE	Yes	Yes	Yes	Yes	Yes	Yes - all
EL	In part	No	No	In part (S)	No	Yes – judges and police
ES	Yes	Yes	Yes	Yes	No	Yes – all (S)
FI	No	-	-	-	-	Yes – judges, prosecutors, defence counsels
FR	Yes	Yes	Yes	Yes	Yes <sup>2</sup>	Yes - all
HR	Yes	No*	Yes	Yes	Yes	No*
HU	In part	In part (S)	No	In part (S)	No*	No
IE	In part	In part (S)	No*	No*	No*	In part <sup>3</sup>
IT	Yes	Yes	Yes	Yes	Yes	Yes - all
LT	No*	No	In part <sup>4</sup>	In part <sup>5</sup>	No	In part – police
LU	Yes	Yes	Yes	No*	No*	No*
LV	Yes	No*	Yes	Yes	Yes	Yes – all
MT	No*	-	-	-	-	No*
NL	Yes	Yes	Yes	No*	No*	Yes – all
PL	No*	-	-	-	-	Yes – judges, prosecutors <sup>6</sup>
PT	Yes	Yes	Yes	Yes	No	Yes – judges, prosecutors, lawyers
RO	No*	-	-	-	-	Yes – judges, police, prosecutors
SE	No	-	-	-	-	Yes – judges, police, prosecutors
SI	Yes	Yes	No	No	In part (S)	Yes - all
SK	No	-	-	-	-	No
UK-E&W	Yes	Yes	No*	In part <sup>7</sup>	No	Yes – judges
UK-NI	Yes	Yes	No	No	No	Yes – judges, police
UK-S	No*	-	-	-	-	No*

Note: In part (S) indicates that the requirement applies only to authorities who are likely to have contact with child suspects; No\* = the protection does not appear to exist according to the information reviewed in this study; Dash '-' = Not applicable.



- 1 Juvenile police officers must have received special education or have a specialisation in pedagogy.
- 2 The requirement only extends for those defence counsels in receipt of legal aid.
- 3 There is no legislation providing for continuous training programmes for professionals working for or with children involved in criminal proceedings. However, there are some examples of training programmes in specific contexts, such as judges of the Children Court and specialist Garda (police) interviewers.
- 4 Specialised police officers and prosecutors deal with cases involving children, although no formal training prerequisites exist.
- 5 Specialised police officers and prosecutors deal with cases involving children, although no formal training prerequisites exist.
- 6 The obligation to follow training programmes refers to all judges, prosecutors, etc. (not only those working in particular with children).
- 7 The requirement only extends to Youth Offender Specialists (YOS), rather than all prosecutors. YOS undertake major reviews of files involving child suspects. Advocates who deal with children are expected to watch short films where measures are described to help vulnerable victims and witnesses give evidence.