INTERNATIONAL JUVENILE JUSTICE OBSERVATORY

ALTERNATIVES TO CUSTODY FOR YOUNG OFFENDERS

NATIONAL REPORT ON JUVENILE JUSTICE TRENDS

Belgium

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A. Juvenile Justice

A.1. Please describe the legal framework and the main characteristics of the juvenile justice system of your country

A.1.1. Is there a special law or code regarding juvenile justice?

The application of the general criminal law on children was ended by the Children's Protection Act of 1912, which introduced a welfare oriented and autonomous juvenile justice system and abolished judicial punishment for children under the age of 16. This act was applicable not only to young offenders, but also to children that demonstrated so-called 'pre-delinquent' behaviour and to misbehaving or disobedient children. In addition, the Children's Protection Act 1912 aimed to protect certain children in danger. The Children's Protection 1912 was replaced by a new Youth Protection Act in 1965, which reinforced the welfare model and introduced to two different categories of children: those in danger and those who demonstrated delinquent behaviour. The application of the autonomous youth protection and justice system was extended to children up to the age of 18.

Belgium is a Federal State and since the 1980s the competencies concerning the reaction to youth delinquency are divided between the Federal Government and the Belgian communities[1]. The determination of the nature and scope of the juvenile justice system is a federal competence, while the communities are competent for the execution of the measures (see art. 5, § 1, II, 6° Special Act concerning the Reform of the Institutions 1980).

1 Belgium has three communities: the Flemish Community, the French Community and the German-speaking Community. In this report only the situation in the Flemish Community will be reported on where appropriate.

Furthermore, the communities gained the regulatory competences concerning youth care and the measures for children in danger in the process of federalization. These matters are now the subject of different acts in the respective communities. As a result, the provisions concerning children in danger largely disappeared from the Youth Protection Act (with the exception of the certain judicial procedural rules), which now mainly concerns the reaction on youth delinquency. In 2006, the Youth Protection Act was reformed after an extensive period of discussion and preparation where the essence of the Belgian juvenile justice (the welfare approach) was called into question. Some juvenile justice actors and scholars were (and still are) advocates of a departure from the welfare model in favour of a sanctioning approach that focused more on a reaction to the offence and legal safeguards instead of the so-called 'paternalistic' and 'discretionary' approach of the welfare model.[2] Despite the criticism, the welfare model was kept intact in the Youth Protection Act after the 2006 reform. However, not in its entirety: certain legal safeguards, sanctioning aspects and the priority of a restorative approach were introduced into the Youth Protection Act. Sometimes the Belgian approach towards juvenile offenders is now referred to as a 'mixed-models approach' or even a 'non-model approach'.

In general, it is important to note that due to the (at least partial) survival of the historically deep-rooted welfare oriented approach within the juvenile justice system, the line between the reaction to delinquent behaviour of a young person and the reaction to a problematic educational or family context is often blurred. Although there is a separate juvenile justice system and child welfare system with each its own intervention grounds and despite many reforms and shifts in competencies, the two are still inextricably linked.

In the course of 2014, the competence of the Federal State concerning the reaction towards youth delinquency will be transferred to the communities, and the only federal competence regarding juvenile justice left will be the determination of the procedural rules and judicial organisation.[3] It is not unlikely that each of the communities will choose to reform juvenile justice and adopt its own policy towards youth delinquency.[4] It remains to be seen whether the welfare model will survive the next possible series of reforms in the respective communities.

A.1.2. Which courts and other special authorities are responsible for the reactions of juvenile offending (criminal courts, specialised juvenile criminal courts, family courts, special prosecutors, police etc.)?

There are specialized youth courts located in every Court of First Instance in Belgium

2 See C. VanDijk, E. Dumortier, and C. Eliaerts, "Survival of the Protection Model? Competing Goals in Belgian Juvenile Justice", in J. Junger-Tas and S. H. Decker (eds.), *International Handbook of Juvenile Justice*, Springer, New York, 2008, 187-224.

3 See the draft of the Special Act concerning the Sixth State Reform 2013, Parliamentary document nr. 3201/007, www.dekamer.be.

4 See e.g. the chapter on juvenile justice in the green paper concerning the implementation of the sixth state reform of the Flemish Government: https://wvg.vlaanderen.be/jongerenwelzijn/assets/docs/ons/regelgeving/groenboek-jeugdsanctierecht.pdf.

(art. 76 Judicial Code). Their competency is not limited to juvenile justice: they also rule in civil matters[5] concerning children and on compulsory youth care measures. The youth court consists of asingle-seated professional judge. Since the reform of 2006, youth judges are under the obligation to attend 'special training' (art. 259 *sexies* Judicial Code), although in practice this training is rather limited. There also is a special chamber in the Court of Appeal that deals with youth cases and that consist of three professional judges of which at least two should be trained in youth matters (art. 101 Judicial Code). The youth courts are assisted by specialized social services (for the Flemish Community, see art. 56 Decree concerning Integral Youth Care[6]).

At the public prosecutors level, there also is a department specialized in youth affairs (art. 8 and 11 Youth Protection Act). The law does not provide for specialized police units. However, in practice such units often exist.[7]

A.1.3. What is the scope (only criminal or also antisocial behaviour) of juvenile justice? How is the age of criminal responsibility regulated (please refer to different age groups and include the legal definitions on "child", "youth" and "young person")?

The Youth Protection Act applies, in principle[8], only in cases where a young person is suspected of committing or has committed an offence as described by general criminal law. There are no legal definitions on "child", "youth" or "young person" included in the Youth Protection Act. The scope of application *ratione personae* of the Youth Protection Act corresponds with the age of civil majority: anyone below the age of 18 years at the time of the offence can according to article 36, 4° of the Youth Protection Act be prosecuted for "facts described as a criminal offence".

Strictly speaking there is no minimum age for the application of the Youth Protection Act, but there are minimum ages provided for imposing different types of measures. For children below the age of 12 years only a reprimand, a supervision order or intensive educational guidance is possible. Detention in a closed facility is only possible for minors above the age of 14 years (*infra* nr. 25).

In principle, the upper age limit of the Belgian juvenile justice system is 18, which is evaluated at the moment of the offence. However, there are two exceptions stipulated in the Youth Protection Act.

5 Note that this will change when a new act on the creation of a Family Court will enter into force (1 September 2014). From then on, the Family Court will rule on all civil matters concerning children.

6 Youth Care in the Flemish Community is currently in transition. There is a new Decree concerning Integral Youth Care that will enter into force as of 1 March 2014 and is currently already in force in a pilot-region. This report refers only to the new provisions.

7 C. VanDijk, E. Dumortier, and C. Eliaerts, "Survival of the Protection Model? Competing Goals in Belgian Juvenile Justice", in J. Junger-Tasand S. H. Decker (eds.), *International Handbook of Juvenile Justice*, Springer, New York, 2008, 194.

8 For an exception, see *infra*nr. 10.

First of all, minors above the age of 16 can be transferred to the adult criminal system under certain circumstances (art. 57*bis* Youth Protection Act). This exception is subject to criticism (a.o. from a child-rights perspective)[9], but at the occasion of the 2006 reform the Belgian legislator decided to preserve it despite the fierce resistance from certain actors. However, more restrictive conditions were included in the Youth Protection Act that have to be met before the youth court can transfer a young offender to the adult criminal system.

The possibility to transfer to the adult criminal system targets young persons who are considered to be beyond help and for which the educational measures provided for in the Youth Protection Act are not suitable (anymore). Two additional, non-cumulative conditions were introduced in 2006: either the young person must have been subjected to youth measures before, or he must have committed a serious offence (listed exhaustively in the Youth Protection Act). Only in 0,6% of the total amount of cases that appear before the youth courts a decision to transfer to the adult criminal system is made.[10]

After a transfer to the criminal justice system, the young offenders are treated like adults and can be punished with all criminal sanctions except life imprisonment (art. 12 Criminal Code). They are not tried by adult courts[11] but by a specialized 'extended youth court'[12] that applies adult criminal law. If the young offender is sentenced to a prison sentence, this sentence is executed in specialized institutions (federal detention centres, *infra* nr. 31) at least until the age of 18. After that age has been reached, it is possible to transfer the young adult to adult prisons (art. 606 Criminal Proceedings Code).

The second exception to the upper age limit of the juvenile justice system is the special regime for traffic offences committed by a young person who is aged between 16 and 18 at the time of the offence. These offences are tried by adult Police Courts which apply general criminal law. However, the Police Court has to possibility to transfer the case to the youth court if juvenile justice measures would be more suitable for the young offender in a particular case (so-called 'reversed transfer', art. 36*bis* Youth Protection Act).

There are no special provisions in Belgian law for young adults who commit an offence after the age of 18. Young persons who commit an offence before the age of 18 but who appear before the youth court when they are adults can still be subjected to youth measures, which can be imposed and executed up until a maximum age of 20 years (art. 37, § 3 Youth Protection Act).[13]

9 See J. PUT AND M.ROM, "TOETSING VAN DE NIEUWE JEUGDBESCHERMINGSWET AAN HET INTERNATIONAALRECHTELIJK KADER", *PANOPTICON*2007, AFL. 6, 50 E.V.

10 NICC, *Onderzoek naar de beslissingen van jeugdrechters/jeugdrechtbanken in MOF-zaken*, research report, 2012, 46.

11 An exception exists for very serious crimes: then the young offender is tried by a jury court (*Hof van Assisen*) like adults. However, at least two out of three judges that preside this court should be specially trained in youth matters (art. 119 Judicial Code).

12 This is a special chamber within the Youth Court that consists of one judge trained in criminal matters and two judges trained in youth matters (art. 76, 78, 92 and 101 Judicial Code).

13 The Reform Act of 2006 provided for the possibility to prolong measures until the age of 23. However,

For behaviour that is not penalized by general criminal law the measures provided for in the Youth Protection Act, in principle, do not apply. The only exception is the appeal before the youth court against administrative sanctions.

Anti-social behaviour can under certain conditions be punished by means of municipal administrative sanctions. The Act concerning Municipal Administrative Sanctions is a general act that applies to adults and minors, but it also contains specific provisions for minors. Municipal administrative sanctions can only be imposed on young persons above the age of 14 (art. 14 Act concerning Municipal Administrative Sanctions). Administrative sanctions can consist of a fine (maximum 175 euros for minors) or, as an alternative for a fine, community service or mediation (art. 4 Act concerning Municipal Administrative Sanctions, *infra* nr. 18). Against a decision to impose an administrative sanction an appeal can be brought before the youth court (art. 36, 5° Youth Protection Act). The youth court can decide to quash or confirm the decision but can also replace the administrative sanction with one of the measures provided for in the Youth Protection Act. Thus, in this particular case it is possible to impose youth measures for behaviour that is not penalized by criminal law but that qualifies as 'nuisance' as defined by regional police regulations.

Also the Football Act provides for administrative sanctions (a.o. a football banning order) that can be imposed on minors in case of a breach of the rules of that act (art. 24 *quater* Football Act). For interventions under the Football Act involving minors, an appeal before the youth court is possible as well (art. 36, 6° Youth Protection Act).

Furthermore, it must be noted that anti-social behaviour and even criminal behaviour can also give occasion to involve youth welfare agencies since the grounds for intervention in the youth welfare system are defined very broad (*infra* nr. 47).

A.1.4. Are there specific procedural rules for young persons and how do they differ from those for adults? Are due process guarantees respected?

As a general rule, article 62 Child Protection Act determines that the general Criminal Proceedings Code applies unless the Child Protection Act explicitly provides for divergent procedural rules. The Child Protection Act contains a whole section with such rules, but it exceeds the purpose of this report to describe these provisions in detail. Some general remarks can be made.

The juvenile justice procedure is structured differently than the procedure for adults.

The first stage of the proceedings, before the case is brought before the youth court, perhaps differs the slightest from adult proceedings. There are no specific rules on the

this provision (and some other provisions, see *infra* nr. 20) has not yet entered into force. It is unclear if this provision will ever enter into force, especially given the transfer of competencies in the near future (*supra* nr. 3).

arrest or police custody (first 24-hour period of detention) of minors and regarding the investigation into the facts under the supervision of the public prosecutor. The minor has the right to consult a lawyer at the occasion of the first interrogation (art. 47*bis*, §1 Criminal Proceedings Code) and is assisted by a lawyer during every interrogation if he or she is in police custody (art. 2*bis*, § 2 Pre-trail Detention Act).

The first big difference is that in adult proceedings, as a general but more and more eroded rule, the case has to pass through an examining magistrate who supervises the investigation into the facts, before it can be send to the criminal court for judgment. In juvenile justice proceedings, this principle is reversed and the case will only be referred to the examining magistrate in exceptional circumstances (art. 49 Youth Protection Act). While in adult cases it is the *raadkamer*[14], an examining court, that decides on pre-trail detention, in juvenile justice cases the youth court has a general competency to impose provisional measures (*infra* nr. 19) combined with the authority to oversee an investigation into the personality and circumstances of the young person suspected of having committed an offence (art. 50 and 52 Youth Protection Act). This is one of many illustrations that the juvenile justice system places an emphasis more on the personality and underlying problems of the young offender than on the offences that he might have committed.

After the investigation, the public prosecutor has the monopoly to decide on prosecution[15] and to bring the case before the youth court for judgment, as opposed to adult cases where the victim also has a right to initiative (art. 47 Youth Protection Act).

During the judgment stage of the proceedings the same youth court is competent to render a final judgment in the case. Furthermore, the youth court is also responsible for the subsequent follow-up on the execution of the imposed measures, which can also result in a revision of the measures (see art. 60 Youth Protection Act). For adults, there is a special court that supervises the execution of sentences (*strafuitvoeringsrechtbank*).

The youth court has the obligation to hear cases involving minors aged 12 and above, before taking a (provisional) measure. Each time the minor appears before the youth court, he or she has to be assisted by a lawyer (art. 52*ter*Youth Protection Act). An appeal can be lodged with (the Youth Chamber of) the Court of Appeal against the judicial orders of the youth court (art. 58 Youth Protection Act).

As a result of the (at least partially) welfare oriented approach, the juvenile justice system is often criticised for setting aside legal safeguards in favour of the 'best interests and protection of the child'.[16]Although the different reforms of the original Youth Protection

14 After the investigation is closed and the case has been referred to court, the competent criminal court decides on the continuing of pre-trail detention before a final judgment has been rendered.

15 Note that in Belgium there is no obligation to prosecute but a principle of opportunity.

16 See e.g. C. VanDijk, E. Dumortier, and C. Eliaerts, "Survival of the Protection Model? Competing Goals in Belgian Juvenile Justice", in J. Junger-Tas and S. H. Decker (eds.), *International Handbook of Juvenile*

Act of 1965 managed to improve certain aspects, some issues remain unaddressed. Especially the 'preliminary stage' of the proceedings is often the target of criticism from a 'rights' point of view. Although the Child Protection Act since 2006 explicitly states that provisional measures should never be used with the aim of immediate sanctioning and can only be used with an investigatory or safeguarding purpose, research revealed that these measures are still used with the aim of inducing a '*short-sharp-shock*'.[17] This can be related to the considerable leeway the youth judge has when deciding on provisional measures (*infra* nr. 20-21). Furthermore, the fact that the same judge decides in the pre-trail and trail phase of the proceedings is considered to be at odds with the presumption of innocence and the right to an impartial judge.[18]

A.2. Please describe the sanctioning system regarding juvenile justice in your country.

A.2.1. Please give an overview on the sanctions/reactions on youth offending at the different levels of criminal proceedings.

The police acts under the authority of the public prosecutor and has no autonomous power to react to juvenile crime. However, in practice the police sometimes gives unofficial warnings or, for example, demands the young person to attend traffic courses.[19] In theory, police offers must send an official report to the public prosecutor for every offence and it is the public prosecutor who decides on further investigation, whether or not to prosecute and refer the case to court, to drop the charges or to opt for an alternative pathway.

Before the 2006 reform, there existed many diversionary practices involving community services, educational programs and mediation outside of the legal options available to the prosecutor. Research found that community service at the prosecutors level was not only used as an alternative for prosecution or judicially imposed measures, but also as an alternative for dismissal and thus had a net-widening effect.[20] In addition, these alternatives were not surrounded by sufficient legal safeguards, leaving a lot of discretion to prosecutors. At the occasion of the 2006 reform, the legislator decided to limit the powers of the prosecutors, and the options available on this level of the proceedings are now exhaustively listed in the Child Protection Act and include the following possibilities:

Justice, Springer, New York, 2008, 199-202 and 210-211.

17 NICC, *Onderzoek naar de beslissingen van jeugdrechters/jeugdrechtbanken in MOF-zaken*, research report, 2012, 137.

18 Decock, G. and Put, J. (eds.) *Jeugdsanctierecht gewikt en gewogen. Toetsing van beleid en praktijk aan de principes van het jeugdsanctierecht*, Gent, Larcier, 2012, 43-48.

19 J. Put, *Handboek Jeugdbeschermingsrecht*, Brugge, die Keure, 2010, 247-248.

20 C. VanDijk, E. Dumortier, and C. Eliaerts, "Survival of the Protection Model? Competing Goals in Belgian Juvenile Justice", in J. Junger-Tas and S. H. Decker (eds.), *International Handbook of Juvenile Justice*, Springer, New York, 2008, 195-199.

- Issuing a warning (art. 45ter Youth Protection Act)

- Reminding the young person of his legal obligations (herinneringaan de wet), which is sort of a verbal warning (art. 45ter in fine Youth Protection Act)

- Offering mediation, which is not a true diversionary practice in Belgian law since it does not prevent further prosecution (infra nr. 36)

In addition, the prosecutor can send a young person and/or his family to the competent youth welfare agencies if he considers it to be a case of 'symptom-delinquency' where there is another underlying problem that needs to be addressed.

Thus, the prosecutor does legally no longer have the possibility to impose community service, educational training, treatment or similar alternatives.

The options of the youth court are discussed below (*infra* nr. 19 *et seq*).

A.2.2. Which possibilities exist to divert a juvenile from a trial? (diversion structures/schemes, alternative authorities like special community councils which can impose certain measures)?

Aside from the options available to the public prosecutor mentioned above, there are no true diversion structures provided for by Belgian legislation. The only 'alternative' is the system of municipal administrative sanctions (*supra* nr. 10) that also applies to certain types of 'mixed offences' which are punishable by the general criminal law as well (e.g. vandalism). For these type of offences, the juvenile justice system and the system of municipal administrative sanctions overlap and a choice between the two of them has to be made by the public prosecutor (in every particular case or by means of a general agreement with the municipalities). When minors are involved, the municipal sanctioning officer must offer 'local' mediation in every case and an administrative sanctioncan only be imposed if mediation fails (art. 18 Act concerning Municipal Administrative Sanctions). The law does also provide for a procedure of 'parental involvement' where the parents can inform the official of their point of view and the educational measures they plan to impose on their child (art. 17 Act concerning Municipal Administrative Sanctions). It must be noted that the legislation on municipal administrative sanctions was changed recently[21] and is subject to a lot of criticism since it leaves a lot of discretion to the municipalities and is at odds with the principle of the separation of powers.[22] It has yet to be pointed out how the new legal framework will be implemented in practice by the

21 The new Act concerning Municipal Administrative Sanctions entered into force on 1 January 2014.

22 See e.g. D. Cops, J. Put, S. Pleysier, "De GAS-wetgeving als instrument voor de aanpak van overlast. Bedenkingen bij en suggesties voor een integraal en onderbouwd overlastbeleid", *Panopticon* 2012, afl. 6, 552-563.

municipalities[23] and whether its provisions will survive the scrutiny of the constitutional court[24].

A.2.3. What types of interventions can the competent court impose?

Provisional measures

During the investigatory stage of the proceedings, the public prosecutor refers the case to the youth court for an enquiry (executed by the social services) on the 'personality and the social circumstances' of the offender. The purpose of this investigation is to determine what is in 'the best interests' of the young person en which measures are suitable for his re-education and treatment. In principle, this investigation must be completed within six months. The public prosecutor then has two months to decide whether to refer the case to the youth court or to drop the prosecution (art. 52*bis*Youth Protection Act). There is however no sanction if this time limit is not respected.

For the duration needed for the investigation and pending a final judgment of the youth court, the public prosecutor can request the judge to impose provisional measures (art. 50 and 52 Youth Protection Act). The following measures are possible:

- Supervision by the social services.

- To accommodate the investigation into the personality of the young person the youth judge can combine this measure with community service (max. 30 hours).[25]

- Placement in a private institution or with a 'trustworthy' private individual with the aim of housing, treatment or education.

- This measure refers to placement in private welfare institutions where also 'children in worrying situations' are staying (*infra* nr. 30) or with foster care families (*infra* nr.45).

- Placement in a public institution with an open or closed regime.

- Here a distinction must be made between placement in a public institution of the communities or the federal detention centre. The latter is subject of a separate act (*infra*

23 Every municipality has to decide for itself for which behaviour and from what age municipal administrative sanctions will be imposed on their territory. The Act concerning the Municipal Administrative Sanctions only provides for a general framework ,and for now it is unclear what the procedure of 'local mediation' and 'parental involvement' will look like in practice.

24 Different appeals against the act are pending before the Constitutional Court.

25 The Court of Cassation in 1997 found that it was a breach of the presumption of innocence to impose measures that had the characteristics of a sanction in the investigatory stage of the proceedings (before the guilt of the young person has been determined by a judge). However, in 2003 it made an exception for measures that can be considered as 'measures of investigation', which is why art. 52 Youth Protection Act considers community service as such a measure. It is questioned whether this practice of 'renaming' this measure as a measure of investigation makes any difference in practice.

nr. 27). The former institutions are also accessible to 'children in worrying situations' (*infra* nr. 30).

If the young person is not placed in a private or public institution and is thus preserved in his everyday environment, the youth court has the possibility to add a various range of conditions, such as: school attendance, participation in an educational program[26], injunctions and/or house arrest, compliance with medical or pedagogical guidelines, participation in social, cultural or sports activities, etc.

The reform act of 2006 provided for several additional measures, in particular for young persons with psychological, substance-abuse or psychiatric problems, such as ambulant treatment by or a residential stay with health care service providers (psychologist, psychiatrists, services specialized in addiction treatment or sexual education). However, the entry into force of these provisions has been delayed several times (the current date of commencement is foreseen for 1 January 2016 at the latest). The youth court for now has to manage with the options described above.

Different provisional measures can be cumulated and may only be imposed 'for the shortest duration possible' and only if the purpose of the provisional measures cannot be achieved in any other way. However, there are no strict limitations imposed to the duration of provisional measures. The Youth Protection Act sets out a list of criteria that must be taken into account by the judge when deciding on provisional measures (art. 52 *juncto* art. 37, § 1 Youth Protection Act) including: the personality and maturity of the young person; the characteristics of his or her environment; the circumstances of the offence and the nature/extent of the damage inflicted; previous interventions; the security of the young person; public security; and the availability of treatment and/or educational programmes. As has been mentioned before (*supra* nr. 14), the purpose of provisional measures may not consist in immediate sanctioning or to exercise any form of pressure on the young person.

It must be noted that provisional measures can also be imposed if there are no sufficient indices of guilt of the young person. This condition introduced in the Youth Protection Act in 2006 was annulled by the constitutional court because it would result in a breach of the right to an independent judge if the judge had to rule on the presence of sufficient indices of guilt in this stage of the proceedings and later on the merits of the same case.[27]

26 E.g. social skills training, programs on coping with drugs or aggression, programs confronting young offenders with the consequences for victims of offences…

27 This judgment of the Constitutional court can be questioned from a legal safeguards point of view and one can wonder why the court decided this way, instead of finding it unconstitutional that the same judge intervenes in both the pre-trail and trail stage of the proceedings.

Final measures

Juvenile justice measures are called 'measures of care, preservation and education' (art. 37 Youth Protection Act). Such measures are neither retrospective nor intended as a proportional sanction for the offence. On the contrary, they are prospective, with the aim of social rehabilitation.

The youth court has considerable latitude in deciding which measures to impose. It can impose al the measures that are available during the investigatory stage of the proceedings and in addition can also:

- Give a simple reprimand.

- Impose intensive educational guidance, which means that the young person will receive individualised support by an educator.

- Impose participation in a so-called 'positive achievement'. These are mostly activities like 'uprooting journeys' (on foot or by bike) or a working stay during some months on a farm.

- Impose community service (up to 150 hours) as an autonomous measure, unlike community service in the first stage of the proceedings, where this is added to supervision by the social service.

If the young person is preserved in his everyday environment, the youth court can add the same conditions as in the investigatory stage of the proceedings, and, in addition, it can add 'payed labour' as a condition if the young person agrees, in which case a fixed sum per hour is set available for the reparation of the victim's damage.

Before the youth court might impose a measure underpinned by its discretionary powers, the Youth Protection Act requires that the judge extensively justifies his or her orders and judgments (art. 37, § 2quinquiesYouth Protection Act). Furthermore, the judge is required to give preference to ambulant measures over residential ones. A placement in a closed institution is possible only as a last resort and under strictly defined conditions (infra nr. 25). The youth court must take into account the same criteria as during the investigatory stage (art. 37, § 1 Youth Protection Act). Note that the measures imposed in the juvenile justice system are not necessarily imposed in proportion to the severity of the offence. The judge can take into account a lot of different criteria without any hierarchy. Thus, the offence is the occasion for imposing a measure but not necessarily the reason nor the measure for an intervention of the youth court. Of course, this general observation must be nuanced in light of the specific conditions for imposing far-reaching placement measures: these types of measures are in a certain way linked to the severity of the offence (infra nr. 25et seq).

The youth court determines the initial duration of the measure. For most measures there isno strict limitations imposed with regard to the maximum duration (community service

is an exception). Except for placement in a community institution (where a shorter term applies, *infra* nr.25), a yearly revision is mandatory for every measure that has not ended by that time (art. 60 Youth Protection Act). The youth court has extensive powers to adapt the measure to changes in the personality or circumstances of the young person and can withdraw, extend or change the measure. In principle, the measures end when the young person turns 18, but the measures can be prolonged until the age of 20 if the young person asks for it or in case of continuing misbehaviour or dangerous conduct (art. 37, § 3 Youth Protection Act). When the offence was committed after the young offender turned 16 it is possible to immediately impose measure until the age of 20 (of course, yearly revision is still required).

A.2.4. Which forms of liberty depriving sanctions are provided? What is the minimum and what is the maximum length for liberty depriving measures?

In general, the idea of detention as a last resort has a solid foundation in the Youth Protection Act. In addition to an order of preference where liberty depriving measures rank at the bottom and that the judge is required to respect, the legislator in 2006 tried to reduce the use of such interventions by introducing rather strict conditions for imposing them in the Youth Protection Act. Placement in a closed public institution is the only liberty depriving measure in the strict sense of the word. The length and the conditions for placement in a closed institution vary depending on the stage of the proceedings and the institution where the measure will be executed.

Placement in a closed section of an institution of the communities is the main liberty depriving measure, which the youth court can impose as a provisional and final measure.

With regard to placement in a closed section as a final measure, the Youth Protection Act requires that the young person should, in principle, be at least 14 years old and must fit in one of five categories defined by art. 37, §2 *quater* Youth Protection Act. These categories relate to the seriousness of the offence and the track record of the young offender with regard to previous juvenile justice measures. A young person between the age of 12 and 14 years old can also be placed in a closed section of a community institution, but only if he is considered 'exceptionally dangerous'.

If it concerns a provisional measure, it is less certain which conditions apply. As a result of a recent judgment of the Belgian Court of Cassation the conditions from art. 37, § 2quater cannot be applied in this stage of the proceedings because that would be contrary to the right to an impartial judge.[28] Article 52 quater only provides that the young person must exhibit behaviour that is dangerous for himself or for others and if there are serious reasons to fear that he or she will commit new serious offences, will flee, will temper with evidence or will conspire with others. The condition that there should be sufficient

28 Cass. 16 October 2012, nr. AR P.12.1584.N.

indices of guilt has been annulled (supra nr. 21).[29]

In the investigatory stage, placement in a closed section of an institution of the communities can be ordered for two consecutive periods of three months. After six months, the judge has to confirm the placement every month and each decision to uphold the measure should be motivated and based on exceptional circumstances concerning public safety or the personality of the young person (art. 52 quater Youth Protection Act). As a final measure, the youth court determines the initial duration. However, revision is mandatory every 6 months and the initial duration can only be prolonged in case of continuous misbehaviour or dangerous conduct (art. 37, § 2 Youth Protection Act). The young person must be released in any case when he or she turns twenty (supra nr. 23). Thus, apart from the age limits, there is no minimum or maximum duration for these measures.

The reform act of 2006 provided for an additional liberty depriving measure: placement in a closed psychiatric ward. As has been mentioned before (*supra* nr. 20), this measure has not yet entered into force.

A special form of deprivation of liberty is incarceration in a federal detention centre as a provisional measure. This measure was created to catch up with a shortage of places in the community institutions and for the execution of urgent measures imposed on young offenders who are suspected of having committed a very serious crime. This type of placement is regulated more strictly, is subject to more judicial control, is only available for boys[30], and has to be regarded as an exceptional measure. The young person must be 14 years old, he must have committed an offence as listed in the Provisional Detention Act, and the presence of sufficient indices of guilt is required. In addition, there must be exceptional circumstances concerning public safety that justify detention, and placement in a federal detention centre is only possible when there is no place in a community institution (art. 3 Provisional Detention Act). The measure must be confirmed within a period of five days for the first time and after that the measure can be extended for a period of one month twice (art. 5 Provisional Detention Act). After that, he has to be placed in an institution of the communities. Incarceration in a federal detention centre is a provisional measure and not a sanction (however, see *supra* nr 14).

It should be noted that a minor can also be placed in a (semi-)open section of an institution of the community. Although this is not considered to be a liberty depriving measure *sensustricto*, it is a measure that can have serious repercussions on the freedom of movement of a young offender (see for example, the possibility to put a young person in isolation). Less strict conditions apply: there is a minimum age of 12 years and the

29 Recently, the Court of Cassation (Cass. 16 July 2013, nr. AR P.13.1144.N) decided that there should be elements that point in the direction that the young person is involved in a serious attempt on someone's life or health. It is hard to imagine how this can be reconciled with the right to an impartial judge while the former legislative provision (sufficient serious indices of guilt) could not.

30 Thus, girls can only be placed in institutions of the community.

restrictions with regard to the seriousness of the offence are more lenient (art. 37, §2*quater* Youth Protection Act). It is remarkable that the legislator did not define what an 'open' or a 'closed' regime should entail. In general, the open sections have a less structured daily regime and rules for leaving the institution are more lenient. The same remarks as for the duration of placement in a closed section (*supra* nr. 25 *in fine*) can be made with regard to the duration of placement in an open section.

Furthermore, also placement in a private institution can have liberty-restricting aspects and elements that involve coercion (see *infra* nr. 30).

A.2.5. What types of residential and custodial institutions exist for juvenile criminal offenders?

Except for the federal detention centres, the residential institutions in the juvenile justice system are institutions that are shared with the child welfare system. Thus, juvenile offenders and children in a 'worrying' situation can end up in the same welfare-oriented institutions. A distinction has to be made between the public institutions of the communities and the private welfare institutions which are subsidized and recognized by the communities.

Deprivation of liberty is, legally speaking, exclusively reserved for the public institutions where a young person can be placed in an open, semi-open or closed regime. There are no separate places reserved for juvenile offenders and no distinction is made between pre-trail placement and convicted young offenders. As the main institution where liberty depriving measures are executed it can be distinguished from general prisons by the extensive educational guidance provided and other in-house support programs that focus on the rehabilitation of the young offenders. They can be distinguished from private institutions by their (additional) aim to protect society (especially the closed sections), special infrastructure, safety procedures and strict and uniform rules concerning the possibility to leave the institution. The rules can be found in the 'household' regulations of the community institutions.

The functioning of private institutions varies in respect of the structuring of daily routines and the degree of freedom of the young person to come and go as he or she pleases. There are private institutions that have a quasi-closed regime. A rather recent initiative is of certain private institutions is the start-up of so-called 'experimental gardens', which can be regarded as the organisation of closed residential care by private institutions with the aim of maximizing the reintegration of youngsters in society. If such a project is imposed it starts with a highly structured residential phase, gradually evolves into semi-residential care and after that ambulant care. The practice of these projects remains unclear.[31]

31 J. Put, "Plaats en voorwaarden van opsluiting in het jeugdsanctierecht", in G. Decock and J. Put (eds.) *Jeugdsanctierecht gewikt en gewogen. Toetsing van beleid en praktijk aan de principes van het jeugdsanctierecht*, Gent, Larcier, 2012, 106.

The federal detention centres are for now still institutions of the Federal Government (supra nr. 3). There are two federal detention centres. One serves as an institution where detention as a provisional (pre-trail) measure is executed. The other one is primarily reserved for young offenders who are transferred to the adult criminal system and that are condemned to serve a prison sentence. Since January 2013 also *primo delinquents* between the age of 18 and 24 that serve a prison sentence for the first time can be placed in this centre. The federal detention centres are prison-like institutions but cannot be placed on the same footing because of the pedagogical approach.

A.2.6. What does in practice happen with most juvenile offenders? Are they regularly subject to diversion schemes or to court trials? Do you have any reliable data about the diversionary and sentencing practice?

In Belgium, there is no coherent system of data collection on the interventions in the juvenile justice system. Belgian research has been lagging behind in this respect, and although many interesting research has been carried out it is hard to draw conclusions on general trends and evolutions because every study tends to use a different methodology (which makes comparison a hazardous enterprise).[32]

Complete and recent statistics on the interventions on the prosecutor level do not exist. In about 70% of the cases the charges are dropped and about a quarter of registered decisions entail a referral to the youth court.[33] There are numbers available on the referrals to mediation (*infra* nr. 42), but not on the use of other powers of the prosecutor (such as the warning).

Most recent research results on the interventions at the youth court level can be found in a self-report study of the National Institute of Criminalistics and Criminology (NICC) conducted in 2011.[34] The following results are available for the measures imposed by youth judges in the Flemish Community[35].

A majority of the registered measures entails an ambulant measure (57%). In the judgment stage this percentage is even higher: 76% of the measures are ambulant (as opposed to 41% in the investigatory stage). The imposition of conditions is most popular (33% of registered decisions). Conditions include, among others: community service (19%), participation in an educational program (18%), school attendance (15%), house arrest

32 See Christiaens, J., Dumortier, E. and Nuytiens, A., "Country report. Belgium" in F. Dünkel,J. Grzywa, P. Horsfield, I. Pruin (eds.), Juvenile Justice systems in Europe. Current Situation and Reform Developments, 2011, 103.

33 I. Detry, E. Goedseels and C. Vanneste, "Les chiffres des parquets de la jeunesse au grand jour", in F. Gazan, C. De Craim and E. Traets (eds.), *Jeugddelinquentie op zoeknaarpassendeantwoorden*, Antwerpen/Apeldoorn, Maklu, 2010, 41–65.

34 See NICC, *Onderzoek naar de beslissingen van jeugdrechters/jeugdrechtbanken in MOF-zaken*, research report, 2012, 181 p.

35 Similar research results are available for the French Community.

(12%), compliance with medical or pedagogical guidelines (10%). As an autonomous measure, community service is imposed only in a very limited number of cases (1,6% of registered measures). In general, community service represents 14% of registered decisions and the average duration is 30 hours.

12% of registered decisions entail placement in a private institution and 14% placement in an institution of the communities. 60% of the registered placements in an institution of the communities are placements in a closed section. This is remarkable given the fact that there are more open places than closed places available. This result might relate to the mixed population in the institutions of the community: youth judges might prefer placement in an open section for young persons in a 'worrying situations' which results in less available places in these sections for juvenile offenders. Placement in a federal detention centre represents 16% of provisional measures.

6% of registered decisions imposed no measure at all.

Although the number of placements seems to have declined when comparing to available data from 2001, it can still be noted that Belgian judges are known to apply the rules in the Youth Protection Act in a creative manner in order to circumvent the legal restrictions that were introduced in 2006 to establish liberty depriving measures as a last resort.

B. Restorative approach within juvenile justice[36]

B.1. Where do you see a restorative approach within the juvenile justice system (this questionnaire follows a process based definition of restorative justice)?

The restorative provisions of the Youth Protection Act are largely inspired by informal practices that had previously existed. In the Flemish Community, mediation for young offenders has been developing since 1994, carried out by not-for-profit organizations and very often supported by local judicial officials and/or by universities. Furthermore, a conferencing pilot-project was established in Flanders during 2000-2003, and between 2003 and 2006, the mediation services that participated in the project continued to apply conferencing with the support of judges who considered it to have a positive impact with regard to serious offending.

The legislator wanted to cement these practices and created a legal framework for the restorative offer with the reform act of 2006. One of the main characteristics of that act was that it clearly prioritized restorative and reparative options at all stages of the proceedings. Mediation and conferencing are now, at least in theory, considered to be the primary responses to youth crime. Generally, the aim is to assist the young offender to assume responsibility and to take the victim's rights more seriously (victims did not receive a lot of attention in previous legislative acts). This was and is considered to be a more appropriate and effective response to youth delinquency than imposing measures on young offenders.

On the **level of the prosecutor**, article 45*quater* of the Youth Protection Act determines that the public prosecutor must consider to refer to mediation in every case where there is an identified victim. Originally, the Youth Protection Act included two other conditions: that there were sufficient indications of guilt and that the offender did not deny the facts. However, those conditions were nullified by the Belgian constitutional court because they were deemed to be incompatible with the presumption of innocence.[36]Article 45*quater* must not be interpreted as an obligation to refer to mediation: the law does only provide for an obligation 'to consider a referral'. Thus, referral to mediation is not an automatism. If the public prosecutor for some reason does not deem it suitable to refer a case at hand to the mediation services this is still possible. However, when the prosecutor decides not to refer to mediation and refers the case to the youth court, he must explicitly state his reasons for non-referral in writing. If the public prosecutor neglects to do so, the referral to court is invalid. In practice this motivation is often a standard justification.

36 Constitutional Court 13 March 2008, nr. 43/2008.

It is important to note that a referral to mediation does, in principle, not prevent further prosecution. The possibility exists that the prosecutor refers to mediation and to the youth court at the same time. Mediation may resolve the conflict between the victim and the offender, but there might also be a public dimension of the offence that has to be addressed by the youth court. Thus, completion of mediation does not necessarily result in the definite and final closure of the case. However, in some districts the prosecutor will always wait for the outcome of mediation before deciding on further prosecution and will never offer mediation after a case has been referred to court.[37]

Article 37*bis* Youth Protection Act provides largely the same for the youth court level. In any stage of the proceedings the youth court can, under the same condition as the prosecutor, formulate an offer of mediation or conferencing[38] towards the young person. More, article 37 Youth Protection Act specifies that the youth court should consider a restorative offer before he considers the measures set out in that article. However, similar to the possibility of the prosecutor to decide in favour of further prosecution in spite of a restorative offer or agreement, a restorative offer or agreement does not prevent the youth court to impose additional measures.

Neither the youth court, nor the public prosecutor can impose mediation or conferencing on the young offender or the victim. Belgian law defines mediation and conferencing as a voluntary process. There is no obligation to participate and a restorative offer can always be refused.

In case a restorative offer is made, a letter of the prosecutor or transcript of the judgment is send to the parties to invite them to participate. The mediation or conferencing service receives a copy of the letter or transcript and invites the parties again should they not respond to the initial letter within eight days (art. 37*ter* and art. 45*quarter*, § 1 Youth Protection Act). The parties must also be informed that they have the right to consult a lawyer before accepting the offer and when an agreement is reached (article 37*bis*, § 4 and art. 45*quarter*, § 1 Youth Protection Act). However, the parties can also be assisted by a lawyer during the process of mediation or conferencing. The latter is not explicitly stated in the legislative provisions, but the constitutional court decided this way in 2008.[39]

If an agreement is reached within mediation or conferencing, it is sent to the prosecutor or youth court (depending on which stage the proceedings are in). Only the agreement is sent and not the proceedings, as these are considered to be confidential. All other documents or information revealed during mediation or conferencing is confidential and cannot be used in any further proceedings unless the parties agree otherwise. The prosecutor (art. 45*quater*, § 2 Youth Protection Act) /youth court (art. 37*quater*, § 1Youth Protection Act) must accept the agreement, unless it contains elements that are

37 Ferwerda, H. and van Leiden, I., *De schade hersteld?Een onderzoek naar herstelbemiddeling bij jeugdige delinquenten in Vlaanderen*, 2012, Bureau Beke, Arnhem, 28-29.

38 On the prosecutors level, only mediation is possible.

39 Constitutional Court 13 March 2008, nr. 50/2008.

contrary to public order. When an agreement is approved, the mediation service will monitor its execution and report back to the prosecutor or youth court (art. 45quater, § 3 and 37 *quinquies* Youth Protection Act). The Youth Protection Act further specifies that a properly executed agreement 'must be taken into account' without specifying what this should entail. The prosecutor can take the agreement into account when deciding on further prosecution. If he decides not to prosecute at this point in the proceedings the right to prosecute is dissolved. The youth court can take the agreement and its execution into account when deciding on the case if the agreement is executed before the judgment. Otherwise, the case can be re-opened before the court to impose less severe measures.

Where no agreement could be reached, judicial authorities and other persons are not permitted to use the course or results of the mediation process to the detriment of the young person (art. 45*quater*, § 4 and art. 37*quater*, § 2 Youth Protection Act).

Taken together, the procedural and substantive elaboration of the restorative processes in the Youth Protection Act results in the possibility of a 'parallel' settlement. Both pathways (the restorative and the 'classical' judicial) are functioning mutually independently. This was deemed to be the best way to safeguard the basic principles of restorative justice (confidentiality, voluntariness and neutrality), whilst at the same time preserving the fundamentals of both the judicial system (with its right to a fair trial and due process) and of the protection model (with its emphasis on welfare oriented interventions).

B.2. What are the types of restorative justice measures provided for juveniles (e.g. victim-offender mediation, family conferencing, circles)? Please also refer to their legal basis.

Two different types of restorative justice measures exist: mediation and conferencing. The legislative provisions do not clearly define the difference between those two restorative processes (see art. 37*bis*, § 2 versus § 3 Youth Protection Act). The main difference between mediation and conferencing seems to be that conferencing is considered to be more suitable for serious offences and is a broader process where more people are allowed to participate (such as relatives or other acquaintances of the offender and the victim). Where mediation seems to be directed mainly at restoration for the victim, conferencing is also directed at a reaction on behalf of society (which is why a police-officer is present).[40]

Also worth mentioning in the context of restorative justice is another innovation of the reform act of 2006: the written project, whereby a young person himself/herself proposes an action as a reaction to the offence, without any preliminary communication with the victim. This can be a valid alternative when mediation is not possible (e.g. because

40 L. Walgrave and N. Vettenburg, *Herstelgerichtgroepsoverleg*, Leuven, LannooCampus, 2006, 110.

the victim does not wish to participate or when there is no victim). The written project can include a.o. an apology, following treatment or restoring the damage caused by the offence and must be presented to the youth court (a written project cannot be validated by the public prosecutor). The Youth Protection Act also indicates that the youth court must give priority to the written project above any other measures, only mediation and conferencing enjoy higher status (art. 37, § 2, § 2*bis* and § 2*ter* Youth Protection Act).

B.3. Do these restorative measures play a role in juvenile justice (sentencing) practice?

Statistics on mediation in the Flemish Community reveal that there was an increase in the number of referrals from 2006 onwards, especially after the Reform Act of 2006 came into force.[41] Remarkably, from 2008 onwards there is a decrease in the number of referrals.[42] However, there was also a total decline in the numbers of prosecution.

Almost all referrals to mediation (96%) originate from prosecutors.[43] An initial analysis of the total number of cases at prosecutors' level show that 6% to 7% of the registered decisions entail an offer of mediation.In comparison, most of the registered decisions entail dropping charges (about 70%) and about a quarter entail a referral to the youth court.[44] Thus, at the prosecutors level mediation has a non-negligible role to fulfil. Very little referrals to mediation originate from the youth judges (3% of all referals to mediation). Also the number of referrals to conferencing seems rather low.[45] Three possible explanations are provided for this observation. First of all, the youth courttends to follow the point of view of the prosecutor. In cases where the prosecutor did not consider mediation feasible the youth court does not offer mediation either. A second reason is that the time that has passed since the offence and the appearance before court is considered too long for a meaningful and successful offer of mediation. In addition, not all judges are familiar with mediation.[46]

In 58% of the cases where an offer of mediation is made, the actual process of mediation is never started. In most cases (27%) this is because the victim does not want to participate. In 9 % the offender does not want to participate and in 21% of the cases there are other reasons (e.g. one of the parties cannot be contacted, there is already a settlement) why

41 1587 young persons referred to mediation in 2005 as opposed to 3485 in 2007.

42 In 2012, 3244 referrals were registered while in 2008 a peak of 4349 was registered.

43 H. Ferwerda and I. van Leiden, *De schade hersteld?Een onderzoek naar herstelbemiddeling bij jeugdige delinquenten in Vlaanderen*, 2012, Bureau Beke, Arnhem, 44.

44 I. Detry, E. Goedseels and C. Vanneste, «Les chiffres des parquets de la jeunesse au grand jour», in F. Gazan, C. De Craim and E. Traets (eds.), *Jeugddelinquentie op zoek naar passende antwoorden*, Antwerpen/ Apeldoorn, Maklu, 2010, 41–65.

45 1% of registered decisions from the youth courts (22 referrals out of 1877 registered decisions).

46 See NICC, *Onderzoek naar de beslissingen van jeugdrechters/jeugdrechtbanken in MOF-zaken*, research report, 2012, 164.

mediation does not start. In the 42% of the cases where mediation is started after het offer, about 30% results in a complete agreement. In only 5% of the cases the process stops before the agreement.[47] Surprisingly, the number of completed mediations tends to decrease after the implementation of the Reform Act of 2006. A possible explanation for is that the increased number of referrals reduces the capacity of the mediation services for intensive preparation and follow-up which results in less completed mediations.

Looking at the type of offences for which mediation is started, it can be observed that mediation is most common for offences like theft (32%), vandalism and arson (30%), but also for assault or battery (22%). Mediation seems less suitable for sexual offences (1%).[48]

In general, the aim of mediation is to repair the material and relational damage caused by the offence. Of all types of repair, financial repair is the most commonly agreed upon (37%), followed by an apology (25%). In 13% of the cases, mediation tends to be just about conversation and the exchange of information (e.g. the young offender answers the question of the victim). In other cases the offender makes certain promises (12%) or the outcome is the physical repair of the damage or the carrying out of chores by the young offender (7%).[49]

It should be noted that there are significant differences in how the restorative offer is implemented in the different regions and districts. The mediation services use different methods (some are more persistent in contacting potential participants than others), but also on the level of the prosecution there are very divergent practices.

Although the 'written project' was a promising new option in the Youth Protection Act, practice shows that it is almost never[50] used. From the beginning, the law was unclear about how this option should be implemented in practice. Research revealed juvenile justice actors (youth lawyers, social services and even youth judges) often do not know about the existence of the possibility to propose a 'written project'. The support for the written project is also lacking: there is no service responsible for the guidance necessary for formulating and executing the written project.[51]

47 H. Ferwerda and I. van Leiden, *De schade hersteld? Een onderzoek naar herstelbemiddeling bij jeugdige delinquenten in Vlaanderen*, 2012, Bureau Beke, Arnhem, 51.

48 H. Ferwerda and I. van Leiden, *De schade hersteld? Een onderzoek naar herstelbemiddeling bij jeugdige delinquenten in Vlaanderen*, 2012, Bureau Beke, Arnhem, 48-49.

49 H. Ferwerda and I. van Leiden, *De schade hersteld? Een onderzoek naar herstelbemiddeling bij jeugdige delinquenten in Vlaanderen*, 2012, Bureau Beke, Arnhem, 52-53.

50 4 out of 1877 registered decissions contained a written project. NICC, *Onderzoek naar de beslissingen van jeugdrechters/jeugdrechtbanken in MOF-zaken*, research report, 2012, 43-44.

51 NICC, *Onderzoek naar de beslissingen van jeugdrechters/jeugdrechtbanken in MOF-zaken*, research report, 2012, 165.

B.4. What are the main actors involved in delivering restorative justice measures (public institutions, NGOs…). Who bears for the costs of restorative justice measures?

Since the execution of juvenile justice measures is a responsibility of the communities, there are different regulations in the Flemish and French Community. In the Flemish Community, mediation and conferencing is carried out by private 'services for restorative and constructive options' (*HCA-diensten*). These services do not only offer mediation and conferencing but are also responsible for the execution of certain measures imposed by the youth judge: community service and educational programs. In every legal district a service for restorative and constructive options is available. These services are recognized and subsidized by the Flemish government in accordance with the rules that apply to all private institutions and services in the youth welfare and justice sector. Thus, it is the government who bears the cost of the restorative justice measures.

C. Foster care within the juvenile justice system

C.1. Does foster care play any role in your juvenile justice system?

See *infra*.

C.2. Under which conditions can foster care be imposed within the juvenile justice system (at pre- or post-sentencing level or in case of diversion?) Can foster care be imposed as an alternative to custody or pre-trial/ police detention? If so please describe the regulations for foster care (length, rights of the children/the foster carers etc.) If there are possibilities in law, how are they used in practice?

Foster care is available as a juvenile justice measure and as a youth care measure in the general youth welfare system. It is the public prosecutor who decides whether to qualify a case as a juvenile justice case or a child welfare case.

Foster care as a juvenile justice measure

One of the measures that can be imposed by the youth court is placement in a private institution or with a 'trustworthy' private individual with the aim of housing, treatment or education, which also includes placement in a foster family. This measure can be imposed as a provisional measure but also as a final measure (*supra* nr. 20and 22). Only a judge can impose these measures, since it is a far-reaching measure that takes the young person out of his everyday environment. As for all placement measures, the young person should be at least 12 years old. For children below that age, a foster care placement is only possible in the child welfare system (*infra* nr. 47). There are no other special restrictions for imposing this measure: foster care can be imposed for all offences that fall within the scope of the Youth Protection Act. Of course the general provisions for imposing measures in the investigatory or judgment stage apply. Since it is a placement measure and not an ambulant one, the judgment that entails the decision to place a child in foster care must provide for a special justification with regard to the preferential treatment of restorative and ambulant measures (art. 37, § 2*quinquies*).

In practice, foster care is a very exceptional measure within the juvenile justice system.

For the period covered[52] by the research, the NICC registered in the Flemish Community only 2 provisional decisions (0,42% of all provisional measures) and 0 final judgments that placed the child in foster care.[53] Results in the French Community were slightly higher: 9 registered provisional decisions (1,06% of all provisional measures) and 1 final judgment (0,34% of all final measures) imposed a foster placement upon the young offender and his or her family.[54] A possible explanation for these low numbers (as put forward by the youth judges that participated in the research) is first of all, that there is a general shortage in places in the private residential care sector. Foster care placements have risen with 62% between 1998 and 2011 and the demand for foster families exceeds their availability.[55] In addition, the services responsible are less accessible to juvenile offenders. These measures are perhaps not considered as a suitable response to delinquent behaviour and the private foster care and residential care services, notwithstanding a few exceptions, consider themselves ill-equipped to handle these type of young persons.[56] Placement in foster care and, in general, in private residential institutions is considered more to be a purely welfare-oriented intervention and is therefore more commonly imposed as a child welfare measure than as a juvenile justice measure.

Foster care in the general welfare system

The organisation and regulation of foster care is a competency of the communities. As a result, there are no uniform rules for the whole of Belgium. In the Flemish Community, foster care is part of the youth welfare system. One of the basic assumptions of the Flemish youth welfare system is the precedence of voluntary care over compulsory care. In first instance, youth welfare authorities must try to receive the cooperation of the parents and the child itself if he or she more than 12 years old[57] (art. 6 Integral Youth Care Decree). Only if the required consent is absent (and after a referral from the child welfare authorities) or in case of urgency, the public prosecutor can bring the case before the youth court to impose child welfare measures (art. 47 Integral Youth Care Decree). The intervention ground is the presence of a 'worrying situation' which is a situation in which the development of a minor is threatened because his or her psychological, physical or sexual integrity or that of one or more members of his or her family is affected or because his affective, moral, intellectual or social development opportunities suffer, which makes it a social necessity to offer youth care and assistance (art. 2, § 1, 54° Integral Youth Care Decree).

52 From 20 October 2011 until 20 December 2011.

53 NICC, *Onderzoek naar de beslissingen van jeugdrechters/jeugdrechtbanken in MOF-zaken*, research report, 2012, 50.

54 NICC, *Onderzoek naar de beslissingen van jeugdrechters/jeugdrechtbanken in MOF-zaken*, research report, 2012, 56.

55 Registration report foster care 2011, www.pleegzorgvlaanderen.be.

56 NICC, *Onderzoek naar de beslissingen van jeugdrechters/jeugdrechtbanken in MOF-zaken*, research report, 2012, 154 and 167.

57 Younger children must be heard by the child welfare authorities and their 'consent' must be taken into account depending on their maturity.

Foster care is one of the residential measures that can be imposed or agreed upon in the child welfare system. As from 1 March 2014, foster placement will be the preferential compulsory residential measure in the Flemish child welfare system: the youth court must explain why it did not impose foster care if the court places a young person in a private or public residential institution (art. 48, § 1 Integral Youth Care Decree).

The length of foster care is, in case of voluntary foster care, determined by child welfare authorities in cooperation with the parents and in case of compulsory care the duration is determined by the youth court. When the youth court imposes foster care, the judgment of the court can cover a renewable period of maximum three years (art. 48, § 1, 10° Integral Youth Care Decree).[58] In principle, foster care is temporary and the ultimate aim is always the return of the child to his or her legal parents. At the latest, 'official' foster care ends when the child turns 18 years old (art. 52 Integral Youth Care Decree), but it can be continued on a voluntary basis until the age of 21 (art. 36, § 2 Special Youth Care Decree).

The organisation of foster care

The organisation of foster care has been recently reformed. There is 1 foster care service in every province in the Flemish Community (art. 8 Foster Care Decree). Foster Care Services are private agencies recognized and subsidized by the Flemish Community. They are responsible for: the recruitment, screening and orientation of foster families; matching the needs of the child to the abilities of a candidate foster family; the support of foster care families and children; monitoring the placement; providing appropriate aftercare… (art. 7 Foster Care Decree).

Different types of foster care are available: placement in a foster family can be continuous or limited to short periods of time with an alternate stay in the foster family and with the legal parents; foster care can include treatment of the foster child; a foster family can be part of the familial or social network of the child or not… For some types of foster care, the foster care services are directly accessible to families in need of assistance and for other (more intrusive) types of foster care, families will have to go through the youth welfare procedure. Foster families are volunteers. Candidate foster-carers are thoroughly screened and trained by foster care services on their ability to take care of a foster child (art. 14-15 Foster Care Decree). Foster families receive a daily allowance for the expenses of the foster child (art. 16 Foster Care Decree).

Unless a judge decides otherwise, the legal parents keep exercising the rights that are connected to their parental responsibility. They have a right to information, to contact with their child, support, participation in important decisions and consent in medical

58 As opposed to foster care as a juvenile justice measure, where a yearly revision is required (*supra* nr. 23).

interventions. Foster parents only have material custody of the child and in this respect can make the ordinary daily decisions that are required. The services for foster care and social services mediate when balancing parental rights and the implications of a foster placement becomes difficult.[59] The rights of children in foster families are covered by the Decree concerning the Legal Position of Minors in Integral Youth Care of 2004 which applies to all care providers (institutions, services and individuals) within the child welfare system. The Decree provides for rights such as the right to participation, privacy, contact with parents, pocket money, complaint…

C.3. Does your system know any other alternatives to custody like alternative care in case of pre-trial detention (e.g. in closed juvenile welfare institutions instead of prisons) or in case of juveniles sentenced to youth prison or comparable forms of custody? If there are possibilities in law, how are they used in practice?

As has been explained *supra* nr. 30, there are strictly speaking no separate institutions for juvenile offenders in Belgium except for the federal detention centres. The measures that can be imposed by the youth court in juvenile justice cases and child welfare cases are very similar (but not identical). In general, private institutions are used more often for placement in child welfare cases and not so much for juvenile justice cases. The institutions of the Flemish Community are more often used for the execution of juvenile justice measures: about 63% of young people staying in such institutions are there because of juvenile justice measures.[60]

59 M. Berghmans and A. Van Looveren, "Pleegkinderen, twee paar ouders? Juridisch kader van de relaties binnen pleegzorg", in J. Vanderfaeille, F. Van Holen and F. Vanschoonlandt(eds.), *Op weg met pleegzorg: kansen en risico's*, Leuven, Acco, 2012, 96.

60 Answer of the Flemish Minister for Welfare, Public Health and Family (J. Vandeurzen) to parliamentary question nr. 270, 16 February 2012 from K. Schryvers, www.vlaamsparlement.be. Of course, there are differences with regard to placement in an open or closed section and placement of boys and girls.

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European Project 'Alternatives to Custody for Young Offenders - Developing Intensive and Remand Fostering Programmes'

JUST/2011-2012/DAP/AG/3054

With financial support from the Daphne III Programme of the European Union