DIGIRIGHTS PROJECT

Belgian Policy Brief

Digitalisation and the rights of the defence in Belgium: impact assessment and recommendations

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Table of Contents

1. INTRODUCTION 2
2. RIGHT TO BE PRESENT 3
2.1. CURRENT LEGISLATION 3
2.2. NATIONAL STUDY FINDINGS 4
2.3. PROPOSED RECOMMENDATIONS 5
3. RIGHT TO LEGAL ASSISTANCE 8
3.1. CURRENT LEGISLATION 8
3.2. NATIONAL STUDY FINDINGS 9
3.3. PROPOSED RECOMMENDATIONS 9
4. RIGHT TO TRANSLATION 10
4.1. CURRENT LEGISLATION 10
4.2. NATIONAL STUDY FINDINGS 10
4.3. PROPOSED RECOMMENDATIONS 11
5. RIGHT TO ACCESS CASE MATERIAL 12
5.1. CURRENT LEGISLATION 12
5.2. NATIONAL STUDY FINDINGS 12
5.3. PROPOSED RECOMMENDATIONS 12
6. CONCLUSION 13

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1. Introduction

This policy brief presents the findings and recommendations devised by the KU Leuven DigiRights[1] Project Members, in their capacity as the Belgian National Team. The information presented herein is drawn from the legal and empirical research carried out by KU Leuven as a part of the Belgian national study. It joins the comparative assessment(s) collectively undertaken by the other Project partners, including those from Croatia (the University of Zagreb), Estonia (the University of Tartu), Germany (the University of Göttingen), Hungary (the Hungarian Helsinki Committee) and Italy (the University of Genoa), alongside the wider supranational assessment undertaken by the University of Luxembourg.

As with the DigiRights Project itself—which has sought to evaluate how technology can implement the effective application of the rights of the defence during criminal proceedings (whilst still safeguarding those same rights)—this brief focuses on the rights most likely to be exercised "digitally". That is: the right to interpretation, the right of access to the case file, the right to a lawyer, and the right to be present at the trial.

Accordingly, for each of the rights covered, this brief will provide a clear and concise overview of three key aspects, namely: first, the current state of the relevant Belgian legislation; secondly, an analysis of the findings of the Belgian national study, with a particular emphasis on the empirical research, and thirdly, the DigiRights Project Proposals,[2] as applied to the circumstances of Belgium. The latter aim to improve both the implementation and effectiveness of the digital application of the aforementioned defence rights. Finally, for further detail and analysis of the information presented here, reference is made to the Belgian National Report.[3]

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[1] DigiRights (**Digi**talisation of Defence **Rights** in Criminal Proceedings) is a consortium project of seven partner universities funded by the European Commission's Justice Programme (JUST) (2021–2027) (Project No. 101056667).

The partner universities and organisations are KU Leuven (Belgium), Tartu Ülikool (Estonia), Magyar Helsinki Bizottság (Hungary), Universität Göttingen (Germany), University of Genoa (Italy), Sveučilišta u Zagrebu (Zagreb), Université du Luxembourg (Luxembourg). With the exception of Luxembourg, who has been conducting the supranational European study, each partner has been responsible for carrying out the legal and empirical study of their respective national jurisdiction.

For more on the DigiRights Project, see: www.digirights.net.

[2] Please note that the DigiRights Project proposals distinguish between different procedural moments, being: (a) interrogation; (b) pre-trial hearing—(i) *habeas corpus* hearing, and (ii) non-*habeas corpus* hearing (both evidentiary and non-evidentiary); (c) trial hearing; and (iv) appeal hearing.

Within these procedural moments, distinction is also made depending on the detention status of the accused.

[3] The Belgian National Report can be found on the DigiRights website. Reference is also made to the forthcoming book chapter on the digitalisation of defence rights in Belgium, which will be featured in: A. Beazley, A. Mosna and M. Panzavolta (eds.), *Digitalisation, Defence Rights and Criminal Proceedings* (Routledge).

2. Right to be present

2.1. Current legislation

Until 2024 (including during the period of the COVID-19 pandemic), remote or digital appearance during criminal proceedings was only possible for vulnerable witnesses,[4] or suspects and witnesses abroad.[5] The Laws of 25 April 2024[6] and 15 May 2024[7] changed this *status quo*: these introduced into Belgium, for the first time, a legal basis for the use of videoconference[8] in legal proceedings (both criminal and civil). The Laws of 2024 introduced into the Code of Criminal Procedural ("CCP") the new Title VI*bis* (Articles 556–564) which regulate the circumstances and cases in which a procedural moment may take place with the use of videoconference.

Article 560 of the CCP regulates the cases in which a hearing may take place digitally (whether partially or fully). There are three scenarios by which this may occur. First, under Art. 560 §1, an *ex officio* initiative is taken by the courts to invite, *inter alia*, the accused to appear remotely.[9] This invitation must only be made where (a) the use of videoconferencing is compatible with the particular circumstances[10] of the case, and (b) the guarantees to be met by the videoconferencing, as outlined in Art. 558[11]), are met. This invitation must also be accepted by the accused.

The second scenario is found in Art. 560 §2: this is where a request to appear digitally is made by the person themselves. The application must be made to the court before which the person is scheduled to appear, and the court may grant the request if they consider that the same cumulative conditions, as given in §1 (see *supra*) are met, namely that the use of

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[4] Cf. Art. 91, Code of Criminal Procedure ("CCP"), L. 28 November 2000, M.B. 17.III.2001; Art. 190*bis* CCP, L. 5 May 2019, M.B. 24.V.2019.

[5] Cf. Arts. 112, 112*bis*, 112*ter*, 211, and 298 CCP, L. 2 August 2002, M.B. 12.IX.2002.

[6] Law of 25 April 2024 on provisions relating to the digitalisation of justice and various provisions II*bis*, M.B. 28.V.2024. This entered into force on 1 September 2024.

[7] Law of 15 May 2024 on the organisation of hearings by videoconference in the context of legal proceedings, M.B. 24.VI.2024. This entered into force on 7 June 2024.

[8] The term "videoconference" is defined by (the new) Art. 556 of the CCP as 'any direct audiovisual connection, in real time, for the purpose of ensuring of multidirectional and simultaneous communication of image and sound and a visual, auditory and verbal interaction between several geographically distant persons or group of persons.'

[9] As outlined in Art. 560, remote appearance is possible in the following, specified procedural moments: the first hearing of the investigative courts, the introductory hearing, the preliminary hearing, the hearing at which only a decision is made on the civil interests, or for the pronouncement of the judgment.

[10] The "particular circumstances of the case" ask that the court account for a number of specific parameters, including, *inter alia*, the duration and stage of the proceedings, the complexity of the case, the assistance of a lawyer, and the physical and mental capacity of the person who is to be heard.

[11] Article 558 states that the organisation and conduct of a hearing by videoconference ensure, so far as possible, the same rights and obligations as those enjoyed 'in the context of a hearing in which no one appears by videoconference'. Concretely, this means that the organisation and conduct of the hearing by videoconference should ensure that those appearing and participating in the hearing are able, *inter alia*, to participate effectively, by following the proceedings in full, expressing themselves, and being seen and heard without technical impediment.

videoconferencing is compatible with the particular circumstances of the case, and that the guarantees outlined in Art. 558 are also fulfilled.

The third scenario, found in Art. 560 §3 concerns the *ex officio* decision by the court to use videoconference, without the consent of the person(s) concerned. This is the effective prohibition of physical appearance (only) if one of two specified grounds are met: (a) there is an epidemic emergency, or (b) there is a serious and concrete risk to public security which prevents the person concerned from being present at the hearing or, if the person is detained, from being guaranteed safe transport to the courtroom. In addition, the aforementioned cumulative conditions—compatibility with the particular circumstances, and the guarantees in Art. 558—must also be met.

A sensitive point of the Laws of 2024 concerns the existence of legal remedies. Article 560 §8 of the CCP does include some: it provides, for example, suggestions for redress should the guarantees in Art. 558 no longer be met. If this occurs during the hearing, the court must order the suspension of the hearing until these conditions are again met, and/or, where appropriate, the continuation of the proceedings on another date (either again by videoconference or in person). Meanwhile, only the third scenario—the prohibition on physical appearance, may be subject to appeal.[12] Such an appeal, however, is not an ordinary appeal: rather, as given in Art. 560 § 3, the appeal must be made to the President or First President of the court that imposed the injunction against physical appearance. The decision by the (First) President can eventually also be challenged before the Court of Cassation.

2.2. National study findings

The Belgian empirical study for the DigiRights Project took place over an eight-month period between 2023–2024; this was before the Laws of 2024 were entered into force. Accordingly, the practitioners interviewed had not yet had experience of (either partial or complete) videoconference hearings conducted under the new legislative regime. That said, some of those interviewed had some—albeit limited—experience of accused's remote appearance during the pandemic. Those interviewed were generally sceptical about organising hearings via videoconference. Their main reason against doing so was the reduced interaction and non-verbal communication which occurs when one or more persons participates digitally. The judges interviewed, in particular, indicated that these aspects are important for their judgment(s).[13]

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[12] This distinction is based on reasoning found in the case law of the Court of Cassation, which defines the decisions to use videoconference technology as measures of "internal" nature which are excluded from appeal or challenge. See, for example, Cass. (1st Chamber) 10 February 2023, AR C.22.0213.N.

[13] Cf. Transcript J-1, Transcript J-6, Transcript J-8. Some of the judges interviewed spoke of believing an accused's facial expressions, body language, dress and even smell can impact their perception of that person and their apparent (dis)honesty: Transcript J-4, Transcript J-7.

See also: M. Panzavolta, 'A Defendant's Right to Videoconference? Looking at Online Participation in Criminal Trials in a Different Light' (2024) 29 Tilburg L.R. 69, DOI: 10.5334/tilr.392.

The defence lawyers interviewed, meanwhile, expression notable dissatisfaction at the idea of defending their client(s) "online": many of the lawyers spoke of their believe in the added value of their own physical presence at the hearing—they consider personal interaction and eye contact with the judge to be crucial to the proper fulfilment of their role.[14] Together, all of the practitioners spoken with agreed that physical hearings should remain the rule. Nonetheless: they recognised the added value of digital hearings in specific situations, particularly those of *force majeure*—they agreed that in such circumstances, it was important to find means to increase the participation of the accused by allowing the use of videoconference. Their main proviso to this was that technical and practical problems with such technological "adaptation" must be mitigated: in particular, the effective participation of, *inter alia*, the accused must be supported by sufficient technical equipment—cameras, screens, microphones, speakers, etc.—and internet connection.

2.3. Proposed recommendations

The DigiRights Project's default recommendation for the right to be present is that the accused (suspect, defendant, etc.) should be present in person, alongside their lawyer. This *prima facie* accords with the (new) legislative status quo in Belgium, in which Art. 556 §2 of the CCP expressly notes that the 'provisions of this title [Title VIbis] do not affect the general principle that court hearings are held physically in court buildings.' Derogation from this general principle is only possible if one of the three scenarios outlined in Art. 560 (and above, supra) are implemented.

The exceptions to the default recommendation by the DigiRights Project are four-fold: exception to the default norm of physical participation should be made in favour of digital participation where one of four alternate conditions is met: first, there are circumstances of *force majeure*[15]; secondly, there is judicial imposition because of either a (a) serious threat to public safety (which must be duly documented and not simply presumed), or (b) need for witness protection; thirdly, there is a judicial decision with the accused's consent, or lastly, there is a request by a suspect or accused which is approved by the court. For the latter three exceptions, three conditions must be met: (i) all persons participating remotely (i.e. via videoconference, outside of the courtroom) can do so from a secure location; (ii) there are sufficient measures to ensure (1) those persons are not subject to improper pressure, (2) there is no external interference with the procedural moment, and (3) the confidentiality of the accused's exchanges with their lawyer are protected; and (iii) for *habeas corpus* hearings, the lawyer and client are physically together (albeit, remote from the courtroom). When compared to the Belgian legislation, we find that some of these exceptions are covered by Title VI*bis*—in particular, by the conditions each of the scenarios outlined in Art. 560 (see *supra*) must meet. That said, the elements of the DigiRights Project conditions, as elucidated in this paragraph, are absent from the current legislative framework in Belgium. These conditions, which largely seek to guarantee the practical implementation of the right to be present, would be welcome additions in Belgium, where the current law is silent on such considerations.

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[14] Cf. Transcript L-2, Transcript L-4, Transcript L-6, Transcript L-7.
[15] Note: for first *habaes corpus* hearings, this is the only exception.

Beyond that discussed in relation to the DigiRights Projects recommendations, the Belgian national study identified further *lacunae* in the current legal framework which ought to be addressed. Most notably is the absent of clear legal remedies for all "problematic" circumstances, not just, for example, the decision to impose videoconferencing (the third scenario under Art. 560). The distinction made by the Belgian legislature between the decision to use videoconference technology with permission (Art. 560 §§ 1–2) and the decision to prohibit physical presence (Art. 560 §3) is difficult to accept in full, particularly when the opinion of the Council of State is considered. The Council had advised that the first "category" of decisions (i.e. those made with permission) were nevertheless (still) judgments which touch upon a legal issue, and as such, ought to be guaranteed an appeal.[16] Indeed, to recognise that participation by videoconference may affect the right to a fair trial is itself sufficient to ensure an effective remedy within the meaning of Art. 13 of the ECHR.[17] As the legal framework now stands, there is no possibility for those who either consent to, or themselves request, a decision to appear by videoconference. Likewise: whether the person did, in fact, consent can also not be challenged, even though this too touches on a legal point (i.e. a lack of interest). Without a clear legal remedy against decisions taken under Art. 560 §1 or §2, how can a person dispute that they gave their free and deliberate consent to use videoconferencing?

Additionally, the suggestion is proffered here that the rules and conditions for the digital participation of the accused be clearly distinguished from those of the other parties. This is because the (physical or digital) presence of the accused concerns a different set of interests and of rights than those of other parties (e.g. prosecutors, victims). Presently, there is no such distinction in the Belgian legislation which, in speaking of "persons"[18] does not seem to differentiate clearly between the different participants.

In contrast to the above, the digital participation of witnesses (who are not parties to the case) are more readily distinguished in Belgium. Article 560 §7 CCP is specific to the participation of witnesses and experts by videoconference; this states that 'a witness or expert may be heard under the conditions referred to in [Art. 560 §§ 1–3] where the appearance by videoconference meets the conditions referred to for the closed-door proceedings referred to in Article 561 §1.' Importantly, the additional conditions given in Art. 561 §1 include a requirement that confirmation is made to the court that no other person, other than the persons named and authorised by the judge to be present remotely, via videoconference, is present at the (remote) location. This is of particular note, given the recommendation(s) of the DigiRights Project that such an assurance (also) be provided for the accused participating remotely, via videoconference.

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[16] Cf. Counseil d'état, avis sur avant-projet de loi 'portant organisation des audiences par vidéoconférence dans le cadres des procédures judiciaires', 24 mars 2023, no. 72.861/1-2, https://www.raadvst-consetat.be/dbx/avis/72861.pdf#search=72.861.

[17] For more on this point—and this discussion generally, see: M. Panzavolta and R. Van de Gaer, 'De digitalisering van justitie in strafzaken in België: Een blik op digitale dossiers en videoconferenties' in *Recht in beweging. 32ste VRG-Alumnidag 2025* (Gompel & Svacina 2025) 99–126.

[18] Article 557 of the CCP, for example, refers to the purpose of the use of videoconferencing in criminal proceedings to be to allow 'one or more persons…' The term "persons" is not defined further.

Furthermore: while there may be concerns that the digital participation of the accused (and to some extent, that of the other parties) could pose a threat to the fairness of the trial, and to the rights of defence, the findings of the DigiRights Project indicate that the digital participation of witnesses could instead enhance the (especially, witness examination) rights of the defence of the accused (and the other parties), particularly in jurisdictions—like Belgium—where the large majority of decisions (and convictions)[19] are taken on the basis of the written transcripts of the interviews conducted during the (secret) investigative stage (by the police or the investigating judge).

A final point under this part concerns videoconferencing in judicial cooperation in criminal matters. With regard to the request—and granting of—videoconferencing in cross-border cases, the insertion of the aforementioned new rules in the CCP, which expressly introduce the possibility of videoconferencing, should remove all principled objections to the recourse of videoconferencing in cross-border criminal cases. The latter is an objection that was previously and occasionally raised on the ground that videoconferencing in Belgium was impermissible because it would breach the principle of legality.[20] It is now clear that videoconferencing in criminal matters is not in violation of the fundamental right to a fair trial, at least under certain conditions. The KU Leuven Team, on behalf of the DigiRights Project, suggests that Belgium clarifies in a circular letter (*omzendbrief/circulaire*) that new legal framework includes the possibility to have recourse to videoconferencing in cross-border cases.

Such a circular letter should first address the cases of videoconferencing falling within the scope of Regulation 2023/2844:[21] although the Regulation is directly applicable, some executing clarifications are still necessary in order to ensure that the Regulation be effectively applied in practice. Secondly, the circular letter should clarify to what extent requests from foreign countries to conduct interviews by videoconference (in the context of passive requests) should be allowed.[22] In this respect, the recommendation herein is that the conditions for allowing videoconferencing in criminal cases should not necessarily mirror those provided for in (internal) national cases. Given that moving between countries remain cumbersome for accused individuals, and given that the forced transfer of the accused (on the basis for instance of a surrender upon execution of a European Arrest Warrant) would be significantly more intrusive, it is advisable that the conditions for allowing participation via videoconference in the context of judicial cooperation (and particularly within the framework of the European Investigation Order) be somewhat looser than those applicable to purely internal cases: the

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[19] With exception of cases heard by the Court of Assize (jury system), the hearing of witnesses in court is a rather exceptional circumstance, as was also confirmed by the stakeholders in the study.

[20] See, for instance, the arguments raised by the Belgian authority in the application for a preliminary ruling in the *Bissilli* case: C-325/24, § 10, https://curia.europa.eu/juris/showPdf.jsf?text=videoconference&docid=288545&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=621277.

[21] Regulation (EU) 2023/2844 of the European Parliament and of the Council of 13 December 2023 on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation.

[22] For instance on the basis of Article 33 Law of 22 May 2017 on the implementation of the European Investigation Order.

law could allow for digital participation whenever the accused – or even the witness – is located in a foreign country, and as long as there are no compelling reasons to require physical presence.

3. Right to legal assistance

3.1. Current legislation

As with the right to be present, prior to the pandemic, there was little in the Belgian legal framework for the remote legal assistance by defence counsel. The exception was Art. 2*bis* of the Law of 20 July 1990 (the "pre-trial custody act"), which provides for the possibility for remote legal assistance—via telephone or videoconference—where there is a notable geographical distance between the accused and their lawyer.[23] The conditions here are that the lawyer must request their remote assistance, and their client must consent.

Now, due again to the Laws of 2014 discussed above, there is a greater possibility for remote legal assistance in Belgium. Article 560 §9 and Art. 38*quater* of the pre-trial custody act have introduced the possibility for the lawyer to assist their client remotely during investigatory hearings or the trial itself[24]—where their client (the accused) participates via videoconference. Article 560 §9 provides that if the person concerned is assisted by a lawyer, and they themselves (the accused) are appearing remotely (i.e. participating via videoconference) the lawyer may choose to (a) sit in the same room as the members of the court, or (b) sit in the same place as their client (and so also appear by videoconference); or (c) appear by videoconference, but from a different location to the client, one that is deemed appropriate by the court.

Aside from the above, no changes were made by the Law of 25 April 2014 to the basic law on the communication with one's defence counsel, particularly for detained persons. As it stands, Art. 68 § 1 of the Law on Prisons,[25] for example, (still) does not provide for the possibility for defence counsel and their client to communicate via videoconference. Likewise, as yet unspecified (or perhaps not yet clarified) is how, precisely, defence counsel and their client(s) are to communicate when physically separated, because of the remote appearance of one or both of them. Also unclear is how the confidentiality of this communicated is to be guaranteed.

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[23] Article 2*bis* of the Law of 20 July 1990 (M.B. 14.VIII.1990) was—perhaps unsurprisingly—inserted in 2017 (Law of 3 October 2017). It is a direct implementation of Art. 3 §5 of the Directive 2013/48/EU on the right to legal assistance.

[24] Note that as per Art. 38*quater*, the Arts. 556–562 and 565–567 also apply to the circumstances of pre-trial or preventive detention covered by the Law of 20 July 1990. See: Law of 25 April 2024 (n 6).

[25] See: Loi de principes de 12 janvier 2005 [concernant l'administration pénitentiare ainsi que le statut juridique des détenus] M.B. 1.II.2005.

3.2. National study findings

As discussed above, the defence lawyers interviewed were notably dissatisfied at the idea of providing legal assistance remotely. So convinced of the added value of their own physical presence were they, a number of the lawyers did not express concern about being physically separated from their client, if this means that they (the lawyer) can be physically present in the courtroom.[26] The defence lawyers felt their own presence to be an important element in how they do their job.[27] Likewise: despite limited experience in this regard, many of the lawyers expressed significant dissatisfaction with the idea of participating in a digital interrogation, in which they would assist their client from afar.[28]

Particularly because of the COVID-19 pandemic, almost all of the defence lawyers interviewed had experience consulting with clients informally via digital (e.g. videoconferencing) means.[29] The majority of these lawyers considered consultations through videoconference to be a useful means to speak with their clients and prepare their defence strategy.[30] Only a select few of the lawyers felt that it was important to meet with their clients face-to-face, where possible; these lawyers nonetheless acknowledged the benefits (such as ease) remote consultation may (also) provide the client.[31]

3.3. Proposed recommendations

The DigiRights Project recommendations for the right to legal assistance differ somewhat to that given by the legal framework in Belgium. The default recommendation is that the accused should be present in person, alongside their lawyer. As with the right to be present, there are proposed exceptions to this default recommendation. Here, exception for digital participation should be made where there is (a) *force majeure*; (b) a request by the accused, which is given with their lawyer's consent; (c) the accused gives their informed consent to the suggestion of their lawyer's remote assistance (e.g. where this suggestion comes from their lawyer); or (d) both the lawyer and accused give their consent to the suggestion of the lawyer's remote assistance (e.g. where this comes from the court).

For the latter three exceptions, two conditions are proposed: first, that the confidentiality of the exchanges between the accused and their lawyer are sufficiently guaranteed; secondly, if both the lawyer and their client are online, they should do so from the same physical space, unless both have consented to their physical separation (i.e. remote participation from different locations). Finally, for client-lawyer consultation, the DigiRights Project recommends that if the

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[26] Cf. Transcript L-4, Transcript L-6, Transcript L-7. For a further discussion of this, particularly during the COVID-19 pandemic (when it was particularly common for defence lawyers to physically represent their (absent) clients in the courtroom, see: A. Beazley and R. Van de Gaer, 'COVID's Choice? Criminal Trials, and the Right to Be Present, the Right to Be Tried Within a Reasonable Time and the Possibilities of Remote Participation' (2024) 29 Tilburg L.R. 10, DOI: 10.5334/tilr.387.

[27] See, e.g., Transcript L-7.

[28] See, e.g., Transcript L-4, Transcript L-6.

[29] See: Transcript L-2, Transcript L-3, Transcript L-4, Transcript L-5, Transcript L-6, Transcript L-7.

[30] See, e.g., Transcript L-4, Transcript L-6.

[31] See, e.g., Transcript L-7.

client is free (i.e. not detained), their means of consultation be decided by mutual agreement between them. If, however, the client is detained, the recommendation is that the client may choose (but is not obliged) to request digital consultation.

Within Art. 560 §9 of the CCP we see elements of the DigiRights' recommendations: for example, the lawyer can only themselves appear remotely if their client is already participating remotely. Yet the clearest omission in the Belgian legislation is the absence of a requirement for the accused to consent to their lawyer's remote assistance—particularly where this will involve the lawyer remaining physically separated from the accused. Also missing, as previously touched upon in Part 3.1 above, is an express indication of how the confidentiality between the lawyer and their client will remain guaranteed, whether one or both are remote.

4. Right to interpretation

4.1. Current legislation

Until the introduction of the Law of 25 April 2024, there was no explicit right to interpretation via digital means for either interrogations or hearings. The possibility for remote interpretation in either procedural stage has now been introduced. For interrogations, this can now be found in Art. 47*bis* §6(4) of the CCP (for non-detained suspects) and in Art. 2*bis* §4 of the Law of 20 July 1990 (for detainees). Likewise, for hearings, Art. 560 §9 of the CCP and Art. 38*quater* of the Law of 20 July 1990 contain the relevant provisions.

For interrogations, both Art. 47*bis* §6(4) CCP and Art. 2*bis* §4 of the Law of 20 July 1990 stipulate that, in cases where the interpreter is unable to travel, assistance may also be provided by means of telecommunication or videoconference. Each also goes on to note that the organization and conduct of assistance by means of telecommunication must be such that the rights of defence of the person being questioned are guaranteed.

For hearings, meanwhile, the legal basis is found in Art. 560 §9,[32] which itself is the same provision as for remote legal assistance. Given this, it is perhaps of little surprise that the conditions for remote interpretation are all but identical to those for remote legal assistance. Concretely: if the accused is participating remotely (via videoconference) the interpreter may interpret (a) from the same room as the members of the court, (b) from the same place as the accused (i.e. also by videoconference); or (c) appear by videoconference, but from a different location to the accused, one that is again deemed appropriate by the court.

4.2. National study findings

Given the absence of an appropriate legal framework at the time of the Belgian national empirical study, is it perhaps of little surprise that those interviewed about their experiences of remote interpretation—both interpreters and other legal practitioners—had very little in the way

[32] See fn. 24 for the deference to Art. 560 §9 found in Art. 38*quater*.

of experience. A related reason for this was also the practice of preferring the interpreter to be physically present in the courtroom when interpreting.[33] For the defence practitioners, many expressed concerns that remote interpretation would disturb the smoothness of the proceedings, because of the need to pause to allow sufficient time (and space) for the interpretation.[34] In a physical hearing, the interpreter can interpret simultaneously (i.e. at the same time), in the defendant's ear, without disrupting the other parties; the same is not true of remote interpretation. The interpreters themselves, meanwhile, while they expressed dissatisfaction at the "restrictions" remote interpretation may pose to the quality and speed of interpreting (particularly for simultaneous interpretation), nonetheless indicated that, given the importance of an accused's right to interpretation, the possibility of remote interpretation was a welcome alternative to that of no interpretation at all.[35]

4.3. Proposed recommendations

Following the same pattern as those rights above, the DigiRights' default recommendation for the right to interpretation is that this is given in person, which the interpreter and the accused (at least) in the same physical space. Again, exceptions to this, in favour of remote interpretation, may be made where it is evident that videoconferencing can (a) improve the quality of the interpretation, so strengthening the right to interpretation; (b) improve the efficiency of the proceedings, particularly where the suspect or accused is under arrest or in pre-trial detention; (c) ensure the fairness of the proceedings require that the interpreter participate remotely.

As with the possibility of remote legal assistance, the current legal framework in Belgium does not much reflect the nuances of these recommendations. In particular: it remains unclear, under the terms of Art. 560 §9, who can request the remote participation of the interpreter: is this only the court? Or can the accused, or the interpreter themselves, make such a request? While the provisions which relate to the use of remote interrogation clearly indicate that the rights of the accused are to be safeguarded (Art. 47*bis* §6(4) and Art. 2*bis* §4; see *supra*), Art. 560 §9 is less indicative. Further ill-defined are the rationales for the interpreter's remote presence: during interrogations, this may be because of 'impossibility' to be present (this is itself not explained further); while during hearings, this is only if the accused themselves are participating remotely. Yet there are many circumstances—not least where the language(s) of interpretation involved are uncommon—where the remote participation of an interpreter would be of benefit to an accused, if such participation would improve the quality of the interpretation, improve the efficiency of the proceedings (i.e. preventing (further) delays in the proceedings), or ensure the fairness of the proceedings, as the DigiRights Project suggests. A consideration of these suggestions in the Belgian context is recommended.

[33] See: Transcript J-4, Transcript L-5.
[34] See, e.g., Transcript J-2, Transcript J-3, Transcript L-4. Transcript L-2, Transcript L-4, Transcript L-7.
[35] See, e.g., I-1, I-2, I-3.

5. Right to access case material

5.1. Current legislation

For a long time, case files in Belgium have only been accessible in paper form, and as a result, had to be physically consulted at the court. The FOD Justice's "Digital Transformation Plan" is slowly changing this.[36] Alongside the structural changes being implemented, the Belgian legislature introduced a legal basis for the digital file into the law, with the Law of 27 March 2024. As per the (now) amended Art. 568 of the CCP, procedural documents may be drawn up in both "material" (i.e. physical—paper) and "dematerial" (i.e. digital) form. This also includes the possibility for procedural documents drawn up in digital form to be signed with electronic signature, as well as for the minutes of a hearing, alongside all orders, judgments and rulings, handed down in the case, to be filed electronically immediately after they have been signed. The electronic case file, furthermore, can be composed of "mixed" documents—those in both material and dematerialised form (Art. 569 §3). Following the introduction of the Law of 27 March 2024, and the subsequent amendment to Art. 568, it is now the electronic case file that is the authentic file (see: Art. 568 §7). Following this, there is now also a legal possibility for suspects to exercise their right to (request) digital access to their case file.[37]

5.2. National study findings

In contrast to the responses of the practitioners interviewed to the remote participation of the accused, the defence counsel or the interpreter, the experiences of these stakeholders with the digital file were predominantly positive. According to the lawyers, the biggest advantage of electronic access to the case file was the time saved in no longer needing to go to the court registries.[38] The lawyers also reported the digitalisation of the case file itself (whether as scanned or electronic) facilitates their engagement with the materials contained within the file.[39] The added value of the digitised case file appears to be more limited for the judges and public prosecutors: many expressed preference for the case file in paper form.[40]

5.3. Proposed recommendations

The DigiRights Project proposes, as a default recommendation, that the right to access the case file should include access to any materials held digitally or electronically. In other words, it suggests that there should (also) be a right to digital access. The conditions of this are two-fold: first, that Member States should each establish an effective, secure, and accessible

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[36] For more on this, see the Digital Justice Project's website: https://nextgenbelgium.be/fr/projet/du-bozar-%C3%A0-la-justice-12-projets-de-num%C3%A9risation-%C3%A0-lhonneur-2.

[37] For an analysis of whether this possibility has increased a suspect or accused's rights of access, see: A. Beazley and R. Van de Gaer, 'Neither discourage nor prohibited: the law of disclosure in Belgium, the right to an effective defence and suggestions for reform' in E. Johnston and T. Smith (eds.), *Global Perspectives on Disclosure* (Routledge, forthcoming).

[38] See, e.g., Transcript L-4.

[39] See: Transcript L-2, Transcript L-4, Transcript L-5, Transcript L-7, Transcript L-8.

[40] See, e.g., Transcript J-6, Transcript J-8, Transcript PP-1, Transcript PP-3.

electronic or digital information system; and secondly, that system should include appropriate access restrictions to ensure information therein is not corrupted, deleted, modified or otherwise unlawfully interfered with or modified.

Applying these recommendations to the Belgian legislative framework, we see that the Law of 27 March 2024—as implemented through Arts. 568–569—is largely concordant. Indeed, if anything, the establishment of the digital case file (and the related electronic case file registry) facilitates in Belgium greater access (at least for the defence) to case material. At any rate, this certainly represents a right to digital access, as suggested by the DigiRights Project.

6. Conclusion

Taken together, the recent legislative developments in Belgium have introduced the necessary legal bases to allow each of the defence rights discussed—the right to be present, the right to legal assistance, the right to interpretation, and the right to access case material—to be realised digitally. The current legal framework offers sufficient room to make use of the digital tools and possibilities now in existence within Belgium. As we understand from the Belgian national study for the DigiRights Project, while some digital possibilities, particularly the digital file, are already widely accepted and being fully exploited, others—such as the use of videoconferencing—remain more controversial, and the full scope of their use will be in the hands of the courts, who have a broad discretion to determine the complete application of these legal provisions.

That said, there is still room for improvement, particularly with regards to those elements which either lack sufficient clarity, or are absent, from the national legal framework. In addition: there is room for the legislator—should they choose to revisit the provisions introduced with the Law of 2014—to push the scope of application of these further still: for example, there are some types of hearings not included within the list for which videoconferencing may be used (e.g. summary proceedings) but which could, reasonably, also make use of the possibilities offered for remote participation via videoconference. Finally, and perhaps obviously, if the digitalisation of justice in Belgium is to succeed—and with this, (continue to) safeguard the defence rights discussed herein—practitioners need to be adequately trained, and new ways of working developed, to ensure these new digital tools and possibilities can be fully utilised.