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Journeys to European Justice: (How) Can the EU Enable Children to Enforce their Rights?

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Ingi Iusmen
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Journeys to European Justice: (How) Can the EU Enable Children to Enforce their Rights?

Helen Stalford

Introduction

This chapter examines the legitimacy and effectiveness of the EU as a children's rights actor by examining the extent to which children influence the laws and policies it develops. It interrogates what mechanisms are in place to ensure conscientious implementation of EU children's rights measures and how the EU tests and responds to the impact of those measures on the ground. In that sense the analysis departs from the common tendency to view access to justice issues through the lens of national justice processes and examines how children claim their rights in a distinctly supra-national – in this instance European Union (EU) – context. The analysis deliberately excludes any consideration of judicial enforcement of EU children's rights, either from the perspective of the national courts or from the perspective of Court of Justice¹, thereby departing from the routine conflation of 'access to justice' with 'access to the courts'. By examining more routinely available (non-judicial) justice channels through which children can actively enforce and advance their EU rights, the discussion questions whether the EU genuinely endorses practices that are compatible with a child rights-based approach.

The notion of a child-rights based approach is inherent in the notion of 'child friendly justice' (CFJ). CFJ is one of the key priorities identified by the Commission in its seminal 2011 'Agenda for the Rights of the Child' (Commission 2011: 6) and in the various legislative, policy and research funding initiatives that have ensued. CFJ has become something of a mantra in broader children's rights law and policy-making, not only at European level, but at domestic and international level too. The EU, in particular, continues to invest significant resources in research, training and knowledge exchange projects across a range of domestic children's rights contexts. This has already yielded a wealth of comparative, qualitative and quantitative data providing rich insights into children's experiences of the justice system, and into the

1 These issues are explored further by the author in Stalford 2014; and Stalford and Drywood 2011.

extent to which practitioners adapt processes to meet the needs of children.² These initiatives complement parallel efforts aimed at ensuring that international (supra-national) justice processes are amenable to children's rights, as well as an established and ever-expanding body of scholarship exploring the extent to which the distinct interests and needs of children are accommodated in various justice settings (see chapter 5 by Rap in this collection; Kilkelly 2001; Fortin 2006; Council of Europe 2008; Nolan 2011; Tobin 2012). This chapter adds a new perspective to this body of work by examining the extent to which the EU's *own* justice processes are amenable to claims from and on behalf of children.

The analysis focuses on the main non-judicial 'points of entry' to EU-level justice, notably the EU Ombudsman, the EU Citizens' Initiative, EU Parliamentary petitions and infringement proceedings. In focusing on these contexts, the analysis highlights the importance of securing children's access to justice at all stages of law and policy-making, whilst at the same time drawing attention to the limitations and challenges inherent in such processes. It interrogates the extent to which children can and do really access justice at EU level, and speculates on the impact of this on the way that children's rights are disposed of and developed at both EU and national level. The chapter concludes somewhat cynically that the EU, for all of its rhetorical and financial commitment to child friendly justice, is very far from practising child friendly justice within its own justice mechanisms. Indeed, it has some way to go before it evidences a meaningful commitment to children as individual and active rights holders who can readily access EU mechanisms to hold both the EU institutions and their nation states to account. This raises serious questions as to the progress the EU can really make to advance children's rights in a way that inspires other polities at the national or, indeed, the international level if the measures it enacts and the processes by which they are enforced remain impenetrable to the very individuals they are designed to protect. With this in mind, the discussion includes some thoughts on how and whether such processes can be made more accommodating of children, par-

2 For instance, in 2012, the EU Fundamental Rights Agency commissioned research involving over 570 interviews with justice professionals (judges, prosecutors, lawyers, guardians, people working at courts, psychologists and social workers) across 10 EU countries to gain their perspectives of how children's rights are protected within justice proceedings, particularly in courts. This was complemented by a similar number of interviews with children and young people in 2013-2014. The project findings should be released in 2015. See <http://fra.europa.eu/en/project/2012/children-and-justice>. Similarly, DG Justice of the European Commission funded an in-depth study of children's involvement in judicial proceedings across the 28 Member States of the EU. This was to address the significant gap in reliable, comparable and official data on the situation of children, particularly in the context of justice proceedings (Commission 2011, p. 5). See further <http://www.childrenjudicialproceedings.eu/Home/Default.aspx>.

ticularly given the anticipated increase in child rights-related claims arising out of EU law in the future.

To set the scene for this analysis, the initial sections define precisely what is meant by ‘access to justice’ and summarise the key components of ‘child friendly justice’ by reference to the relevant legal and policy guidance.

1. Defining Access to Justice

Access to justice governs a range of processes related to the enforcement and advancement of rights. There is a multi-layered legal framework underpinning children’s access to justice in a European context, drawn both from the more generic international human rights provision as well as from dedicated children’s rights law and guidance. The Universal Declaration on Human Rights, for example, asserts that “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” (UDHR 1948, Article 8). Similarly the International Covenant on Civil and Political Rights 1966 refers to an “effective remedy” (Article 2(3a)) for all the rights in the Covenant and further guarantees the right to “take proceedings before a court” (Article 9(4)), the right to a “fair and public hearing” (Article 14(1)), and the right to be tried without undue delay (Article 14(3c)). More recently, the 2006 UN Convention on the Rights of Persons with Disabilities, noted for its ratification by the EU, places an explicit obligation upon states to ensure equal access to justice to those persons with disabilities, including a requirement to provide their agents with appropriate training to accomplish this (Article 13).

In a European context (specifically the Council of Europe) the European Convention on Human Rights 1950 (ECHR) protects individuals’ right to a fair trial and to an effective legal remedy (Articles 6 and 13 respectively), provisions that have been expansively interpreted to cover a range of civil, criminal and administrative proceedings. Access to justice for those seeking to uphold their economic and social rights (not traditionally the focus of ECHR proceedings) is facilitated by the European Social Charter.³ Importantly, this instrument makes explicit reference to legal and social protection,

3 Adopted in 1961 (ETS 035) and revised in 1996 (ETS 163). All EU Member States have ratified the 1961 version of the Charter. All Member States with the exception of Croatia, Czech Republic, Denmark, Germany, Greece, Luxembourg, Poland, Spain and the UK have ratified the 1996 version of the Charter.

particularly for children in the context of criminal proceedings, family proceedings and administrative proceedings.⁴

Access to justice is equally embedded in the EU legal order. In fact, it is regarded as fundamental to the Union's constitutional claim to be grounded in the rule of law and to the EU's ongoing pursuit of good governance.⁵ The Court of Justice, through an established jurisprudence dating back to the 1980s, has played a central role in articulating and reinforcing the EU and national authorities' obligations to facilitate access to justice.⁶ More recent changes to the EU's constitutional architecture, particularly following the 2009 Lisbon Treaty, further reinforce (and arguably extend) the rights associated with access to justice. Notably, the Charter of Fundamental Rights which now is on the same legally-binding footing as the Treaties (Article 6(1) TEU), summarises all of the key ingredients associated with the right to an effective remedy and a fair trial (Article 47), including: the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law; the right to be advised, defended and represented; and the right to legal aid for those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.⁷ More specifically, the EU has assumed a direct correlation between achieving access to justice and ensuring cross-border recognition and enforcement of judgments, notably in the context of international family (including parental child abduction) or civil proceedings (such as cross-border child maintenance claims). Thus, a requirement has been incorporated into the Treaty on the Functioning of the European Union (TFEU) that the Union shall "facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters." (Article 67(4) TFEU. See further Lamont's discussion in Chapter 3 of this collection).

Drawing on this extensive legal framework, jurisprudence and procedural guidance, access to justice is characterised by three key broad components:

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- 4 See in particular Article 17 – the right of children and young persons to social, legal and economic protection.
 - 5 The Commission has defined good governance as having five basic components: openness, participation, effectiveness, coherence and accountability (Commission, 2001).
 - 6 The Court of Justice first recognised in the Johnson ruling of 1986 that the fundamental right to judicial process, as enshrined in Article 6 ECHR, forms part of the general principles of EU law binding upon the MS when acting within the scope of the Treaties, and thus applies for the benefit of all individuals whose Union rights are implemented through the national systems of judicial protection (Case 222/84 *Johnston* [1986] ECHR 1651). See further Dashwood et al. (2011: 289) for an overview of subsequent case law.
 - 7 In that sense, Article 47 Charter is more generous in scope than Articles 6 and 13 of the ECHR, insofar as it extends to a right to financing legal proceedings for those who lack the resources to pursue their rights. This is currently being used to challenge widespread cuts in legal aid that have been imposed in recent years, particularly in the context of immigration proceedings (Meyler and Woodhouse 2013).

- it is inclusive (it applies to all individuals, regardless of age, ethnicity, gender, physical or mental capacity, socio-economic, political or legal status);
- it implies access to ‘an effective legal remedy’, broadly construed;
- it governs justice processes at all levels, from the local, to the national, European and the international level.

Importantly, access to justice extends far beyond facilitating effective access to formal, judicial proceedings aimed at interpreting and enforcing the law; it is equally applicable to administrative processes, including the right to challenge laws and other decisions that are unfair, or to campaign for remedies that accommodate individual interests and rights more effectively. This raises questions as to how this body of guidance is brought to bear specifically on *children’s* access to justice.

2. Applying Access to Justice Principles to Children

In seeking to understand how access to justice principles apply to proceedings involving children, the most comprehensive point of reference is the Council of Europe (CoE) Guidelines on Child Friendly Justice (CoE 2010, hereafter ‘the Guidelines’) developed as part of the CoE’s comprehensive children’s rights strategy.⁸ They are, in legal terms, a relatively ‘soft’ alternative to the provisions described above. That said, they offer a detailed blueprint for child friendly justice governing all types and stages of formal proceedings affecting children and, as such, have informed a range of Council of Europe and, indeed, EU measures in the field.⁹

Consistent with our broad understanding of access to justice, the Guidelines relate to all formal investigative, judicial and administrative proceedings including the police, immigration, educational, social or health care services. Moreover, they refer to children’s rights before, during and after formal pro-

8 The Council of Europe’s children’s rights strategy ‘Building a Europe for and with children’ (2012-2015), runs in parallel with the European Union children’s rights strategy, the ‘EU Agenda on the Rights of the Child’. There are a number of themes and priorities common to both, including child friendly justice, stimulating a degree of collaboration and resource-sharing. See further: <http://www.coe.int/t/dg3/children/>.

9 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012, p. 57-73; Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, COM(2013) 822 final, see paragraph 24 of Explanatory Memorandum.

ceedings, implying a broad application to a range of democratic processes involving the enforcement and enhancement of individual rights. Specifically, ‘child-friendly justice’ is defined in the Guidelines as:

...justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level ... giving due consideration to the child's level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity. (Part II.c., emphasis added)

The Guidelines identify the key mechanisms that need to be in place to achieve these guarantees, including: access to appropriate information and advice; the right to be heard; access to the court and to the judicial process; the avoidance of any undue delay in reaching and processing decisions relating to children; protection and, if necessary, anonymity, in the course of participating in proceedings; specialist training and multi-disciplinary co-operation to enable professionals to respond more effectively to children's interests and needs in the context of justice proceedings; and a clear commitment to using detention only as a measure of last resort (Part IV). As the CoE notes:

...the right of any person to have access to justice and to a fair trial – in all its components (including in particular the right to be informed, the right to be heard, the right to a legal defence, and the right to be represented) – is necessary in a democratic society and equally applies to children, taking ... into account their capacity to form their own views. (Para 1 preamble, emphasis added)

These standards resonate, in particular, with the UN Convention on the Rights of the Child 1989 (CRC) which is replete with references to child friendly justice. In fact, almost every substantive provision of the CRC reflects one of the child friendly justice principles, including children's right to appropriate (legal) assistance and direction;¹⁰ to participate in the decision-making process;¹¹ to undue delay;¹² and to be protected before, during and

10 For example, Article 5 respects children's right to ‘appropriate direction and guidance’ in the exercise of their Convention rights; Article 8 requires that states provide children with ‘appropriate assistance and protection’ when they are pursuing claims relating to their identity, nationality, name and family relations; and Article 14 upholds the rights and duties of parents and, where applicable, legal guardians, to provide direction to the child in the exercise of his or her right to freedom of thought, conscience and religion, in a manner consistent with the child's evolving capacities. Article 22 requires that asylum seeking children are provided with the necessary protection, assistance and information in the context of family reunification proceedings; and Article 37 guarantees children who are deprived of their liberty the right to prompt access to legal and other appropriate assistance.

11 Article 9 provides that children should have a right to participate and make their views known in child protection proceedings.

after justice proceedings.¹³ These provisions are further bolstered by the four general principles of the CRC¹⁴ and by the recently established complaints mechanism.¹⁵ These, together with the broader provisions referred to above, provide hefty legal and procedural armour to protect children's rights in the justice process.

Ensuring that justice processes are child friendly is as crucial at the international or inter-state level as it is at the national or regional level. International courts and complaints mechanisms offer the last resort for most justice proceedings; the ultimate opportunity to hold authorities and individuals to account for abuses where domestic processes have failed; an international platform for establishing universal moral and ethical standards and setting legal precedents on the interpretation of the expansive body of international human rights laws, whether they expressly refer to children or not. The outcome of those processes can have dramatic repercussions for millions of children. They can stimulate a gradual domino-effect of reforms in domestic child law and practice across a range of jurisdictions,¹⁶ trigger important

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- 12 Article 10 relating to family reunification resonates with the 'no delay' principle underpinning child friendly justice insofar as it requires such applications to be dealt with in a positive, humane and expeditious manner. Similarly, children are entitled to 'prompt decision' relating to whether or not they can lawfully be deprived of their liberty (Article 37).
 - 13 Article 16 acknowledges children's right to legal protection against any interference with their right to privacy, family or correspondence; Articles 19, 20 and 21 provide similar safeguards for children in the context of child protection proceedings.
 - 14 Article 2 (right to non-discrimination); Article 3 (best interests); Article 6 (right to life, survival and development); and Article 12 (right to participation).
 - 15 27 January 2012. The Third Optional Protocol on a Communications Procedure entered into force on 14th April 2014 and, at the time of writing, had been ratified by 46 state parties. It allows individual children to submit complaints to the Committee on the Rights of the Child regarding specific violations of their rights under the Convention and its first two optional protocols.
 - 16 The first ECtHR judgment to deal with children's rights was *Tyrer vs the United Kingdom* (Application No. 5856/72, judgment of 25/04/1978), in which the Court concluded that corporal punishment (in this case birching) inflicted on a young offender at the hands of the police constituted a breach of Article 3 ECHR. This decision triggered a Council of Europe-wide campaign to ban corporal punishment which has contributed, in turn, to legal reform across over half of the 47 Council of Europe states. Paradoxically, the UK remains one of the few countries in which the practice of 'reasonable punishment' by parents is still legal (s.58 Children Act 2004). See also the collective complaints submitted to the European Committee on Social Rights by civil society organisations against states regarding their corporal punishment laws: *World Organisation against Torture (OMCT) vs Greece*, Collective Complaint No. 17/2003; *World Organisation against Torture (OMCT) vs Ireland*, Collective Complaint No. 18/2003; *World Organisation against Torture (OMCT) vs Belgium*, Collective Complaint No. 21/2003; *World Organisation against Torture (OMCT) vs Portugal*, Collective Complaint No. 34/2006.

ethical and cultural debates,¹⁷ re-define the boundaries of parental and state authority over children¹⁸ and the interrelationship between children's welfare and autonomy.¹⁹

Maud de Boer-Buquicchio, former Deputy Secretary General of the Council of Europe, has explained the importance and meaning of access to international-level justice as follows:

What do we mean by "access" to international justice for children? I believe that it means more than being able to fill in a form to lodge an application with the Court. I believe that access to international justice for children occurs when they have a real chance, be it directly or indirectly through family members, legal representatives or NGOs, to have their voices heard and interests taken care of by an international judicial or non-judicial body ... For international justice to be really meaningful for children, we have to identify and act upon ways to improve children's access to information on standards, procedures and decisions; to facilitate their participation in proceedings; to incorporate children's rights in the functioning and decisions of the monitoring mechanisms; to improve the contacts between children and their representatives with the monitoring bodies; and last, to accelerate procedures and improve the scrutiny of the execution of decisions. (2008:10-11)

With this in mind, access to international justice is as much a matter of ensuring that children's rights norms, theories and empirically-verified evidence is brought to bear on decision-making as it is about ensuring that children can participate in justice proceedings, either directly or through a representative.

Maud de Boer-Buquicchio's comments reflect a growing body of case law manifesting the international courts' engagement with and application of children's rights principles and processes in interpreting international treaties.²⁰ References to the CRC, in particular, have become a routine feature of

17 The minimum age of criminal responsibility has been widely mooted in response to a number of key international decisions, including the conclusions of the European Committee for Social Rights (ECSR, Conclusions XV-2, Malta (2003)).

18 As evidenced, for example, in the ECtHR's interpretation of immigrant children's family rights by reference to the best interests principle: *Osman v. Denmark* (Application no. 38058/09); *Mugenzi v. France* (Application no. 52701/09, Judgment of 10 October 2014; and *Mubilanzila Mayeka and Kaniki Mitunga vs Belgium*, (Application no. 13178/03, Judgment of 12 January 2007).

19 See for instance *S.C. vs the United Kingdom*, judgment of 15 June 2004 in which the ECtHR upheld the child's right to participate in justice proceedings as central to fulfilling Article 6 ECHR right to a fair trial and required that the process be adapted accordingly. See also, *Sahin vs Germany*, (Application no. 30943/96, Judgment of 8 July 2003) confirming the child's right to full and accurate information as instrumental to the child's right to participate in custody proceedings.

20 See, for instance, the Inter-American Court of Human Rights (IACHH) ruling in *Juvenile Re-education Institute vs Paraguay* (Judgment of September 2, 2004. Series C No. 112) which referred to Article 6 and Article 27 CRC to interpret the right to life as imposing on the state an obligation to 'ensure to the maximum extent possible the survival and development of the child'. Moreover, the court referred to the Committee on the Rights of the Child's interpretation of the word 'development' in its broadest sense as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social develop-

all Strasbourg jurisprudence relating to children (Kilkelly 2009; Kilkelly 2011; Besson 2007; Daly 2011)²¹ often to the point that the ECtHR has been accused of overstepping its function and usurping the role of the Member States in dictating the nature and scope of their children's rights obligations (*Neulinger and Shurukv. Switzerland* (Application No 41615/07) ECHR [2010]; Walker and Beaumont 2011). Other international jurisdictions, such as the inter-American Court of Human Rights (Feria-Tinta 2014), the International Criminal Court (Nyamatata 2014), and the African Commission on Human and Peoples' Rights (Seifu 2008) have followed suit in deliberately endorsing children's rights principles in their jurisprudence and in at least showing some willingness to adapt procedures to facilitate children's participation in proceedings, either directly or indirectly. The fact that more and more states parties to the CRC are ratifying Optional Protocol 3 on a communications procedure is also testament to the widespread support for the use of international non-judicial mechanisms to hold domestic authorities to account (Buck and Wabwile 2013).²²

Save the Children make a similar observation about the importance of supra-national scrutiny of rights violations, particularly where national-level accountability is lacking, but note that "...with the exception of the Council of Europe and the Inter-American system, regional mechanisms tend to be weak or non-existent" (Save the Children 2009: 2). The next section tests this assertion in relation to different justice processes at EU level. But, as a preliminary question, it is important to understand precisely why access to justice for children holds particular significance in an EU context. In the process, it responds to a common contention that it is neither reasonable nor, indeed, feasible to expect the EU to facilitate children's access to its justice mechanisms to quite same the extent as its European or international counterparts, particularly given the former's relatively weak, or at least less mature human rights mandate.

ment. This is in spite of the US's stubborn refusal to ratify the CRC. See further Macaulay 2008. For a full review of the extent to which the IACHR draws on the CRC see Feria-Tinta 2014.

21 Children's rights-related case law is available through a dedicated database, Theseus.

22 Above note 15.

3. Children's Access to Justice at European Union Level – Why Is It Important and What Does It Involve?

There are at least two main reasons why securing children's access to justice at EU level is important. The first is strategic in nature and is about providing children and their advocates with an appropriate channel through which they can communicate with the European institutions as to the actual and desired nature, scope and impact of EU children's rights measures. It is about giving ordinary citizens a genuine say in the kind of role we want the EU to play in promoting issues that, for various reasons, be they political, financial or social, cannot be adequately dealt with at the national level. This is particularly important given the explicit constitutional undertaking by the EU to protect the rights of the child in all activities that fall within EU competence (Article 3(3) TEU; Article 24 EU Charter of Fundamental Rights of the European Union).

The legitimizing effects of enabling children and young people to have a say in how EU measures affecting them are shaped should not be underestimated. Since the adoption by the European Commission of its seminal Agenda on the Rights of the Child in 2011 (Commission 2011), there have been numerous, bold expressions by other EU institutions, attesting to their commitment to the protection and promotion of children's rights when developing EU law and policy. All of these emphasize the importance of securing children's access to justice and of involving children in decisions that affect them, including decisions at the supra-national level. For example, in November 2014, the European Parliament adopted a Resolution on the rights of the child to mark the 25th Anniversary of the UN Convention on the Rights of the Child. In doing so, the Parliament declared that "children's rights are at the heart of EU policies" and urged both the EU institutions and the Member States to "take additional measures to ensure respect for the rights of every child everywhere, especially the most vulnerable" (EU Parliament 2014: para 1). Specifically, the Resolution calls upon the Commission and the Member States "to take the necessary action to ensure that all children can effectively access justice systems that are tailored to their specific needs and rights, whether as suspects, perpetrators, victims or parties to proceedings" (Ibid.: para 12).

The EU's commitment to upholding and protecting children's rights is also evidenced in the Council of the European Union Conclusions on the Rights of the Child, adopted on 4th December 2014 (Council 2014). The Council of the European Union is the main context within which national ministers from each EU Member State meet to adopt laws and co-ordinate

policies.²³ It also co-ordinates Member States' economic policies, approves the EU annual budget and co-ordinates co-operation between the courts and police forces of the Member States. As such, the Council has an important strategic and practical function in the development and actual enforcement of EU measures affecting children at both the EU and national level. It commits itself to: holding thematic debates on the promotion and protection of the rights of the child in relevant Council working groups; ensuring that all new legal and policy proposals adequately address children's rights; and engaging in regular dialogue with the other law-making institutions (namely the Parliament and the Commission) on EU measures affecting children. It invites both the Member States and the Commission to be more effective in their implementation of children's rights at the national level, particularly in relation to the right of the child to be heard, and to increase efforts to create child-friendly justice systems and child-sensitive procedures in order to facilitate children's access to justice.

These initiatives evidence a far-reaching and explicit commitment across the EU institutions to integrate children's rights considerations, as informed by children's direct and indirect participation, into all stages of the legal and policy process at EU-level, and to act in a co-ordinated, sustained way to achieve their effective implementation at the domestic level. It follows then, that the extent to which such commitments are being fulfilled should be open to scrutiny and that, in cases of default, the relevant institutions or agencies be held to account by children and their representatives.

The second reason for ensuring children's access to justice at EU level relates to effective implementation. In short, it is about ensuring that the now proliferate, binding measures contained in EU law that relate to children's rights and welfare are not only transposed in a formal sense at national level, but are conscientiously applied in practice, by agencies, professionals and the courts. Consider, for instance, the EU Victims' Directive which obliges state authorities to make protective provision available to vulnerable victims involved in different justice processes, including children (Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, OJ L 315, 14.11.2012). Similarly, the EU trafficking directive imposes a range of obligations on States including: adopting a harmonised definition of trafficking; implementing more robust investigation and prosecution procedures; offering more tailored assistance and protection to victims of trafficking, particularly children; developing awareness-raising

23 The Council of the European Union should not be confused with the European Council where EU leaders meet to discuss the EU's political priorities. Nor should it be confused with the Council of Europe, a distinct non-EU polity, which is composed of 47 Member States and which exercises an explicit human rights mandate (as manifested most famously in the 1950 European Convention on Human Rights).

activities, as well as appropriate professional training with a view to preventing trafficking (Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, OJ L 101, 15.4.2011). Likewise, the EU Sexual Exploitation Directive imposes harmonised definitions of and procedures for tackling sexual offences committed against children. It also lays down the minimum sanctions for offenders. Included within this are provisions aimed at combating child pornography on-line and sex tourism, facilitated by rules on the sharing of criminal records information between Member States. Moreover, the directive obliges Member States to provide unconditional assistance, support and protection to victims of sexual exploitation and pornography before during and after criminal proceedings, which includes the appointment of free legal representation and counselling (Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, OJ 2011 L 335/1, Articles 18-20). All of these instruments emphasise the need to provide legal assistance and support to children at all stages of the justice process, consistent with the principles and procedures laid down in the Council of Europe guidelines.

Of relevance also is the extensive social welfare provision enshrined in EU immigration and asylum law that guarantees to migrant children that their basic needs to education, health and legal assistance will be met notwithstanding their fragile immigration status,²⁴ and the directly effective EU Regulation governing cross-border child abduction and parental responsibility disputes. This obliges professionals in the family justice process to hear the views of the child and to adopt the best interests of the child as a primary consideration before decisions around return, custody or access are made (Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, [2003] OJ L338/1: para 12 preamble, Arts 12(1)(b), 12(3)(b) and 12(4), Arts 15(1), 15(5) and Art 23(a)). All of this legal entitlement is only of value if effectively implemented and legally enforceable at the national level, and if supported by sympathetic procedures and adequate financial investment, including the provision of legal aid and free, independent legal representation.

24 Asylum Procedures Directive 2013/32 (OJ L 180, 29.6.2013), Article 7 and 25; Child Victims Directive, 2012/29/EU (OJ L 315, 14.11.2012), Article 8; Refugee Qualification Directive, 2011/95/EU (OJ L 337, 20.12.2011), Articles 27- 29; Family Reunification Directive 2003/86/EC (OJ L 251, 3.10.2003), Article 14; Temporary Protection Directive, 2001/55/EC (OJ L 212, 7.8.2001), Article 14; Reception Conditions Directive, 2013/33/EU (OJ L 180, 29.6.2013), Article 14 and 17; Return Directive, 2008/115/EC (OJ L 348, 24.12.2008), Article 14(c). For a summary overview of EU children's rights provision in the context of immigration and asylum see FRA 2015: chapter 9.

And yet, despite these obligations, there is evidence across the Member States of inconsistent, often inadequate implementation of at least some of these obligations, leading to a widespread shortfall in the protection of children's rights. For instance, recent cross-national empirical studies of how young suspects are treated in the criminal justice process have revealed significant disparities in how young offenders are questioned, supported and informed about their rights, and widespread failure to inform child witnesses or victims of the substance and scope of their rights in a way that they can understand.²⁵ Similarly, a detailed, comparative evaluation of immigration laws and processes draws attention to a range of factors at the national level, both systemic (fragmentation of responsibilities across a range of agencies) and procedural (lack of communication between the various professionals working with child asylum seekers), that impede successful implementation of the extensive EU provision governing the rights and welfare of unaccompanied children (O'Donnell and Hagan 2014).

This begs the question as to who should be held accountable for inadequate implementation of such obligations and, indeed, how those responsible can be brought to account. It has already been noted that mechanisms in this regard take on a variety of forms. It does not have to involve a court-based, adversarial process or respond to a particular human rights violation. It can amount to action aimed at enhancing the legislative prominence of certain rights, amending the way that a particular right is framed within the legislation, or at encouraging more conscientious implementation of rights by the relevant domestic authorities. With this in mind, the remaining discussion is framed around three key questions:

- How do children change or propose EU laws with a view to enhancing their rights/experiences?
- How do children complain about EU actions or, indeed, omissions that adversely affect their lives or impede the exercise of their rights?
- How do children harness the EU's non-judicial authority to hold Member States to account for breaching or failing to implement their EU rights?

25 See notably the in-depth study, commissioned by DG Justice of the European Commission, to gather legal, procedural, statistical and qualitative data on children in judicial proceedings across the EU28, available at: <http://www.childreninjudicialproceedings.eu/Home/Default.aspx>. See in particular the comparative report, 'Summary of contextual overviews on children's involvement in criminal judicial proceedings in the 28 Member States of the European Union', Luxembourg, 2014, particularly chapter 4. See also the current 2 year project (2014-16), 'Protecting young suspects in interrogations', co-ordinated by Maastricht University and funded by the European Commission. This involves in-depth interviews with young suspects, lawyers and the police as well as analysis of audio samples of police interrogations across Belgium, Italy, Poland, The Netherlands and the UK. See further youngsuspects.eu.

4. How Do Children Change or Propose EU Laws with a View to Enhancing Their Rights?

The discussion has already alluded to the expanding body of EU legislation that addresses the rights of children across a range of areas that fall within EU competence.²⁶ The extent to which these measures positively reinforce the rights of children depends, to a degree, on when they were enacted. Those enacted post 2010 are more likely to correspond explicitly with international children's rights principles and practice. 2011 marked the launch of the EU's formal children's rights Agenda in which the Commission committed to providing "... practical internal training on the rights of the child and other fundamental rights to reinforce and further promote a culture of respect for fundamental rights", and to explaining how child rights considerations were taken into account in the drafting of legislative proposals (Commission 2011: 5). The legal elevation of the EU Charter of Fundamental Rights to the same status as EU treaties in early 2010 supported this process insofar as it made the children's rights provisions contained therein both more visible and legally binding on both the EU and the Member States in their development and implementation of EU law (Art 6(1) TEU). This, in turn, precipitated the introduction of an *ex ante* fundamental rights auditing mechanism to ensure that all new legislation proposals could be screened to ensure their compliance with the fundamental rights obligations contained in the Charter (Commission 2010). With this in mind, the Commission announced that:

In order to reinforce its assessment of the impact of its proposals on fundamental rights, including on the rights of the child, the Commission has prepared operational guidance that will enable its departments to examine the impact of an initiative on fundamental rights, including the rights of the child, and to select the option that best takes into consideration the best interests of the child. (Commission 2011: 5)

There is every indication, from the profusion of children's rights references in more recent EU laws affecting children, that this auditing strategy has been conscientiously applied. That said, it seems to have been a largely top-down process, with limited or no input from children and young people or their advocates as to how a proposed legislative initiative responds to their lived experiences and needs. Furthermore, EU children's rights measures that pre-date 2011, while they might contain sporadic references to children's rights principles, tend to be significantly less considered in how they protect and promote children's rights and, in many cases, obscure or even undermine

26 For a more detailed overview, see FRA Handbook on European Children's Rights, and for a more detailed, critical look at the evolution, content and scope of EU law relating to children, see Stalford, H. (2012) *Children and the European Union: Rights, Welfare and Accountability* (Oxford, Hart).

children's rights. Take, for example, Directive 2010/13 (OJ L 95, 15.4.2010) on Audiovisual Media Services (AVMS) which contains rules limiting children's exposure to potentially harmful media content or exploitative commercial advertising. While this might be framed in terms of protecting the best interests of the child, in reality, the provisions are extremely limited, creating significant leeway for commercial operators to interpret their obligations to meet the (primary) demands of the market economy (Garde 2011 and 2013; Bartlett and Garde 2013).

In a bid to support a more inclusive, empirically-grounded approach, the Commission has conducted a number of public consultations, both to inform the development of its broader children's rights strategy,²⁷ and to elicit suggestions on substantive areas of legal reform.²⁸ These consultations are, in principle, open to any individual or organisation – including children's rights organisations – and the responses are published online. However, the extent to which such contributions are genuinely taken into account in the (re-)drafting of law and policy is rather less apparent, and there appears to be limited or no interrogation by the Commission as to the extent to which those contributions incorporate the views of children and young people.

4.1 The Citizens' Initiative

One of the arguably more transparent routes by which private individuals and their representatives can propose changes in EU law is through the Citizens' Initiative.²⁹ This mechanism was launched by the European Commission in April 2012 to create a 'democratic discourse'³⁰ on issues of concern to EU citizens by enabling them collectively to propose legislation in matters that fall within EU competence. The Citizens' Initiative can be organised and submitted by any national of an EU Member State who is old enough to vote

27 See for instance DG Justice's consultation on the European Commission's Communication (Agenda) on the Rights of the Child (2011-2014) which was open from 11 June 2010 to 20 August 2010: http://ec.europa.eu/justice/news/consulting_public/news_consulting_0009_en.htm.

28 See the Commission's Consultation on the functioning of the Brussels IIa Regulation (EC 2201/2003), the EU law governing cross-border parental responsibility and child abduction disputes, from 15 April 2014 until 18 July 2014: http://ec.europa.eu/justice/newsroom/civil/opinion/140415_en.htm.

29 Articles 11(4) TEU and 24 TFEU. The rules and procedures governing the citizens' initiative are set out in EU Regulation 211/2011 of the European Parliament and of the Council of 16 February 2011, OJ L 65/1.

30 Baldoli, R. (2013) 'Thence We Came Forth to Rebehold the Stars': A First Assessment of the European Citizens' Initiative', in: *European Journal of Risk Regulation*, Vol 4(1) 82-86, at p.82.

in the European Parliament elections (18 years old with the exception of Austria where the voting age is 16). The organiser then has 12 months in which to collect statements of support.³¹ Initiatives must be signed by at least one million citizens from at least 7 Member States and there must be a minimum number of signatories from each of the Member States represented in the initiative, proportionate to the population of that Member State.³² Designated authorities in the Member States represented in the initiative then have to verify the signatures collected, following which the final Citizens' Initiative can be submitted to the Commission. This is then published on the Commission website and the Commission has three months in which to reach a conclusion and determine its proposed action.³³

Notwithstanding the democratic aspirations of the Citizens' Initiative, it has been heavily criticised on a number of grounds, not least for explicitly excluding children as potential petitioners (Stalford and Schuurman 2011: 389). Many of those criticisms are borne out in the exceedingly limited use of the mechanism to date by children and their advocates. This is attributable, not least, to the significant resources required to launch and manage such an initiative in terms of campaigning for and gathering the extensive cross-national support required. The not-for-profit international children's rights networks most inclined to engage in such a process already labour under significant resource constraints and are unlikely to divert valuable funds away from core advocacy or campaign agendas to pursue a protracted process that, more often than not, ends in failure. Taking these logistical obstacles into account, it is hardly surprising that, for all its democratic aspirations, there has not been a single Citizens' Initiative accepted to date that advances in any meaningful way the status of children under EU law.

4.2 Children's Rights 'Champions'

While these formal processes to support civil dialogue are largely inaccessible and, therefore, ineffective as a mechanism for advancing children's rights, there are other initiatives driven, to a large degree, by the advocacy of civil society organisations, that offer potentially better channels in this regard. For example, in 2014, in response to a concerted campaign by 14 international and European civil society organisations, over 90 members of the

31 These statements of support must be collected from other EU citizens who are old enough to vote, in accordance with the procedure set in Articles 5 and 6 of the Regulation.

32 Article 7 Regulation 211/2011. The minimum number of signatories required per Member State represented in the Citizens' Initiative is set out in Annex I of the Regulation.

33 Regulation 211/2011, Article 11.

European Parliament have become self-appointed ‘children’s rights champions’.³⁴ This, in turn, has prompted the establishment of an Intergroup on the Rights of the Child for the current parliamentary term (2014-2019). The key aims of the group are to enhance the visibility of children’s rights at EU level, not least by mainstreaming the rights of the child across all areas of EU Parliamentary activity. Implicit in this role is an undertaking to engage with children and their advocates at the national level to ensure that EU measures are discharged in a way that impacts meaningfully on children’s lives, and to ensure that the measures themselves are compatible with international children’s rights norms and principles. While it is too early to evaluate its impact, this simple initiative has succeeded in appointing direct spokespersons for children’s rights at the heart of the legal and policy-making process in a way that more formal justice mechanisms have failed (See further chapter 2 of this collection). This, in itself, illustrates the importance of strategic advocacy as a vital instrument for facilitating children’s access to European-level justice. With the requisite skill and insight into how to target the right individuals in the right EU institutions with the right message at the right time, children’s rights advocacy at this level can generate positive ripple effects and sustained changes in both attitude and practice.

5. How do children complain about EU actions or, indeed, omissions that impede the exercise of their rights?

A fundamental principle of access to justice is the availability of a transparent and responsive complaints mechanism, particularly in cases of alleged rights violations.³⁵ There are two main non-judicial routes at EU-level through which children and their representatives can hold EU institutions to account for failing to uphold their rights: complaints to the EU Ombudsman; and Petitions to the European Parliament.

34 At the time of writing 96 MEPs were registered as children’s rights champions. See further <http://www.childrightsmanifesto.eu/>.

35 The Council of Europe Guidelines on Child Friendly Justice state that: “Children should have the right to access appropriate independent and effective complaints mechanisms.” (III.E.3; IV.A.1.1.a; IV.E.75; V.e). Indeed, it is this very principle that underpins the third Optional protocol of the CRC.

5.1 Holding the EU Institutions to Account for Violations of Children's Rights: The EU Ombudsman

The office of the European Ombudsman was established in 1992 as part of a drive to engage EU citizens in the democratic life of the EU. It became fully operational in 1995 and receives complaints or requests for information and advice about alleged maladministration by the EU institutions, bodies, offices or agencies, with the exception of the Court of Justice of the EU acting in its judicial role.³⁶ It acts independently of any other EU institution and has the authority to launch a full investigation into allegations of maladministration that are deemed well-founded. It also has the discretion to initiate its own inquiries even when no complaint has been made. In such cases, the complaint is referred to the institution concerned which then has three months to respond and, ideally, take remedial action. If the institution in question does not take steps to resolve the issues, the Ombudsman drafts a report (which may include a series of recommendations) which is then forwarded to the European Parliament and to the EU institution or body subject to the complaint.

While the Ombudsman has been heralded as an important democratic feature of the EU, enhancing the transparency and accountability of the EU administrative process (Gregory and Giddings 2001) it is fair to say that its achievements in enhancing children's access to justice at EU level have been very modest indeed. A minute proportion of the 2,500 or so complaints it receives annually relate to children's rights. Investigations relating to children tend to be connected with relatively marginal issues, such as specific financial or educational benefits accruing to the children of EU institutional employees or the administration of niche European schools (Case: OI/3/2003/JMA), all of which fall within the remit of the Ombudsman only insofar as they are heavily subsidised by the European Commission. Even these marginal complaints have yet to really result in any decisive remedy at EU level (see further the discussion by Iusmen in chapter 6 of this collection).

There might be many reasons for the reluctance of individuals or groups to engage the intervention of the European Ombudsman: at best, it might be because the EU institutions, offices, bodies or agencies are discharging their functions in relation to children perfectly legitimately and effectively, such that no complaints have been warranted. A more likely explanation is that ordinary citizens, including those tasked with representing children, have no knowledge of the Ombudsman's existence or mandate, let alone the mechanisms by which they might submit a complaint. Moreover, such is the re-

36 Article 24(3) TFEU states that every EU citizen has the right to make a complaint to the EU Ombudsman. The duties of the Ombudsman are set out in Article 228 TFEU and in Decision 94/262 of 9 March 1994, [1994] OJ L 113/15.

moteness and bureaucratic complexity of the EU, the average citizen has no means of identifying how and where such maladministration has occurred; they merely live with the consequences of it. This highlights the sobering reality that all but the most informed of individuals regard concerns of EU-level maladministration to be beyond redress, perpetuating what might be more appropriately termed ‘passive’ democracy. In short, complaints mechanisms such as the Ombudsman might exist, but the majority of individuals have neither the incentive nor the capacity to proactively engage it, even if doing so might stimulate more active and conscientious enforcement of their rights at EU institutional level.

And yet the possibilities of using the Ombudsman to encourage the EU institutions and bodies to follow through on their commitments to fundamental rights – including children’s rights – are noteworthy. Jacob Söderman made it abundantly clear from the very early days of taking up office as the first European Ombudsman that if an EU institution or body fails to act in accordance with fundamental rights as required by Treaties (notably Article 6 TEU), this would constitute *ipso facto* an instance of maladministration. Thus, ensuring compliance by the EU with its fundamental rights (including children’s rights) obligations is an integral part of the European Ombudsman’s mandate.

The potential of the Ombudsman to hold the institutions to account for their human rights compliance is rendered even more forceful as far as children are concerned since the adoption of the EU Charter of Fundamental Rights, with its express obligations to uphold children’s best interests as a primary consideration, to ensure that children are heard, to protect children’s relationship with their parents (Art 24), to ensure children’s access to education (Art 14), and to protect children from exploitative labour or harmful working conditions (Art 32). Consider also the numerous official statements made by the European Commission and European Parliament over recent years, among other things, “to consult children and listen to them” (Commission 2011:13), to “mainstream children’s rights in every policy and legislative text adopted” (European Parliament 2014: para 33) and to ensure that the best interests of the child is taken into account in all EU external actions relating to them (Commission 2008: 5). The European Ombudsman provides a transparent, ‘reflective’ platform for exerting some pressure on the institutions to initiate concrete action in fulfilment of these commitments, even if that only amounts to a query raised by the Ombudsman in her annual report (Vogiatzis 2014: 122). It offers a route by which one branch of the EU machinery can prompt another branch to reflect on the value and impact of its actions, to add substance to what are often ambitious but largely vacuous declarations of intent regarding children’s rights, and to identify areas in which additional resources might be invested, both at EU level and at the domestic level, to give useful effect to those commitments. For instance, it is

now common for the Ombudsman to scrutinise the Commission's handling of complaints under the infringement process (explained below), which may involve interviewing individual Commission officials and submitting concrete recommendations that are, in turn, made available to the European Parliament. This has proved to be a powerful political tool, as Smith notes:

In the course of the Ombudsman's investigations into the handling of [infringement proceeding] complaints, he has uncovered some disturbing practices that range from mismanagement, administrative ineptitude, 'high handed and arrogant' treatment of the complainants, a routine lack of reasoning and the potential for corruption due to a lack of administrative controls. These practices have been inured into infringement handling over decades of unregulated activity; without the intervention of the Ombudsman they would no doubt have continued unabated. (Smith 2008: 787)

But the European Ombudsman also plays another important role in terms of liaising with national ombudsmen, particularly in areas where the children's rights issue would be better addressed at the national, as opposed to the European level. National ombudsmen representing children across the EU Member States maintain strong links with the European Ombudsman and, indeed with the other institutions, facilitated through the European Network of Ombudspersons for Children (ENOC). This relationship lends itself to fluid communication between national stakeholders and those at European level, to identify the most appropriate level at which to campaign for effective enforcement of existing children's rights obligations or for the development of new children's rights measures. It is just unfortunate that evidence so far suggests that ENOC is focused less on opening up children's access to and influence over European-level decision-making processes, and more as an opportunity for national ombudsmen to gain (financial and political) support for their localised activities (Thomas, Gran and Hanson 2011).

5.2 Alleged breaches of EU children's rights by EU or domestic level authorities: European Parliament Petitions

Another way of holding those in authority to account in relation to children's rights is by petitioning the European Parliament. The petitions process enables individuals or organisations to bring alleged violations or incorrect applications of EU law by a Member State, local authorities or other institutions, to the attention of the European Parliament (Articles 24 and 227 TFEU). Petitions can be submitted either individually or collectively by EU citizens or those who are resident in a Member State, as well as by legal persons (businesses, associations, civil society organisations) who have their

registered office in an EU member state. It can take the form of a request, a complaint or an observation concerning the application of EU law. Alternatively, it can involve a direct appeal to the European Parliament to adopt a position on a specific issue of public or private interest.

Parliament petitions are a particularly alluring mechanism for pursuing children's rights claims because of their simplicity and transparency. Unlike the Citizens Initiative, there are no complicated criteria for collecting signatures, the process is not limited to those of EU nationality, it is not confined to those over the age of 18, and it is a relatively quick process. In fact, there are only two conditions for admissibility: the petitioner must be directly affected by the matter raised (a condition that has been interpreted broadly); and the issue must fall within the scope of EU activity. Importantly, as far as access to justice is concerned, petitioners have the opportunity to observe (online) and even participate in committee debates concerning their petition. The Parliament has a range of remedies at its disposal if a petition is deemed admissible and there are sufficient grounds for further action. For instance, it can make representations to the offending national authorities requesting that they address the concern raised; it may initiate action at EU level in the form of a resolution, or even legislation; or it may request that the Commission issue infringement proceedings against an offending Member State for failure to properly implement their EU legal obligations (considered below).

This accessible and potentially far-reaching mechanism corresponds with the Parliament's long-standing support for children's rights. Of the 1,500 or so petitions heard each year, a relatively small but significant number relate to children. These include: complaints against the Romanian ban on international adoption (Petition 1154/2013); a call for a ban on smoking in public places or other areas in which young children have access (again in Romania, Petition 0951/2013); complaints about cuts to spending on children's services in Italy, Greece and France; complaints against several national courts' rulings on custody, access and parental child abduction proceedings; and several complaints against local authorities in the UK for forcibly removing children from their parents and restricting contact thereafter (Petition 1707/2013 and Petition 2468/2013). The wide-ranging nature of these petitions demonstrate how the EU justice process can be used, not just to challenge remote, top-down laws and policies enacted or omitted by Governments, but to bring authorities to account for alleged breaches of children's rights that are happening on a very localised, everyday basis. What is also interesting about the petitions process is its potential to reinforce domestic processes such as judicial review, with a view to maximising European-wide exposure of and support for issues of individual concern, even if they have only the most tenuous connection with EU law and policy-making competence.

For all of its accessibility, however, the petitions process is not particularly child-rights sensitive. Even if some submissions might be couched in the

cosy language of children's rights, in reality they are more concerned with the enforcement of parents 'proprietary' rights' over their children, making it difficult to extricate from the submissions made (by adults) the specific interests and needs of the children. There is no transparent or routine consideration of the best interests of the child as a mediating principle; no explicit requirement or mechanism by which children's views on the matter can be heard, either directly or through an independent representative; and no discernible attempt to present the findings of such petitions in a way that can be understood by children, regardless of the impact such findings might have on them. The absence of these staple components of child friendly justice significantly undermines the petitions process as a legitimate mechanism for upholding children's rights.

6. How can children harness the EU's authority to hold *Member States* to account for breaching or failing to implement their EU rights?

It has already been noted that access to European-level justice serves a dual function: it holds the EU institutions to account for the children's rights obligations by which they are bound and it activates the EU institutions' authority to ensure implementation of EU children's rights at Member State level. The main non-judicial mechanism for achieving the latter is the European Commission's infringement proceedings.

6.1 Challenging Member States' failure to implement EU law relating to children: Infringement Proceedings

It is somewhat pedestrian to note that explicit integration of children's rights provision within EU law only takes us half way towards protection of such rights; they have to be accompanied by an accessible and effective mechanism of enforcement, and there have to be sanctions for non-compliance. The European Commission plays a key role in this regard. Where a Member State fails to comply with its obligations under EU law, either by failing to implement EU law properly, or by implementing it in a manner that is inconsistent with the law, the Commission can commence infringement proceedings (Article 258 TFEU). Described as "... a unique space of interaction for a multitude of actors" and "... a valuable opportunity for the perceived unaccounta-

ble EU institutions to deliver valuable inter-institutional accountability” (Smith 2008: 781) these proceedings are perhaps the most common and accessible justice mechanism at EU level. They are administrative in nature and complaints submitted by individuals are pursued at the discretion of the Commission. They precede (and aim to prevent) court-based-litigation by providing Member States (including any national body controlled by the State) with an opportunity to comply voluntarily with their EU legal obligations.

In the average year, the Commission investigates around 2,500 allegations of Member State non-compliance with EU law per year. There are essentially four stages to the infringement procedure, although most complaints will be dealt with in the first three (largely administrative) stages (Commission 2012). The first stage is *submission of the complaint*. In principle, anyone, including a child, can lodge a complaint free of charge against a Member State for any specific measure (law, regulation or administrative action), or, indeed, the absence of a measure or practice by a Member State which they consider incompatible with EU law. An individual does not have to demonstrate a formal interest in bringing proceedings. Neither does the individual have to prove that they are principally and directly concerned by the alleged infringement. The only condition regarding admissibility is that a complaint has to relate to an infringement of EU law by a Member State. On receiving the complaint, the Commission exercises discretion whether or not to take further action. The second stage is the *investigation*. The Commission examines the complaint further in co-operation with the Member State concerned within one year of the complaint being registered. Within this time, the Commission determines if there are grounds to issue formal infringement proceedings against the Member State or, conversely, whether no further action should be taken. The third stage involves the Commission issuing a letter of *formal notice* to the Member State concerned, defining the subject-matter of the complaint and setting out a period in which the alleged failure must be corrected. If, after the expiry of this period, the Member State is still in breach of its obligations, the Commission may issue a reasoned opinion setting out the legal arguments supporting compliance, the action that needs to be taken to achieve compliance, and fixing a new time limit within which the remedial action must be taken. If the Member State persists in its non-compliance, the Commission may proceed to the fourth, *judicial stage* and issue proceedings before the Court of Justice which may ultimately lead to the imposition by the Court of pecuniary sanctions (Article 260 TFEU).³⁷ This can include an order for damages in favour of any individual affected by non-implementation of EU law (Cases C-6/90 and C-9/90 *Francovich and Bonifaciv Italy* [1991] ECR I-5375).

37 Less than 10% of alleged infractions proceed to this stage (Smith 2008: 782).

Infringement proceedings have already been used to enforce Member States' compliance with their children's rights obligations under EU law. Specifically, since the passing of the deadline for implementation of the EU Trafficking Directive (6 April 2013), the Commission has issued reasoned opinions to 12 Member States³⁸ requesting compliance. Similarly, the deadline for domestic transposition of the EU Sexual Exploitation Directive was 18 December 2013. Since then, formal notices have been issued against 11 Member States³⁹ requesting that they fully comply with the requirements set out in the Directive.

While proceedings in relation to these two particular directives are still ongoing, there is some evidence that the very threat of further action by the Court of Justice acts as an effective deterrent.⁴⁰ It is a popular option as far as justice proceedings go, insofar as it offers an early-warning mechanism enabling the Commission to admonish Member States for failing to comply with their obligations under EU law, whilst providing them with an opportunity to present their defence. Once the Commission has investigated the matter fully, determined that the breach is still ongoing and issued proceedings before the Court of Justice, it is extremely difficult for Member States to justify their non-compliance. Infringement proceedings thus offer a potentially effective means of achieving compliance with very explicit children's rights obligations, particularly those contained in the raft of EU law relating to criminal law and child protection. As an online form that anyone can submit it is much more accessible and cost effective for children's rights advocates or private individuals than other justice routes.

The difficulty, of course, lies in knowing what is in the law in the first place to be able to identify gaps in implementation. It requires significant, up-to-date knowledge of the transposition dates, content and scope of the obligations imposed by EU measures, and an in-depth understanding of progress made at domestic level to respond to those obligations. In most cases it would not even occur to children and their advocates that binding obligations pertaining to, for example, children's best interests, their right to be heard, the right to legal representation, to expedient decision-making or to non-detention emanate from EU legislation. To be effective, such actions generally require the support of civil society organisations with a specialised and pro-active legal department who can distinguish the EU children's rights entitlement that can be directly claimed from that which requires more crea-

38 Cyprus, Belgium, Greece, Hungary, Italy, Malta, Netherlands, Portugal, Romania, Slovakia, Spain and the UK.

39 Cyprus, Greece, France, Germany, Ireland, Italy, Luxembourg, Malta, Netherlands, Portugal, Slovakia and Spain.

40 In the UK, for instance, the recent Modern Slavery Bill represents the UK's attempt to comply with the obligations set out in the EU Trafficking Directive and, indeed with its obligations under international human rights law.

tive advocacy at the national level. For example, the EU Directive on combating child sexual abuse, sexual exploitation and pornography reinforces child victims' protection and support by imposing an obligation on Member States to provide the child with access to free legal counselling and representation without delay, in premises designed or adapted for child victims, by professionals trained to work with children (Art 20). These are qualified rights, however, insofar as they need only be provided in accordance with national procedures; there is no legal requirement that national procedures are themselves compatible with the principles of child friendly justice. It follows, then, that Member States can still comply with the requirements imposed by the Directive by simply providing child victims of sexual exploitation with access to available provision in these areas, even if their established procedures and settings for providing legal assistance to children are lengthy, ill-adapted to children's specific needs, and administered by professionals with no specific child-related training. Evidently, the more effective route for children's rights advocates in this context is to campaign at national level to integrate more explicit, child friendly requirements into national law and process, whilst also building capacity among practitioners on the ground (for example through training programmes) as to how they might adapt practice and processes to meet the aspirations set out in the Directive.

Even where EU children's rights obligations are unequivocal and non-negotiable and specialist legal support is available to initiate a submission to the Commission, it can take several months, years even for such proceedings to result in effective implementation, by which point the child or children originally affected are unlikely to benefit. This point highlights the intrinsically altruistic nature of most EU-level justice proceedings involving children; virtually none provide a quick fix response to the interests of children currently affected by alleged breaches of their EU rights. The best most complainants can hope for is a modest legal or attitudinal shift that may benefit children in the future.

Conclusion: The future of children's access to justice at EU level?

If the EU's role as children's rights adherent is to be persuasive and of international standing, there have to be discernible, accessible mechanisms by which children can influence the way in which laws and policies affecting them are framed. Only then can the EU ensure that its laws are based on the reality of children's lives, experiences and needs. Beyond this, to be truly effective and legitimate in advancing and protecting children's rights, there

has to be some way that children can actively enforce the rights that emanate from the EU legal order. Such enforcement mechanisms need to be visible not just at the Member State level, but at EU level too.

This chapter has deliberately extended the analysis of ‘access to justice’ beyond the adversarial, court-based processes that are routinely associated with the concept to embrace a broader range of democratic mechanisms that facilitate participation in all stages of the legal and policy-making process. In doing so, it has sought to capture the majority of children and their advocates whose claims never get to court, and to explore alternative (non-judicial) opportunities for democratic dialogue with those that wield the decision-making authority at EU level. In doing so, the discussion has sought to highlight and critically evaluate the channels through which children and their representatives can not only react to violations of their rights but, more positively, to actively shape how those rights are expressed in EU law and policy in the first place. Closer scrutiny of existing non-judicial mechanisms in place at EU level reveals that their bureaucratic, skills-, knowledge-, financial-, age- and nationality-based requirements render them distinctly arcane when it comes to pursuing children’s claims on a routine basis.

But the process of developing, implementing and monitoring children’s rights is not just a question of the EU acting alone; it implies a joint responsibility of a range of actors. At the most basic level the EU can initiate and enact laws but it is for the Member States to actually discharge them and for civil society organisations, parents and others in authority to empower children to claim those rights or to suggest new contexts in which they need to be articulated. Peter Newell, a long-standing advocate of children’s rights, provides a fitting reflection on the two-way direction (top-down and bottom-up) in which reform needs to take place to make European level children’s rights a meaningful endeavour:

Fault doesn’t just lie at the feet of the EU ... one wonders whether children’s access to European justice would be any more apparent/effective if all of the mechanisms were refined and adapted to conform with the Child Friendly Justice Guidelines. To be truly effective, this has to be complemented with more investment in awareness-raising and training among those who represent children ...; complaining to the Commission about inadequate implementation of EU children’s rights obligations by various national actors; or by calling on the European Ombudsman to investigate complaints against European authorities in their administration of the various children’s rights duties which they have endorsed ...

Let’s be clear that children themselves are not going to flood these mechanisms with their own complaints, however child-friendly they become. It is going to remain largely an adult responsibility and obligation to pursue breaches of children’s rights: our obligation because of our adult success in breaching them. (Newell 2008: 131)

Significant legal, policy and procedural advancements have been made at EU level to stimulate access to justice and democratic participation in decision-making, but these have occurred largely in isolation from developments in

the field of EU children's rights. Consequently, no matter how well-intentioned and persuasively articulated EU children's rights provisions are, they will remain largely decorative until EU-level justice processes are adapted to accommodate children's specific capacities, vulnerabilities and interests.

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