The following response presents some thoughts and suggestions for the development of EU Justice policies, from a children’s rights perspective. Children are affected, to at least some degree, by virtually all areas of EU activity, particularly those falling within the mandate of DG Justice.

DG Justice has made significant progress in ensuring that children’s rights occupies a more prominent position on the EU legal and policy agenda. We are therefore hopeful that, despite the absence of any reference to children in the consultation documentation, our response will be welcomed and integrated into the future planning of the EU justice agenda.

The European Children’s Rights Unit is an interdisciplinary research unit, based in the School of Law and Social Justice, University of Liverpool, UK. We are the leading academic experts on children’s rights at EU level, having completed a number of major research projects on various aspects of children’s rights (see our website for further details). These include the development of an extensive set of Children’s Rights Indicators on behalf of the EU Fundamental Rights Agency (2009); the development of a child participation self assessment tool for the Council of Europe (2012); major academic studies into the extent to which the EU’s constitutional and institutional architecture can accommodate children’s rights more effectively; and more focused studies on children’s rights under various substantive areas of EU law and policy (including immigration and asylum; EU consumer law; EU employment law; EU free movement law; EU child protection law and policy; EU citizenship; EU education law and policy; and EU family law). The following recommendations are therefore informed by this rich, empirically verified body of work.

**EU Civil Law**

Our suggestions respond specifically to question 2:

*In which area of family law is further progress needed at EU level? How should it be achieved?*

Children’s rights and interests are central to domestic family justice proceedings and so it follows that children’s rights should be a central consideration in international family proceedings. The most significant EU instrument in this regard is [Regulation 2201/2003](#). This incorporates explicit reference to children’s rights principles, specifically the right of the child to be heard and the best interests principle.
Insofar as the EU is confined to regulating the procedural aspects of cross-national family justice it is limited in its capacity to hold Member States to account for their adherence to these principles. In reality, it is for national law and processes to determine the scope and content of their children’s rights obligations in this regard. It follows then that the strength of children’s rights under the Regulation depends entirely on whether measures at the national level give effect to such a right and on how amenable national judges are to interpreting and applying those measures expansively. In reality, significant divergence exists between the Member States in the procedures for consulting with children, presenting something of a lottery for children, depending on where they are residing when proceedings are issued.

That said, there is evidence to suggest that the Regulation can be used more readily to audit national family justice processes involving children. For instance, Article 23(b) of the Regulation enables Member States to refuse to recognise parental responsibility decisions on the basis that the appropriate child consultation procedures were not followed in the issuing state. Similarly, return orders following child abduction between two jurisdictions can be refused if it is demonstrated that the competent child has made well-founded objections.

These obligations should be scrutinised and applied more intently by the Court of Justice with a view to encouraging Member States to adopt a more rigorous and consistent approach to their child consultation procedures. This should involve supporting more effective cross-national exchange and sharing of best practice on effective child consultation procedures, bearing in mind the obligations and guidance inherent in Article 12 of the UN Convention on the Rights of the Child and General Comment No 12 on the right of the child to be heard.

A second instrument of relevance to children in this context is Regulation 4/2009/EC on jurisdiction, applicable law, recognition and decisions and cooperation in matters relating to maintenance obligations. While this governs all aspects of maintenance, child maintenance falls within its scope. However, the regulation does not make a single reference to the welfare of the child - The emphasis instead is firmly on enforcing parental obligations, protecting the rights of the ‘maintenance creditor’ (generally the parent with care or the state), and on promoting the proper administration of justice within the European Union. There is no universal right of either application or enforcement that equates with the competent child’s universal right to participate in proceedings concerning custody and access.

Children’s material welfare following divorce or parental separation is, therefore, entirely subject to the relevant national law and procedure, making the likelihood of any financial relief not only dependent on their custodial parent pursuing a maintenance claim, but also on the relevant authorities ensuring such obligations are enforced. The effect of this is to further disenfranchise even the most competent of children, effectively placing any decision to enforce parents’ financial obligations in the hands of adult proxies or at the mercy of resource-intensive, excessively bureaucratic and, in some cases, dysfunctional national enforcement procedures. This illustrates the futility of developing supra-national regulation in the field of maintenance if, on the ground, national enforcement procedures are selective, overly-bureaucratic and insensitive to children’s rights. We would urge the EU institutions, therefore, to exploit the opportunities presented by the development and enforcement of this area of law, to articulate more persuasively the children’s rights imperative driving maintenance provision and to encourage Member States to share best practice accordingly.

A final aspect of EU family law of relevance to children is the EU Mediation Directive (Dir 2008/52/EC of the European Parliament and the Council of 21 May 2008 on
Certain Aspects of Mediation in Civil and Commercial Matters). Despite the incredibly broad scope of this instrument, it is a potentially valuable mechanism for encouraging a swifter, more conciliatory response to family disputes involving children. However, a number of procedural and logistical issues could be addressed to render it more effective for children.

Most obviously, the inclusion of family mediation within its compass should surely have prompted some consideration of children’s interests. However, the Directive does not make any reference to children at all. Any future revision of this instrument could at least include a general reference to children’s rights without overstepping the EU’s constitutional limitations, if only to serve as a subtle reminder to Member States of their abiding obligation to address children’s interests in the context of alternative dispute resolution processes. More reference to children’s rights can have a surprisingly motivating effect on Member States prompting a re-appraisal of national procedures by administrative and judicial authorities and others implicated in the family justice system, and sending out a consistent message about how the EU values children’s rights.

FUNDAMENTAL RIGHTS

1. What actions at EU and national level are required to increase the effectiveness of the rights enshrined in the Charter of Fundamental Rights?

Children’s Rights and the Charter

The Charter of Fundamental Rights has been identified by the Commission as a central plank of its EU children’s rights programme. Indeed, it is referred to no less than 22 times in the EU Agenda on the Rights of the Child, and is seen as reinforcing the EU’s authority to act in the field of children’s rights.

One of the most significant innovations of the Charter is that it contains direct and detailed provision relating to children, many of which are heavily inspired by the UNCRC and the ECHR. Thus the Charter grants children a specific right to: such protection and care as is necessary for their well-being, the opportunity to express their views freely and assurance that such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.\(^1\) Article 24(2) further provides that ‘in all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration’; while Article 24(3) acknowledges children’s right ‘to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests’.

Additional provisions directly addressing children’s rights and interests include: the right to receive free compulsory education (Art 14(2)); the prohibition of discrimination on grounds of, inter alia, age (Art 21) and the prohibition of exploitative child labour (Art 32). Provision targeting the family unit is also of relevance to children such as the right to respect for private and family life, home and communications (Art 7) and the family’s right to enjoy legal, economic and social protection (Art 33). Some of the more age-neutral provisions can also be construed in favour of children in line with parallel ECHR interpretations. Notable examples include Article 4 which prohibits torture and inhuman or degrading treatment\(^2\) and Article 5(1) prohibiting slavery, forced labour and human trafficking.\(^3\)

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\(^1\) Art 24(1).
\(^2\) Applied successfully by the ECtHR in the context of corporal punishment under Art 3 ECHR, see \textit{A v United Kingdom} App no 25599/94 (1999) 27 EHRR 611.
\(^3\) The parallel provision of Art 4 ECHR having been interpreted by the ECtHR to impose a positive obligation on the state to prevent child trafficking and domestic servitude, see \textit{Siliadin v France} App no 73316/01 (2006) 43 EHRR 16; see further H Cullen, ‘\textit{Siliadin v France: Positive Obligations under...}’
A further benefit associated with the Charter as compared to other children’s rights mechanisms relates to its impact on the EU law and policy-making process, particularly following its legal elevation by the Treaty of Lisbon. Specifically, it has been adopted as a ‘proofing tool’ to enable the institutions to scrutinise all legislative proposals and internal procedures to ensure their compatibility with fundamental rights. The “Charter Strategy” is an important mechanism, but it needs to consider more explicitly and comprehensively the impact of legal proposals on children in a more comprehensive, systematic way. With that in mind, we would encourage more strategic use of all provisions of the Charter (not simply those referring explicitly to children) with a view to mainstreaming children’s rights into all stages of the EU law and policy-making process, including the activities of the Court of justice.

Children’s Rights and non-discrimination

The substance of the Charter can also be applied more creatively to support more child-sensitive interpretations of related legislation. For instance, one principle explicitly expressed within the Charter in which there is much potential for the EU to play a more active role with regard to children’s rights pertains to equality and non-discrimination. Relevant legislation, notably Council Directive 2000/78/EC (the Framework Directive), prohibits discrimination on grounds of religion or belief, disability, age and sexual orientation in the context of employment. Still, Article 6 of this Directive dramatically reduces the protection against discriminatory practices by allowing discrimination on grounds of age if occurring for an objectively and reasonably justified legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means to achieve that aim are appropriate and necessary.

The fact that discrimination on grounds of age can be justified on the basis of this ‘extra’ reason clearly contributes to pushing age towards the bottom of the ‘hierarchy of grounds’ of EU anti-discrimination law. Case law has confirmed the latitude afforded to Member States in determining public policy objectives which justify derogating from age equality. Nevertheless, in a more recent case, the CJEU held a national rule in relation to pilots’ compulsory retirement to be in violation of the prohibition of age discrimination. Also, the CJEU has already had the opportunity to use the Framework Directive to protect the interests of young (but not child) workers: in Hütter concerning determination of pay; Kücükdeveci concerning calculating the notice period for dismissal; and in Hennigs and Mai concerning a national collective agreement providing for differences in basic pay according to age.

Other contexts in which the Framework Directive may be used to fight discrimination against working children include the offer of more precarious employment arrangements (e.g., allowing more successive fixed-term contracts for younger workers than for older ones, as advocated in the Netherlands and Spain) and lower salaries (e.g., paying younger workers a proportion of the minimum salary payable to older workers merely on grounds of


4 For example, C-144/04, Werner Mangold v Rüdiger Helm, Judgment of 22 November 2005; C-411/05, Félix Palacios de la Villa v Cortefiel, Judgment of 16 October 2007; and C-388/07, Age Concern England v SSBERR, Judgment of 5 March 2009.

5 C-447/09, Prigge and others v Deutsche Lufthansa AG, Judgment of 13 September 2011.

6 C-88/08, David Hütter v Technische Universität Graz, Judgment of 18 June 2009.


8 C-297/10 and C-298/10, Hennigs v Eisenbahn-Bundesamt, Land Berlin v Mai, Judgment of 8 September 2011.
age, as occurs in Greece and the UK). Domestic case law also reveals the potential to use age anti-discrimination provisions to protect young workers’ fundamental rights, as in the UK decision in Wilkinson v Springwell Engineering Ltd concerning dismissal.

Of course, children suffer violations of their right to equality beyond the sphere of employment, reinforcing the need to proceed with the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (2011).

2. Should the rights guaranteed in the Charter be directly applicable in the Member States in all cases, by abolishing the limitations of Article 51 of the Charter?

Article 51, construed in the context of children’s rights, confirms that unless a children’s rights issue intersects clearly with a substantive area of EU competence, the Charter is confined to making abstract, aspirational declarations as to how children’s rights should be upheld within the territory of the EU. It does not confer any new powers or competences on the EU institutions and cannot be used as a legal basis for any new legislative measures. It can only support action founded on the legal bases included within the Treaties.

We believe that there is real value in maintaining this approach. Children’s experiences and needs are largely dictated by the environment in which they live. Thus, their rights should be determined at the most intimate and sensitive level of governance to the child as possible. It is generally only deemed appropriate for the EU to intervene legally in issues affecting children where they cannot be adequately addressed at the local or national level (notably issues that straddle legal and geographical boundaries, such as free movement, immigration or trafficking).

Moreover, it is important to remember that the EU is operating within an entirely different, rather more restricted constitutional framework than other international institutions charged with a more explicit human rights mandate. Its primary objective is to achieve a sustainable level of political and economic convergence and stability across the Member States. It was never intended to be a children’s rights body, any more than it was intended to be a human rights body. Ultimately, therefore, the strictures of EU competence and the principle of subsidiarity should never allow the EU to interact with domestic children’s rights issues in quite the same way as international law.

But that does not mean to say that the EU does not have a critical role to play in upholding and promoting children’s rights standards. There is a clear need for a more coherent approach to children’s rights at this level, but it has to be strategic than reactive. It has to bow to the reality of EU competence and to the very real political and ideological objections that Member States may raise to potentially reckless and wide-spread intervention in matters that have no identifiable link with the EU’s core functions and objectives.

This demands a more confident assertion on the part of the EU of what it cannot do as much as what it can do in relation to children’s rights. With this in mind, the EU should be regarded as playing a multi-faceted role in promoting children’s rights, as regulator, co-

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ordinator and supporter. The regulatory role involves top-down legislative and policy intervention that can be transposed at the Member State level in accordance with specific domestic interests. The co-ordinating role involves acting as a catalyst and correspondent between the Member States, mobilising rather than dictating domestic responses to universal children's rights issues. Finally, the supportive role involves bolstering the activities of parallel international legal and campaign networks such as the Council of Europe, the United Nations, the World Health Organisation, UNICEF and, indeed, NGOs and practitioners at the domestic level.