

# Summary

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# 1. Introduction

## 1.1 The origin and the aim of the survey

On the occasion of its Semester of the EU Presidency (1<sup>st</sup> January to 30<sup>th</sup> June 2008), the Republic of Slovenia decided to hold a meeting of the Permanent Intergovernmental Group L'Europe de l'Enfance (PIGEU) on the 26<sup>th</sup> of March 2008 in Ljubljana. For this event, the **Slovenian Ministry of Labour, Family and Social Affairs** has entrusted the ChildONEurope Secretariat<sup>1</sup> with the mandate of carrying out the survey on "National Systems of Children's Legal Representation", considering its terms of reference and its relations with PIGEU.

ChildONEurope is an institutional Network of the National Observatories or institutions on childhood appointed by the national Ministries of the EU which form PIGEU. ChildONEurope was set up in 2003 after two years of preparatory work in the context of PIGEU, whose aim is, among others, to promote the mainstreaming of children's policies and of the rights of the child in all EU policies. The main objectives of ChildONEurope are the following:

- the exchange of knowledge and information on national legislations, policies, programmes, statistics, studies and best practices concerning childhood and adolescence;
- the realization of comparative surveys,
- the organization of seminars and conferences at a EU level with a multidisciplinary and comparative approach,
- the development and exchange of knowledge on methodology and indicators in order to obtain comparability of data and information.

In January 2008, ChildONEurope comprised 24 partners<sup>2</sup>. With regard to the contents of this survey carried out by the ChildONEurope Secretariat, the overall objective is to mainstream children's rights in the policies implemented at the national level on national systems of child legal representation on the basis of the Convention on the Rights of the Child (CRC).

The need to appoint a legal representative for a child arises from practice in dealing with complaints. Even though we have been calling attention to this matter, the relationship between the adult and the child as a holder of rights has not sufficiently implemented despite certain legislative amendments. In most cases, they are still only silent observers in the decision making process that will significantly mark their future.

For these reasons, with the intention to seek possibilities to include a legal representative in legislation the Slovenian Government started in January 2007 a pilot project that will assist through its practical work in providing answers to open questions and set the foundations for including a legal representative in legislation. The project will last for two years and its purpose is to develop a model of a legal representative of children's rights that could be contextually and organisationally included in the formal system and thereby ensure the implementation and involvement of this figure at the national level. The model should, in accordance with the CRC, allow the children to enjoy an appropriate active participation in the decision making process.

In order to reach this objective, the Slovenian Government entrusted the ChildONEurope Secretariat with the mandate of drawing up a review of the Children's National Legal Representation Systems. The comparative review will mainly analyse and compare the national experiences and practices on children's legal representation undertaken at the national level by the Government in EU Countries selected by the Slovenian Ministry of Labour, Family and Social Affairs: Austria, France, Denmark, Germany, Ireland and Italy.

The overall objective of the review is to provide information in relation to the existing government experiences on child legal representation systems within the EU Countries mentioned. In this context the aim of the comparative analysis is to underline the main trends

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<sup>1</sup> The ChildONEurope Secretariat has a role which enables it to make proposals and it has technical-scientific, logistic, documentary and communication support functions. The Secretariat's functions have been assigned to the Italian National Childhood and Adolescence Documentation and Analysis Centre whose activities are managed by the Istituto degli Innocenti of Florence.

<sup>2</sup> For more information, see the web site [www.childoneurope.org](http://www.childoneurope.org)

of these practices through the identification of their national legal referral frameworks, the organizational models used, the modus operandi of those systems and the positive practices eventually developed.

This analysis aims, on the one hand, at sharing positive experiences and on the other hand at pointing out the issues on which EU Countries could improve their policies of intervention on child advocacy accomplishing the CRC principles.

## 1.2 The methodology of the survey

In compliance with the mandate and the aims mentioned above, the survey was carried out on the basis of the following steps:

- 1) **Elaboration of a questionnaire.** The ChildONEurope Secretariat drew up a specific questionnaire to be submitted to the EU Countries mentioned for the collection of information and material related to their national experience on children's legal representation. With the intention of gathering information related to the main trends of these practices in the domestic context, the national legal referral frameworks, the organizational models used, the modus operandi of those systems and the positive practices eventually developed, the questionnaire is organised in two parts – the judicial and the extra-judicial contexts (see annexes).
- 2) **Identification, collection and analysis** of the Concluding Observations (COs) related to children's legal representation and elaborated by the Committee on the Rights of the Child (Committee) on the last national reports presented by the EU Countries. Moreover, all the documentation on children's legal representation elaborated by the Committee will be added to this material (e.g.: general measures of implementation, General Comments, General Discussion Days, etc.). The collection will be made through the Committee website. The analysis of the Cos will identify the common, positive and critical points emerging most frequently from the Committee COs on this specific issue. The aim of this analysis is to identify the achievements of the EU Member States and the obstacles and challenges, which remain to be addressed in the process of full implementation of the CRC on this specific issue; the comparison of those common positive and critical points emerging most frequently from the Committee COs.
- 3) **Request, collection and analysis of information from some ChildONEurope partners on national experiences of children's legal representation.** The purpose of this step was to collect information from the selected EU Member States on the policies, programmes and actions they are currently undertaking on the specific issue of children's legal representation through the compilation of the aforementioned questionnaire. The comparative analysis also takes into consideration the information present in the last EU country report to the Committee.

The report is based on the information collected from the ChildONEurope partners as indicated above and reflects the different national realities. Not all countries have developed a system of child legal representation in all the areas indicated in the questionnaire (judicial, extra-judicial context) and therefore the areas covered in the report vary from country to country. Moreover, only four of the above mentioned countries compiled the questionnaire and provided the Secretariat with information on their national experience in this field.

The survey report is divided into five chapters: the first one is an introduction to explain the origin, aims, methodology and content of the survey, the second focuses on the CRC approach and in particular the Committee COs, the third on the national systems developed by each of the selected Countries, the fourth underlines some specific aspects of the comparative analysis and the fifth presents some conclusions.

A final part (Annexes) completes the study. It is composed of a copy of the questionnaire used for the gathering of the information at the national level and of the bibliographic material used as support for the elaboration of the survey, it is drafted by the Biblioteca Innocenti Library.

## 2. The CRC and the Committee's Documents

This chapter is dedicated to the CRC, to the Committee and to its documents, first of all the COs related to the last European Union Member Countries' (27), the Accession Countries' (Croatia) and Candidate Countries'(Turkey) reports.

In conformity with the topic of the survey, children's legal representation, the first and the second paragraphs are focused on the interpretation of and comments on two of the CRC's articles: respectively article 3 on the best interest of the child and article 12 on respect for the view of the child, the right to be heard and child participation.

The third paragraph highlights the COs of the Committee on those articles and in particular on the issue, where expressly mentioned, of children's legal representation.

### 2.1 CRC on the best interest of the child

#### Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

#### Comment on article 3<sup>3</sup>

The concept of the "best interest" of the child has been the subject of more academic analysis than any other concept included in the CRC. In many cases, its inclusion in national legislation pre-dates ratification of the CRC, and the concept is by no means new to international human rights instruments.

The Committee has highlighted in article 3 paragraph 1 that the best interest of the child shall be a primary consideration in all actions concerning children, as one of the general principles of the CRC, alongside articles 2, 6 and 12. The principle was first seen in the 1959 Declaration of the Rights of the Child, which uses it in Principle 2: "The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration".

Interpretations of the best interests of children cannot trump or override any of the other rights guaranteed by other articles in the CRC. The concept acquires particular significance in situations where other more specific provisions of the CRC do not apply. Article 3 paragraph 1 emphasizes that governments and public and private bodies must ascertain the impact on children of their actions, in order to ensure that the best interests of the child are a primary consideration, giving proper priority to children and building child-friendly societies.

Within the CRC itself, the concept is also evident in other articles, providing obligations to consider the best interests of individual children in particular situations in relation to:

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<sup>3</sup> From the *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF, 2002, p. 39-51.

- separation from parents: The child shall not be separated from his or her parents against his or her will “except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”; and States must respect the right of the child to maintain personal relations and direct contact with both parents on a regular basis “except if it is contrary to the child’s best interests” (article 9 paragraphs 1 and 3);
- parental responsibilities: Both parents have primary responsibility for the upbringing of their child and “the best interests of the child will be their basic concern” (article 18 paragraph 1);
- deprivation of family environment: Children temporarily or permanently deprived of their family environment “or in whose own best interests cannot be allowed to remain in that environment”, are entitled to special protection and assistance (article 20);
- adoption: States should ensure that “the best interests of the child shall be the paramount consideration” (article 21);
- restriction of liberty: Children who are deprived of liberty must be separated from adults “unless it is considered in the child’s best interest not to do so” (article 37(c));
- court hearings of penal matters involving a juvenile: Parents or legal guardians should be present “unless it is considered not to be in the best interest of the child” (article 40 paragraph 2 (b)(iii)).

The Working Group drafting the CRC did not discuss any further definition of “best interests”, and the Committee has not as yet attempted to propose criteria by which the best interests of the child should be judged in general or in relation to particular circumstances, aside from emphasizing that the general values and principles of the CRC should be applied to the context in question.

The Committee has repeatedly stressed that the CRC should be considered as a whole and has emphasized its interrelationships, in particular between those articles it has elevated to the status of general principles (articles 2, 3, 6 and 12).

Thus, the principles of non-discrimination, maximum survival and development, and respect for the views of the child must all be relevant to determining the best interests of a child in a particular situation, as well as to determining the best interests of children as a group, and consideration of best interests must embrace both short and long-term considerations for the child.

Any interpretation of best interests must be consistent with the spirit of the entire CRC – and in particular with its emphasis on the child as an individual with views and feelings of his or her own and the child as the subject of civil and political rights as well as special protections. States cannot interpret best interests in an overly culturally relativist way and cannot use their interpretation of “best interests” to deny rights now guaranteed to children by the CRC, for example to protection against traditional practices and violent punishments.

The wording of the first paragraph “shall be a primary consideration” indicates that the best interests of the child will not always be the single, overriding factor to be considered; there may be competing or conflicting human rights interests, for example between individual children, between different groups of children and between children and adults. The child’s interests, however, must be the subject of active consideration. It needs to be demonstrated that children’s interests have been explored and taken into account as a primary consideration.

The wording of the principle indicates that its scope is very wide, going beyond State initiated actions to cover private bodies too, and embracing all actions concerning children as a group.

In its *Guidelines for Periodic Reports* and in its examination of States Parties’ reports, the Committee has emphasized that consideration of the best interests of the child should be built into national plans and policies for children and into the workings of parliaments and governments, nationally and locally and particularly in relation to budgeting and allocation of resources at all levels. The assessment of child impact and building the results into the development of law, policy and practice thus become an obligation (article 4).

Where the phrase “best interests” is used elsewhere in the CRC (see above), the focus is on deciding appropriate action for individual children in particular circumstances and requires determination of the best interests of individual children. In such situations, the child’s interests are the paramount consideration (as stated explicitly in relation to adoption in article 21).

The Committee has emphasized that article 3 paragraph 1 is fundamental to the overall duty to undertake all appropriate measures to implement the CRC for all children in article 4. For example, where a plan of action for children is proposed, the “best interests” principle should be fully integrated.

Integration of the principle must imply the development of mechanisms to assess the impact of government actions on children and to incorporate the results of the assessment in policy development (article 4).

In relation to the vital issue of resource allocation, the best interests principle demands first that within the overall central government budget, and regional and local budgets, there must be an adequate allocation for children (article 4). There must therefore be sufficient analyses of relevant budgets to determine the proportion and amount allocated to children. In considering priorities in resource allocation, both between and within services at the national and local level, best interests must be a primary consideration. The non-discrimination principle is also important; but as emphasized in article 2, the non-discrimination principle allows for positive discrimination – that is, affirmative action – on behalf of particularly disadvantaged or vulnerable groups of children.

Thus, it is vital to set priorities and targets within resource allocation in order to reduce discrimination in overall implementation.

The Committee has paid increasing attention to the importance of budget analysis in its examination of reports and in its discussions with representatives of States Parties. Its *Guidelines for Periodic Reports* seeks information on: the proportion of the budget devoted to social expenditure for children at all levels; budget trends; the “arrangements for budgetary analysis enabling the amount and proportion spent on children to be clearly identified”; and “the steps taken to ensure that all competent national, regional and local authorities are guided by the best interests of the child in their budgetary decisions and that they evaluate the priority given to children in their policymaking”.

Similarly, the impact on children of economic adjustment policies and budgetary cuts must be considered in the light of the best interests principle and other basic principles. This consideration is also highlighted in the *Guidelines for Periodic Reports*: “The measures taken to ensure that children, particularly those belonging to the most disadvantaged groups, are protected against the adverse effects of economic policies, including the reduction of budgetary allocations in the social sector”.

The Committee looks for processes which ensure that the best interests of children are considered in policy formulation, and it has promoted the concept of child impact assessment (article 4).

The second and third paragraphs of article 3 are also of great significance. Article 3 paragraph 2 outlines an active overall obligation of States, ensuring the necessary protection and care for the child’s well-being in all circumstances, while respecting the rights and duties of parents. Together with article 2 paragraph 1 and article 4, article 3 paragraph 2 sets out the overall obligations of the State.

Article 3 paragraph 3 requires that standards be established by “competent bodies” for all institutions, services and facilities for children, and that the State ensures that the standards are complied with. This paragraph demands that institutions, services and facilities be established for children, and that the State must ensure that the standards are complied with through appropriate monitoring. Other articles refer to particular services that States Parties should ensure are available; for example “for the care of children” (article 18 paragraphs 2 and 3), alternative care provided for children deprived of their family environment (article 20), care for disabled children (article 23), rehabilitative care (article 39) and institutional and other care related to the juvenile justice system (article 40).

The provision covers not only State-provided institutions, services and facilities but also all those “responsible” for the care or protection of children. In many countries, much of the non-

family care of children is provided by voluntary or private bodies, and in some States policies of privatisation of services are taking more institutions out of direct State control. Article 3 paragraph 3 requires standards to be established for all such institutions, services and facilities by competent bodies.

Together with the non-discrimination principle in article 2, the standards must be consistent and conform to the rest of the CRC.

## **2.2 CRC on the right to be heard and child participation**

### **Article 12**

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

### **Comment on article 12<sup>4</sup>**

The Committee asserted that article 12 is a general principle of fundamental importance to all aspects of implementation of the CRC and to the interpretation of all other articles.

In its paragraph 1 it requires States to assure that any child capable of forming his/her own view has the right to express views freely in all matters affecting him or her and that the child's views are given due weight in accordance with the age and maturity.

In the article 12 paragraph 2, specifically provides the child with the right to be heard in any judicial and administrative proceedings affecting him or her, covering a very wide range of court hearings and also formal decision-making affecting the child in, for example, education, health, planning, the environment and so on (i.e. juvenile justice matter).

The Committee has consistently emphasized that the child must be regarded as an active subject with rights and that a key purpose of the CRC is to emphasize that human rights extend to children. Article 12, together with the child's right to freedom of expression (article 13), and other civil rights to freedom of thought, conscience and religion (article 14), and freedom of association (article 15) underline children's status as individuals with fundamental human rights, and views and feelings of their own. The Committee has rejected what it has defined as "the charity mentality and paternalistic approaches" to children's issues. Thus, within its monitoring activity the Committee invariably raises implementation of article 12 with States Parties and identifies traditional practices, culture and attitudes as possible obstacles.

The wording of the two paragraphs of article 12 does not provide a right to self-determination but deal with the involvement of children in decision-making process affecting their life. The references to the "evolving capacities" of the child, in articles 5 and 14 emphasize the need to respect the child's developing capacity for decision-making.

Several other articles include references to children's participation. Article 9 paragraph 2 refers to the child's right to be heard in relation to proceedings involving separation from his or her parent(s), during which "all interested parties shall be given an opportunity to participate in the proceedings and make their views known" (article 9) (separation from parents). In relation to adoption proceedings, article 21(a) refers to "the informed consent" of the persons concerned (adoption). Every child deprived of his or her liberty has the right under article 37 to challenge the legality of the deprivation before a court or other authority, suggesting a right to

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<sup>4</sup> From the *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF, 2002, p. 159-184.

initiate court action rather than just to be heard<sup>5</sup>. Whereas, article 40, in relation to children “alleged as, accused of, or recognized as having infringed the penal law,” emphasizes the juvenile’s right to an active role in the proceedings, but that he or she must not “be compelled to give testimony or to confess guilt” (article 40 paragraph 2 (b)(iv)).

The significance of article 12 of the CRC is that it not only requires that children should be assured the right to express their views freely, but also that they should be heard and that their views be given “due weight”. These principles are recognised as such also by the Universal Declaration of Human Rights that states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers” (article 19). In addition the International Covenant on Civil and Political Rights states: “Everyone shall have the right to hold opinions without interference” (article 19 paragraph 1).

Concluding, through the adoption in 2003 of the *General Comment no. 5 on General measures of implementation of the Convention on the Rights of the Child*, the Committee affirmed that the principle of article 12 highlights the role of the child as an active participant in the promotion, protection and monitoring of his or her rights and it applies equally to all measures adopted by States to implement the CRC. “Opening government decision-making processes to children is a positive challenge which the Committee finds States are increasingly responding to. Given that few States as yet have reduced the voting age to below 18, there is all the more reason to ensure respect for the views of unenfranchised children in Government and Parliament. If consultation is to be meaningful, documents as well as processes need to be made accessible. But appearing to “listen” to children is relatively unchallenging; giving due weight to their views requires real change. Listening to children should not be seen as an end in itself, but rather as a means by which States make their interactions with children and their actions on behalf of children ever more sensitive to the implementation of children’s rights”.

### **2.3 Comment on the CRC Committee’s COs: children’s legal representation**

Before analysing the COs adopted by the CRC Committee’s on the best interest of the child (article 3) and on the right to be heard and on child participation (article 12), it is interesting to focus the attention directly on children’s legal representation.

First of all it is significant to highlight that the Committee COs didn’t deal frequently with children’s legal representation. Only in two special measures of protection (unaccompanied, refugee and asylum-seeking children and administration of juvenile justice) did the Committee take this specific issue into consideration. However, also in those cases the child legal representation wasn’t the central point of the Committee’s observations.

Concerning unaccompanied, refugee and asylum-seeking children, one positive achievement made by the Committee is to address the situation of unaccompanied minors by providing them with assistance during their time in the holding area from an “ad hoc administrator” who replaces a legal representative<sup>6</sup>.

Among the recommendations, the Committee underlines to 3 EU Member Countries and 1 Candidate Country that specialized training is equally important for legal representatives, guardians, interpreters and others dealing with separated and unaccompanied children<sup>7</sup>. In advance, the Committee requests to carry out a review of the availability and effectiveness of legal representation and other forms of independent advocacy for unaccompanied minors and other children in the immigration and asylum systems<sup>8</sup>.

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<sup>5</sup> See the specific issue of juvenile justice, in the Survey on Concluding Observations of the CRC Committee on the Rights of the Child on the last EU Countries reports (<http://www.childoneurope.org/activities/issues.htm>).

<sup>6</sup> France.

<sup>7</sup> Austria, Spain, Sweden, Turkey.

<sup>8</sup> United Kingdom.

Concerning the administration of juvenile justice, the Committee underlines the need to establish minimum conditions to improve the conditions of detention and imprisonment, non-restricted rights of appeal and legal representation, free interpretation<sup>9</sup>.

In its COs, the Committee focused its attention on child legal representation only in two special measures of protection, first of all because the EU Countries' reports have spent very few words on it, secondly because the procedure of the reporting system follows the structure of the CRC and no articles are explicitly related to children's legal representation.

The Committee addresses the issue of the child's best interest in the Concluding Observations on 11 EU Member Countries, 1 Accession and 1 Candidate Country<sup>10</sup>.

The attention of the Committee in these concluding observations is mainly focused on the principle set down in article 3 paragraph 1 and 3 paragraph 3. While appreciating the fact that various initiatives have been developed in order to take into consideration the principles of the best interests of the child<sup>11</sup>, that some Constitutional Courts have made a constitutional principle of the best interests of the child, that new legislative measures and programmes incorporating the principle of the best interests of the child have been adopted<sup>12</sup> and that some national boards and institutions for the health and welfare of children and children's parliaments have been established, it first of all expresses its concern about the fact that the principle of the best interest of the child is not appropriately analysed with regard to various situations and contexts for 7 EU Member Countries<sup>13</sup>. Thus, the Committee has requested a greater effort to appropriately analyse the principle of the best interests of the child in all those situations having an impact on children as single persons or as a social group. In particular for 4 EU Member Countries<sup>14</sup> the Committee demands that appropriate and efficient measures be taken in order to ensure that the principle of the best interests of the child forms the basis of the process and decisions in asylum cases involving children and requests the State to adopt this principle as a paramount consideration in all legislation and policy affecting children in the juvenile justice system and in immigration practices.

The Committee has consistently emphasized, during its monitoring activity, that article 3, together with other identified general principles in the CRC, should be reflected in legislation and integrated into all relevant decision-making. For example, the Committee has indicated that it expects the best interests principle to be written into legislation in a way that enables it to be invoked before the courts. When a best interests principle is already reflected in national legislation, it is generally in relation to decision making about individual children, in which the child is the primary, or a primary, subject or object – for example in family proceedings following separation or divorce of parents, in adoption and in State intervention to protect children from ill-treatment. It is much less common to find the principle in legislation covering other "actions" that concern groups of children or all children but may not be specifically directed at children. The principle should apply, for example, to policy-making on employment, planning, transport and so on. Even within services whose main purpose is children's development, for example education or health, the principle is often not written into the legislative framework.

Moreover in its *General Comment no. 5* of 2003 the Committee stresses that article 3 paragraph 1 refers to actions undertaken by "public or private social welfare institutions, courts of law, administrative authorities or legislative bodies". Thus the principle requires active measures through Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their

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<sup>9</sup> Greece, Croatia.

<sup>10</sup> Czech Republic, Germany, Hungary, Italy, Lithuania, Luxembourg, Malta, Romania, Slovakia, Sweden, United Kingdom, Croatia and Turkey.

<sup>11</sup> Germany and Malta.

<sup>12</sup> Czech Republic, Finland, Hungary, Lithuania, Luxembourg, Sweden, United Kingdom, Croatia.

<sup>13</sup> Czech Republic, Italy, Lithuania, Luxembourg, Malta, Sweden and United Kingdom.

<sup>14</sup> Hungary, Lithuania, Sweden, United Kingdom.

decisions and actions – by, for example, “a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children”.

From the COs the Committee’s concern also appears in relation to the integration of all the revisions made to legislation, judicial and administrative decisions and into projects, programmes and services which have an impact on all children for 5 EU Member Countries, 1 Accession and 1 Candidate Country<sup>15</sup> as provided by article 3 paragraph 3. Thus, the Committee demands a stronger integration of these principles in all the mentioned revisions and services dedicated to children and in some cases calls for the reinforcement of the research and educational programs for professionals dealing with children and the strengthening of the efforts to be made by the State in order to ensure that the general principle of the best interest of the child is widely spread and understood<sup>16</sup>.

The provision in article 3(3) does not contain an exhaustive list of the areas in which standards must be established but it does mention “particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision”.

In addition, services and institutions providing care and protection must comply with all other provisions of the CRC, respecting, for example, the principles of non-discrimination and best interests and the right of children to have their views and other civil rights respected and to be protected from all forms of violence and exploitation (articles 2, 3, 12, 13, 14, 15, 16, 19, 32-37). In addition, article 25 sets out the right of a child who has been placed in care, under protection or treatment “to a periodic review of the treatment provided for the child and all other circumstances relevant to his or her placement”.

Concluding, the implementation of article 3 paragraph 3 requires a comprehensive review of the legislative framework applying to all such institutions and services, whether run directly by the State, or by voluntary and private bodies. The review needs to cover all services-care, including foster care and day-care, health, education, penal institutions and so on. Consistent standards should be applied to all, with adequate independent inspection and monitoring.

Concerning the principle of respecting the view of the child, the Committee addressed this point for 22 EU Member Countries, 1 EU Accession and 1 Candidate Country<sup>17</sup>. Such a large number of observations shows the importance of this principle in the full implementation of the CRC for the Committee.

In relation to the principles set down in article 12 CRC and with the intention of underlining that the child has rights and is an active participant, in 1999 the Committee together with the Office of the High Commissioner for Human Rights, held a two-day workshop: “Tenth anniversary of the CRC commemorative meeting: achievements and challenges”, on 30 September and 1 October 1999. On that occasion the Committee made detailed recommendations, stating: “Child rights must be viewed as the human rights of children. The experience of general human rights activities over recent decades should be analyzed and used to promote respect for the rights of the child and to avoid the perseverance of the charity mentality and paternalistic approaches to children’s issues”.

The recommendations include: “The Committee will consider adopting, as a priority, a comprehensive general comment on child participation as envisaged in the CRC (and more particularly in article 12) bearing in mind that participation includes, but is not limited to, consultation and proactive initiatives by children themselves. The Committee reminds States Parties of the need to give adequate consideration to the requirements of these provisions. Such attention should include:

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<sup>15</sup> Czech Republic, Finland, Germany, Lithuania, Romania, Croatia and Turkey.

<sup>16</sup> Czech Republic and Finland.

<sup>17</sup> Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Sweden, United Kingdom, Croatia and Turkey.

- taking appropriate measures to support the right of children to express their views;
- ensuring that schools, as well as other bodies providing services for children, establish permanent ways of consulting with children in all decisions concerning their functioning, the content of the curriculum or other activities;
- increased consideration for the creation of space, channels, structures and/or mechanisms to facilitate the expression by children of their views, in particular with regard to the formulation of public policies from local up to national level, with appropriate support from adults, particularly including support for training. This requires investment to institutionalise effective spaces and opportunities for children to express their views and to engage with adults, especially through schools, community organizations, NGOs, and the media;
- encouraging and facilitating the creation of structures and organizations run by and for children and youth<sup>18</sup>.

These recommendations seem to be the basis of the concluding observation formulated by the Committee, in which, first of all, while appreciating the efforts made by States parties to promote respect for the views of the child, the Committee expressed its concern about the low level of consideration and attention given to this essential principle by civil society and the public and private institutions. Thus, it recommended 11 EU Member Countries, 1 Accession and 1 Candidate Country<sup>19</sup>, should provide the reinforcement of awareness raising campaigns among the public in general as well as the education and training of professionals with a view to the implementation of this general principle in daily life, with the aim of changing the traditional perception of children as objects rather than subjects with rights. In a few cases the Committee explicitly stressed the necessity for skill development and training programmes on children's rights, in a community setting for parents, teachers, professionals working with and for children, local officials, community leaders, administrative officials, the judiciary, the Roman Catholic Church and other religious groups, to encourage children to express their informed view<sup>20</sup>, to have their view taken into account and to participate in matters affecting them<sup>21</sup>.

Article 12 states one of the fundamental values of the CRC and probably also one of its basic challenges. "In essence it affirms that the child is a fully-fledged person having the right to express views in all matters affecting him or her, and having those views heard and given due weight. Thus the child has the right to participate in the decision-making process affecting his or her life, as well as to influence decisions taken in his or her regard..." At first sight it might be considered that article 12 is basically addressing the same situation as article 13 on freedom of expression and information. It is true that they are closely connected. But the fact they were both incorporated in the CRC and coexist in an autonomous manner, has to be interpreted as meaning that, while article 13 recognizes freedom of expression in a general way, article 12 should prevail in all those cases where the matters at stake affect the child, while stressing the right of the child to be heard and for the child's views to be taken into account<sup>22</sup>.

For these reasons, in its COs, the Committee recommended that 11 EU Member Countries<sup>23</sup> make efforts to continue to promote respect for the view of the children within the family, schools, administrative bodies and other institutions and to facilitate their participation in all matters affecting them. In some cases it requested the States to continue to enhance child participation and respect for the opinions of the child, also at national and local levels and in accordance with the age and maturity of the child, and to strengthen the effort, including in respect of legislation, to ensure that children's views are heard and taken into consideration in

<sup>18</sup> Report on the twenty-second session, September/October 1999, CRC/C/90, par. 291 (a), (w), (x) and (y).

<sup>19</sup> Austria, Cyprus, Estonia, France, Germany, Italy, Lithuania, Luxembourg, Poland, Romania, Slovakia, Croatia and Turkey.

<sup>20</sup> Estonia and Slovakia.

<sup>21</sup> Poland and Romania.

<sup>22</sup> *Manual on Human Rights Reporting*, 1997, p. 426.

<sup>23</sup> Austria, Estonia, France, Greece, Hungary, Lithuania, Luxembourg, Poland, Portugal, Romania and Slovakia.

all judicial, administrative and other decisions affecting them and in accordance with the child's age and maturity.

From the legal point of view, while welcoming the efforts made by the States towards amending, reviewing and harmonising the national legislation in order to reinforce the rights of the child to express his/her own opinions freely in all matters affecting her/him (7 EU Member Countries)<sup>24</sup>, the Committee expressed its concern in relation to the necessity that the revisions of the national legislation should expand children's opportunities to express their views and to be heard. The Committee stressed that it was essential to adopt provisions to ensure that article 12 of the CRC is fully implemented, and would be applicable to courts, administrative bodies, institutions, schools, childcare centres and in family matters affecting children and would guarantee the right to appeal against the decisions adopted, for 4 EU Member Countries<sup>25</sup>.

In relation to age, article 12 paragraph 1 does not set any lower age limit on children's rights to express views freely. It is clear that children can and do form views from a very early age, and the CRC provides no support to those who would impose a lower age limit on the ascertainment or consideration of children's views. And it is important to note, for example, that ascertaining the views of some disabled children may require special consideration.

The *Manual on Human Rights Reporting, 1997*, states: "Pursuant to the provisions of this article, States Parties have a clear and precise obligation to assure to the child the right to have a say in situations that may affect him or her. The child should therefore not be envisaged as a passive human being or allowed to be deprived of such right of intervention, unless he or she would clearly be incapable of forming his or her views. This right should therefore be ensured and respected even in situations where the child would be able to form views and yet be unable to communicate them, or when the child is not yet fully mature or has not yet attained a particular older age, since his or her views are to be taken into consideration "in accordance with the age and maturity of the child"..." (*Manual*, p. 426).

There are no limits to the obligation of States Parties to assure the child the right to express views freely. In particular, this emphasis in article 12, that there is no area of traditional parental or adult authority in which children's views have no place, aims to stress that article 12 implies no obligation on the child to express views. "Freely" implies without either coercion or constraint that: "The child has the right to express views freely. He or she should therefore not suffer any pressure, constraint or influence that might prevent such expression or indeed even require it"<sup>26</sup>. Moreover, the reference in article 12 to "all matters" shows that participatory rights are not limited to matters specifically dealt with under the CRC. As the *Manual on Human Rights Reporting, 1997*, comments: "The right recognized in article 12 is to be assured in relation to all matters affecting the child. It should apply in all questions, even those that might not be specifically covered by the CRC, whenever those same questions have a particular interest for the child or may affect his or her life... The right of the child to express views therefore applies in relation to family matters, for instance in the case of adoption, in school life, for instance when a decision to expel the child is under consideration, or in relation to relevant events taking place at the community level, such as when a decision is taken on the location of playgrounds for children or the prevention of traffic accidents is being considered. The intention is therefore to ensure that the views of the child are a relevant factor in all decisions affecting him or her and to stress that no implementation system may be carried out and be effective without the intervention of children in the decisions affecting their lives"<sup>27</sup>.

On the basis of this interpretation, in several cases the Committee requested the adoption of specific legislation governing procedure in courts and administrative proceedings ensuring that children capable of forming their own views have the right to express their own views and that due weight is given to them in accordance with the age and maturity of the child, for 4 EU

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<sup>24</sup> Czech Republic, Denmark, Finland, France, Germany, Slovenia and Sweden.

<sup>25</sup> Finland, France, Denmark and Italy.

<sup>26</sup> *Manual on Human Rights Reporting, 1997*, p. 426.

<sup>27</sup> *Manual*, p. 426 and 427.

Member Countries<sup>28</sup>. In this way the Committee reiterated the active obligation, set out in the words of article 12, to listen to children's views and to take them seriously. Again, they are in accordance with the concept of the evolving capacities of the child, introduced in article 5. In deciding how much weight to give to a child's views in a particular matter, the twin criteria of age and maturity must be considered. Age on its own is not the criterion; the CRC rejects specific age barriers to the significant participation of children in decision-making.

Another issue on which the Committee manifested its own attention is related to the promotion of contexts in which the child can express freely his/her opinions, thus it invites 5 EU Member Countries<sup>29</sup> to take the necessary steps to promote and facilitate the meaningful participation of children in society, continuing and increasing the efforts to support a children's help line, ensuring that all municipalities meet the requirements for active participation by children and young people, encouraging and supporting the establishment of youth centres and organizations and national youth councils, through adequate democratic structures and financial resources. These suggestions from the Committee are essentially linked with the wording of article 12 paragraph 2, which states that the child should be "provided the opportunity", suggests an active obligation on the State to offer the child the opportunity to be heard, although, again, it is important to emphasize that there is no requirement that the child express views. The *Manual on Human Rights Reporting, 1997* also emphasizes that the child's right to intervene in judicial or administrative proceedings affecting him or her "should be interpreted in a broad manner so as to include all those situations where the proceedings may affect the child, both when he or she initiates them, for instance by introducing a complaint as a victim of ill treatment, and when the child intervenes as a party to the proceedings, for instance when a decision must be taken about the child's place of residence in view of the separation of the child's parents, or in the case of the change of the child's name"<sup>30</sup>. There is an increasingly recognized need to adapt courts and other formal decision making bodies so as to enable children to participate. In particular, the Committee suggests that for court hearings this could include innovations such as more informality in the physical design of the court and the clothing of the judges and lawyers, the videotaping of evidence, sight screens, separate waiting rooms and the special preparation of child witnesses<sup>31</sup>.

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<sup>28</sup> Belgium, Hungary, Italy and United Kingdom.

<sup>29</sup> Austria, Belgium, Denmark, Estonia and Netherlands.

<sup>30</sup> *Manual*, p. 428.

<sup>31</sup> See the specific issue of juvenile justice, in the Survey on the CRC Committee on the Rights of the Child's Concluding Observations on the last EU Countries' reports (<http://www.childoneurope.org/activities/issues.htm>).

### **3. Presentation of the national experiences**

#### **3.1 Austria**

##### **3.1.1 Structure**

In the Austrian legal system there is no difference between the judicial and extra-judicial context in relation with the legal representation of children carried out by the competent authorities

In the Austrian experiences the **Child welfare authorities** represent the institutions in charge of the children's legal representation. Concerning its structure, it is not a centralised authority, but is organised in a decentralised manner. In fact, the welfare authorities are established at the regional level within the Austrian Federal States (Bundesländer) and under the responsibility of the latter.

They are part of the district administrative authority (Bezirksverwaltungsbehörde), but instead of working under the domestic public law they work under private legislation. There is no separate entity tasked with a specific responsibility for dealing with children's legal representation. The district administrative authorities are under supervision of the administrative authority of the federal State (Amt der Landesregierung).

##### **3.1.2 Founding legislation**

The setting up procedures have been established by legislation. Formally, the institution has been established through the provisions of the Austrian Federal Constitution, whereas the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch – ABGB) specifies in §§ 211, 212, 213 and 215 the conditions which are to be fulfilled to impose legal representation of minors by the youth welfare authority (“Jugendwohlfahrtsträger”). However, according to the Federal Constitution (federal law) it is not allowed to regulate the administration within the federal States (“Bundesländer”). So the Civil Code imposes a duty to be fulfilled by the federal States.

The founding legislation is much older than the main international instruments dealing with children's rights. Nevertheless, even though the UN Convention on the rights of the child (1989) and the European Convention on the Exercise of Children's Rights (1996) are not mentioned, the wording and the aims of the domestic legislation are completely in line with the principles laid down in the international provisions.

Furthermore, the legal provisions related to the Child welfare authorities are also included in the human rights acts and in the founding law of the ombudsmen for children.

##### **3.1.3 Appointment procedures**

Concerning the appointing process of children's legal representation, we need to remember that in accordance with Austrian law, the Child welfare authority is the legal representative of a child when (both) parents are unknown or when a minor is born in Austria, but no parent is the legal representative (§ 211 ABGB). If considered necessary, the youth welfare authority has to inform a parent about the child's rights (e.g. child support or paternity) and offer support in these matters (§ 212 par 1 ABGB).

By written consent of the legal representative the child welfare becomes the legal representative of the child in the area of establishing parenthood or child support (§ 212 par 2 ABGB). In this case only the consent of one of the legal representatives (if both parents have parental responsibility) is needed, while no consent of the youth welfare authority is required.

By written consent of (one of) the child's legal representatives and with the consent of the child welfare authority, the latter becomes the legal representative of the child in other fields (§ 212 par 3 ABGB).

Where the court has to decide about the custody of the child and there are no near relatives or other apt persons who could take on the function the court has to impose custody by the youth welfare authority (§ 213 ABGB).

In emergency cases the youth welfare authority is authorised by law to set the necessary measures in the field of childcare and education as legal representative of the minor under the condition that the court is involved within 8 days (§ 215 ABGB). If the court grants child support benefits, the youth welfare authority becomes the legal representative of the child in the field of child support (§ 9 UVG).

### **3.1.4 Composition**

Concerning the composition of the Child welfare authority there is no specific reference in relation to the number of staff members, but it is stated that its composition must have the connotation of a multidisciplinary team. The youth welfare authority usually consists of specialists in child support, of social workers and psychologists. However, only one person per time is responsible for handling a single case of a child's legal representation.

The academic and professional background of the staff office is variegated, but generally the main areas of professional and academic skills differ on the basis of the context of intervention. For example in the field of legal representation the staff member responsible for the single case will have a high school level preparation with judicial knowledge, but no college-degree in law, whereas in the cases of child legal representation in the area of child care and education the person in charge of the case will be a social worker.

The only form of special training common to the entire staff members is in family law, in particular in relation to child support. However, on the basis of the law in force in each federal State there could be a specific obligation for them to attend constant refresher courses. Moreover, federal law does not provide any kind of criteria for the professional selection of the child's legal representatives.

### **3.1.5 Power and procedures**

Referring to the process of appointing a legal representative for the child, he/she is appointed either by agreement with the parents or by court decision. Basically, the parents are the child's legal representatives. § 176 ABGB states that the court has to take the necessary measures if a child's welfare is in danger because of the parents' behaviour. One of these measures could be the transfer of the rights of custody – or only the legal representation – to the competent child welfare authority, to the other parent in case of divorce, to the grandparents or to the foster parents.

The appointment of the child's legal representatives could create some problems in relation to parental authority; however as mentioned the appointment could be stated on the basis of an agreement with the parents holding the child's legal representation or by court decision in the above law stated cases. In particular, in case of voluntary appointment by the parents (§ 212 par 2 and 3 ABGB) the child's representatives, as well as the parents are liable to represent the child. In case of appointment by court decision only the child representative is liable to represent the child. Thus, there is a limitation of the parental legal representation of their children only in the case in which the advocate is appointed by the judicial authority.

Moreover, for the appointment of the child's legal representative the procedure employed produces some effects also on the duration of his/her mandate, in fact a child's representatives appointed by parents (§ 212 par 2 and 3 ABGB) can be dismissed by the parents (withdrawal of consent - § 212 par 5 ABGB) at any time. If the parents are excluded from the custody of their child, the legal representation by the youth welfare authority automatically ends (§ 250 ABGB).

Considering the mandate of the child's legal representative, we need to underline that in the framework of the Austrian system his/her main tasks are related in the judicial context to representation in front of the court in cases regarding child support suits and paternity suits in the interest of the child. Besides in the extra-judicial context the representation is related to the negotiations regarding child support (alimony) and parenthood.

The efficacy of the work carried out by the child's legal representative at the federal level is monitored through the statistics on advances of child support. There is also a system of monitoring within the administration of the federal States.

If the child's legal representative is not operating in the full interest of the child, the person concerned may be treated according to the provisions of the law in force for the staff of the federal States. If the youth welfare authority acts against the welfare of the child the court may impose another legal representative for the child (§ 253 ABGB).

Concerning the financial allocation dedicated to the activity of the system of child's legal representation; in the Austrian system the costs of the activity are covered by the budget of the federal States as well as the expenses of every single case and the remuneration of the children's legal representatives.

## 3.2 Germany

### 3.2.1 Structure

There is no German national institutional authority that is especially or exclusively in charge of controlling the compliance of German government action with the Rights of the Child as they are laid down in the UN-Convention. However, there are four entities whose task is to act on behalf of the interest of children in the judicial context (*Verfahrenspfleger* and *Jugendgerichtshilfe*) as well as in the extra-judicial context (*Jugendamt* and *Kinderkommission*).

Concerning their organizational dimension respectively the *Verfahrenspfleger* is not an authority, but an individual person, the *Jugendgerichtshilfe* and the Youth Office (*Jugendamt*) are local authorities and the *Kinderkommission* is a sub-committee of the Federal Parliament. Whereas only the Youth Office (*Jugendamt*) and the *Kinderkommission* are separate entities tasked with a specific responsibility for dealing with children's legal representation

In general, referring to the appointment procedures a distinction needs to be made, because there are different procedures in relation to the authority appointed: the *Verfahrenspfleger* is appointed by the court by judgement; the *Jugendgerichtshilfe* and the Youth Office are local authorities with ordinary employees, thus their actions do not require any appointment; and the members of the *Kinderkommission* are MPs who are especially interested in the Rights of the Child

### 3.2.2 Judicial context

Two of the above mentioned entities that have the mandate to intervene as children's legal representatives in judicial matters, are: the *Verfahrenspfleger* and the *Jugendamt*.

#### 3.2.2.1 Founding legislation

As regards the founding legislation, a distinction needs to be made: the *Verfahrenspfleger* has been established by federal law. The rules are embodied in a code that deals with civil law procedures in family matters (Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit, FGG), whereas the *Jugendgerichtshilfe* has also been established by federal law and its rules are embodied in a code that deals with criminal law procedure for young people (Jugendgerichtsgesetz, JGG). In addition there are no references in the founding legislation to the international law dealing with the promotion, protection and exercise of children's rights.

#### 3.2.2.2 Appointment procedures

The appointment procedures are explicitly stated in the founding legislation, however they vary on the basis of the entity to which it is dedicated. As briefly said before the *Verfahrenspfleger* is appointed by court decision, besides the *Jugendgerichtshilfe* is automatically present in criminal law proceedings that deal with youth matters.

Concerning the selection criteria of the legal child representatives, the *Verfahrenspfleger* is appointed by a judge's decision. It is in the judge's power to select a person with the best qualification for the child's representation in a particular law proceeding. The procedures of appointing the *Verfahrenspfleger* differ from court to court. Some courts have compiled lists with experienced *Verfahrenspfleger*, wherefrom the persons are selected.

#### 3.2.2.3 Composition

The *Verfahrenspfleger* is an individual person who acts privately and not a representative of the State and is not embodied in any governmental authority. The court chooses a private individual who according to his or her educational background is able to act on behalf of the

child. The *Jugendgerichtshilfe* is a sub-division of the local Youth Office. Depending on the dimensions of the local community, it consists of one or more employees.

Referring to the academic and professional background of the staff office, in both entities the main professional categories covered by the staff members are: psychologists, lawyers, and pedagogues. On the base of the legislation in force the staff office or the single child legal representative is not obliged to attend constant refresher courses. The question whether a *Verfahrenspfleger* should participate in refresher or professional development courses is discussed controversially and required by some experts in this field. An active intervention in this direction is operated by the Federal Association of the *Verfahrenspfleger*, which obliges its members to participate regularly in those kinds of courses.

#### 3.2.2.4 Powers and procedures

In relation with the cases in which the law states the appointment of a legal representative of a child, in the German experience the appointment is stated during a civil law proceeding, the court can appoint a *Verfahrenspfleger* for a child under the age of 18 years, if this is necessary to protect the child's interests. A *Verfahrenspfleger* should generally be appointed when:

- 1) the interests of the child differ considerably from those of his or her parents;
- 2) the court has to decide whether the parents have or have not exercised their parental care to the benefit of the child (whether they have for example neglected the child) and accordingly whether the child should stay with his or her parents or not; or
- 3) the court has to decide whether the child has to be taken away from his guardian.

The *Jugendgerichtshilfe* is always appointed in criminal law proceedings that deal with children's matters.

In German legislation there are specific legal provisions regulating the appointment of the child's legal representative in relation to the parental authority and disciplining the powers of the *Verfahrenspfleger* or the *Jugendgerichtshilfe* in relation to parental authority. Thus, the appointment of the child's legal representative does not produce any effects on the parental responsibility.

His/her mandate is not subjected to any limitation, but the tasks vary whether we are referring to *Verfahrenspfleger* or to the *Jugendgerichtshilfe*. The *Verfahrenspfleger* should plead for the child's case and act on behalf of his or her interests, while the *Jugendgerichtshilfe* should supply support to both the court and young people in criminal proceedings.

However, broadly speaking in the judicial context the *Verfahrenspfleger* is in charge of the legal representation of a child involved in civil legal proceedings, e.g. a divorce action between his or her parents. The *Verfahrenspfleger* should be appointed when the interests of the child might differ from those of his or her parents. In this case, the *Verfahrenspfleger* should plead for the child's case and act on behalf of his or her interests.

The *Jugendgerichtshilfe* should supply support to both the court and young people in criminal proceedings. It provides expert reports about the stage of development of young people who are accused of having committed a crime and makes suggestions about a possible punishment that includes educational measures carried out by the *Jugendamt* (Local Youth Office). The *Jugendgerichtshilfe* is carried out by a sub-division of the Local Youth Office.

There is neither kind of monitoring system evaluating neither the efficacy nor the consequences of the work carried out by the child's legal representative. Thus if the child legal representative is not operating in the full interest of the child, probably the *Verfahrenspfleger* would not be appointed for a second time.

Referring to the financial resources, the *Verfahrenspflegers* remuneration and the expenses of every single case are paid by the child. If the child does not have any funds, the costs of the intervention of the *Verfahrenspflegers* are paid by the State. Whereas considering that the *Jugendgerichtshilfe* is embodied in a local authority, it is entirely financed by the local community's funds and the remuneration of its staff is covered by the same local authority.

### 3.2.3 Extra-judicial context

There are two entities that have the mandate to intervene as children's legal representatives in extra-judicial matters: the *Kinderkommission* and the *Jugendamt*.

#### 3.2.3.1 Founding legislation

In the German experience, even the entities dealing with child legal representation in the extra-judicial context are established through a legislative act. As a sub-committee of the Parliament the *Kinderkommission* is established by decision of the Bundestag and the local Youth office is established by legal provisions embodied in the Child and Youth Service Act (*Kinder- und Jugendhilfegesetz, SGB VIII*). Thus in this latter case the provisions referring to the legal representation of the child are contained in a national children's act, but for the others there is no explicit reference to the CRC or any other international instrument dedicated to children's rights.

#### 3.2.3.2 Appointment procedures

Concerning the appointment procedures, in the German experience there is no regulation of this aspect as far as the extra-judiciary context is concerned, the Child and Youth Service Act just states that the rules of the Act are carried out by the local Youth office.

However, the legislation specifies that the local Youth office should intervene when the well-being of a child in its district is at risk (mostly because the parents do not exercise their parental care to the benefit of the child's well-being) and it also states that the legal representation service must be accessible to children. If a child asks for assistance and claims that his or her well-being is at risk, the Youth Office has the duty to act.

The Local Youth Office (*Jugendamt*) is part of the local administration and is especially in charge of youth matters in its district, i.e. protection of children who are neglected by their parents, offering educational assistance to parents who are overstrained with bringing up their children etc. The Youth Office's opinion is also asked in some civil legal proceedings that concern the child, e.g. child custody battles.

The *Kinderkommission* is a sub-committee of the Federal Parliament (Bundestag). Its task is to represent the interests of children in the legislative process. In doing so, the *Kinderkommission* analyses legislative projects and their accordance with child matters.

#### 3.2.3.3 Composition

In relation to the composition of these institutions, the Youth office is a local authority with employees and the number of the staff members differs, according to the dimensions of the local community, whereas the *Kinderkommission* established in the Bundestag is composed of 5 MPs and their 5 deputies. Each member represents one party that holds seats in the Parliament.

Regarding the academic and professional background, in the Youth Office there are three different professional areas that are covered: the psychologists, the pedagogues and the lawyers, whereas in the *Kinderkommission* there are only MPs. Child legal representatives are

specially trained in the case of the Youth Office composed of a multidisciplinary team, whereas in the case of *Kinderkommission* the components are only MPs who are especially interested in the children's matters.

Moreover, the members and the employees of the Youth Office are selected on the job market on the basis of their future tasks, whereas the members of the *Kinderkommission* are selected by the parliamentary groups of their parties.

#### 3.2.3.4 Powers and procedures

In the extra-judicial context the children's legal representatives are appointed for the child, in the case of the Youth office, in order to act when the well being of a child is at risk. In this latter case the appointment does not take place through a formal act. On the other hand, in the *Kinderkommission* as stated above – composed of 5 Members of Parliament and their 5 deputies – each member represents one party that holds seats in the Parliament.

In relation to the parental authority if the well-being of a child is at risk and the parents are not willing or able to take measures to exercise their parental care to the benefit of the child's well-being in the future, the Youth office can take the child temporarily out of his/her home and offer him/her a temporary stay with a family employed by the social services or in a children's home. If, after a short period of time, the child cannot return to his/her family due to the same reasons, the Youth office has to take legal action in court to limit the parents' parental authority. The parental authority can only be limited by court decision and the intervention services of the Youth office cannot limit the parental authority, whereas, the intervention of the *Kinderkommission* has no effect on the parental authority.

The main tasks of the mandate of the Local Youth Office (*Jugendamt*) is part of the local administration and especially in charge of youth matters in its district, i.e. protection of children who are neglected by their parents, provision of educational assistance to parents who are overstrained with bringing up their children etc. The Youth Office's opinion is also taken into consideration in some civil legal proceedings that concern the child, e.g. child custody battles.

The main tasks of the *Kinderkommission* are to represent the interests of children in the legislative process. In doing so, the *Kinderkommission* analyses legislative projects regarding child matters.

In the German experience there is no monitoring system evaluating the efficacy of the work carried out by the child legal representative, however whether the child legal representative is not operating in the full interest of the child the employee of the Youth Office has to face ordinary disciplinary action within the authority to which he/she belongs. On the contrary there are no consequences established by law for the members of the *Kinderkommission*.

The activity of the system of child legal representation in the extra-judicial context is covered by State funds and the employees of the Youth Office earn a regular salary from the State that also covers the expenses of every single case, whereas, the Members of the *Kinderkommission* are remunerated only in their quality as MPs.

## **3.3 Ireland**

### **3.3.1 Structure**

There is no Irish national institutional authority that is especially or exclusively in charge of the activity of legal representation of children. However, there are different entities that intervene in favour of the child representation in the judicial context as well as in the extra-judicial one.

### **3.3.2 Judicial context**

#### **3.3.2.1 Founding legislation**

In order to give the due importance to children's interests in court proceedings, it is possible to find a number of legislative provisions that require the courts to take into account children's wishes in relation to cases that affect their welfare.

There are a range of means by which the Courts have the wishes of children expressed to them. Some Judges will interview children of a certain age while children can also be joined to certain types of proceedings including proceedings on foot of the Guardianship of Infants Act, 1964 and the Child Care Act, 1991. There are legislative provisions, for example section 25(2) of the Child Care Act, 1991, which specifically enables the court to appoint a solicitor to represent the child in proceedings. While in the past Legal Aid Board solicitors have been appointed in these cases, it appears to be less common place these days.

The most common means relied upon by the courts to give expression to the wishes of a child in (non-criminal) court proceedings affecting them is either for the court to order that an independent assessment be carried out for the purpose of the proceedings (possibly on foot of section 47 of the Family Law Act, 1995) or to appoint a guardian ad litem for the child

#### **3.3.2.2 Appointment procedures and powers**

In relation to the appointment procedures the Irish law provides the opportunity to realise this distinction on the base of the child position within the court proceeding.

Thus, whether the children act as witnesses, the Irish Courts Service has published a number of explanatory leaflets which set out the process of going to court as a witness for parents and guardians; child witnesses under 10 years of age; and child witnesses under 17 years of age.

The Criminal Evidence Act, 1992 provided that witnesses may give evidence via live TV link providing the witness is under 17 years of age or has special needs, unless the court sees good reason to the contrary. This was further extended by the Criminal Justice Act, 1999 which extends this to circumstances where the court is satisfied that the witness is likely to be in fear or subject to intimidation.

Vice versa, if the children stand in front of the court as defendants, the cases are held in private and are subject to strict reporting restrictions. In certain circumstances the presiding judge can give permission for certain people to be present, e.g. journalists, researchers. Criminal cases where young people up to the age of 18 are the defendants are dealt with in juvenile courts within the District Court. In Dublin there is a purpose built Children's Court in Smithfield which sits every day. Around the country, certain days or portions of days are set aside for dealing with cases involving children.

In the case the children as subjects of proceedings the High Court provides a dedicated judge to deal with children who are deemed to require non-voluntary institutional care.

Childcare cases are taking an increased amount of time in District courts throughout the country and in Dublin in particular. Their number and complexity is continuing to increase. Allocating time to deal with them properly is placing a real strain on the courts. It is not unusual for childcare cases to take several weeks in the District Court often spread over a number of months.

The Government has approved the appointment of 3 additional judges to deal specifically with childcare cases. The additional judges will facilitate judges to work more closely with all the parties involved, including childcare professionals and families to achieve solutions in the best interests of the children involved.

Always in the criminal judicial contest the Legal Aid in Criminal Cases the Criminal Justice (Legal Aid) Act 1962 provides that free legal aid may be granted, in certain circumstances, for the defence of persons of insufficient means in criminal proceedings. The legislation does not distinguish between adults and young persons under the age of eighteen, therefore, where a child is the defendant in a criminal case he/she is entitled to seek legal aid under the provisions of the above mentioned legislation.

An accused person is entitled to be informed by the court in which s/he is appearing of his/her possible right to legal aid. The grant of legal aid, which is a matter for the court, entitles the applicant to the services of a solicitor and, in certain circumstances, up to two counsel, in the preparation and conduct of his/her defence or appeal.

An applicant for legal aid must establish to the satisfaction of the court that his/her means are insufficient to enable him/her to pay for legal aid him/herself. This is purely a discretionary matter for each court and is not governed by any financial eligibility guidelines. The court may require the completion of a statement of means. The court must also be satisfied that by reason of the "gravity of the charge" or "exceptional circumstances" it is essential in the interests of justice that the applicant should have legal aid. However, where the charge is one of murder or where an appeal is one from the Court of Criminal Appeal to the Supreme Court, free legal aid is granted merely on the grounds of insufficient means.

Besides for what concerns the legal Children's Legal Representation the Legal Aid Board can provide representation to children in accordance with the provisions of the Civil Legal Aid Act, 1995 and the Civil Legal Aid Regulations, 1996. Regulation 5(6) of the 1996 Regulations provides as follows:

- (6) The following provisions shall apply where a certificate is sought by a minor or other person who is unable to make an application on his or her own behalf
  - (a) subject to the provisions in the following paragraphs the application shall be made by a person of full age and capacity and, where the application relates to proceedings which are required by rules of court to be brought or defended by a next friend or guardian ad litem, that person will be the next friend or guardian ad litem;
  - (b) the Board shall not issue a certificate applied for by a person on behalf of another person unless the person making the application has signed an undertaking to pay to the Board (if called upon to do so) any sum which, by virtue of any provision of these Regulations, the Board may require a legally aided person of full age and capacity to pay upon the issue or during the currency or upon the termination or revocation of the certificate;
  - (c) any certificate issued under the Act of 1995 and these Regulations shall be in the name of the person to whom it relates, stating the name of the person who has applied on his or her behalf;
  - (d) in any matter relating to the issue, amendment, revocation or termination of a certificate and in any other matter which may arise as between a legally aided person and the Board, the person who has applied on behalf of another person for the certificate shall be treated for all purposes as the agent of that other person.
  - (e) the Board may, where it considers it appropriate, waive all or any of the requirements of subparagraphs (a) to (d).

As a general rule in all family law proceedings relating to the upbringing of a child (sections 3 and 25 of the Guardianship of Infants Act 1964), the court must always regard the child's welfare as the first and paramount consideration and, where appropriate and practicable, the court will also take into account the child's wishes in the matter having regard to the age and understanding of the child.

The guardian ad litem's role in public law proceedings is the subject of debate within the Children Acts Advisory Board (CAAB) at the moment.

Section 227(1)(b) of the Children Act, 2001 (as amended) requires the Board to publish guidelines on the qualifications, criteria for appointment, training and role of any guardian ad litem appointed for children in proceedings under the aforementioned 1991 Act. The CAAB has established a consultative group to draft guidelines for its consideration.

### **3.3.3 Extra-judicial context**

#### **3.3.3.1 Founding legislation**

The legal provision stating the intervention of a child legal representative are included in the Child Protection Legislation, in particular in the Child Care Act 1991 and Children Act 2001, as amended, form the basis of child protection legislation in Ireland.

The Child Care Act, 1991 places a legal obligation on the Health Service Executive (HSE) to promote the welfare of children who are not receiving adequate care and attention. The HSE has statutory responsibility for the provision of health and child welfare services in Ireland. In implementing the Act, the primary emphasis is on prevention or early intervention and supporting such children in their own family or community. Only as a last resort are alternative appropriate care and welfare services, to place children outside of the home, provided and where possible this involves a through care approach. This Act allows for a child at risk to be taken into care on a voluntary basis or pursuant to a court order. Provisions have also been included in the Act for emergency situations where there is an immediate and serious risk to the health or welfare of the child.

Of approximately 5,000 children in care in Ireland about 4,500 are in foster care (which includes placement with relatives). Of the balance, almost all are placed in residential units which are operated by, or on behalf of the HSE. Residential units operated by the HSE are subject to inspection by the Irish Social Services Inspectorate and where units are run on behalf of the HSE, they are subject to registration and inspection by the HSE.

The Children Act, 2001 was passed by the Oireachtas (Parliament) in June 2001. The Department of Justice, Equality and Law Reform, has the main responsibility for the Act. The Act brings about a major reform in the law relating to juvenile justice and the protection of children and makes provision for non-offending out of control children and children whose actions, but for their age, would be a criminal offence. The focus of the Act is to minimise the need and duration of detention and a number of pilot programmes have been put in place to cater for children's needs in their own community (e.g. Youth Advocacy Projects).

#### **3.3.3.2 Application procedures**

Concerning the appointment proceedings, we need to underline that presence of the legal Representation for Minors is stated in Care Proceedings. More specifically the role of the legal representative is covered by the Guardian Ad Litem Service.

Section 26 of the Child Care Act 1991 provides that the court may appoint a Guardian Ad Litem (GAL) in any proceedings, where the child might become the subject of a care or supervision order or is being placed in the care of the HSE. The GAL is an independent

representative appointed by the court to ensure that the views of the child are heard by the court and to advise the court on the best interests of the child. The GAL will usually employ a solicitor on the child's behalf, with the HSE underwriting the costs of legal services.

The court may only appoint a GAL where the child is not party to the proceedings. Where the child becomes party to the proceedings the order appointing a GAL ceases to have effect. It should be noted that the Act requires the HSE, in carrying out its functions, having due regard to the rights and duties of parents, to act in the best interests of the child and in so far as practicable have regard to the wishes of the child.

It is important to note that the Child Care Act, 1991 covers public law proceedings. Private law proceedings are governed by the Guardianship of Infants Act 1964 and the Children Act 1997 which the Department of Justice Equality and Law Reform are responsible for.

Under the Child Care Act, 1991, the following types of care are provided for, and are provided in the best interests of the child on foot of assessment, care needs and where relevant, the agreement of parent and on foot of Court orders:

### **Special Care**

Special Care involves the detention of a non-offending child for his or her own welfare and protection in a Special Care Unit for a limited period. Guardian Ad Litem are appointed to represent the child's interests in Special Care cases. Places are provided by the HSE in these Special Care Units with education, recreation and therapeutic facilities on site. The units are staffed by child care workers with the support of other professions.

### **High Support**

High Support involves the provision of non-secure residential care to young people with particular emotional and behavioural problems who cannot be adequately cared for in mainstream residential care. The young people are admitted on a voluntary basis or are the subject of care orders. These are usually open centres and the National Standards for Children's Residential Centres apply to them. High Support is increasingly being seen as a methodology as opposed to merely the provision of residential care.

### **Supervision orders**

A supervision order is an alternative to children being taken into the care of the HSE. A supervision order gives the HSE the authority to visit and monitor the health and welfare of the child, who remains in their home-setting, and to give the parents any necessary advice.

### **Voluntary Care**

Children may be placed in Voluntary Care by agreement between the parent(s) / guardian and the HSE, if this is in the best interests of the child. Voluntary Care, which may be provided in a residential setting, does not require the intervention of the District or High Courts, and therefore no Guardian Ad Litem are involved.

### **Care Orders**

The Care Order is used where a child requires care or protection that they are unlikely to receive unless a court makes an order, and may involve the child being admitted to residential care. The court may appoint a Guardian Ad Litem to represent the interests of the child in such cases.

## **Foster care**

Where possible the HSE will place a child with foster parents. Current regulations require that a care plan for the child be drawn up which includes the support to be provided to both the child and to the foster parents and also the arrangements for access to the child in foster care by parents or relatives.

## **Placing children with relatives**

Provision can be made for relatives to receive an allowance for caring for a child placed with them by the HSE. Regulations are in place setting out the arrangements for such placements.

## **After care**

The HSE can provide further assistance to young people up to the age of 21 who have been in care. This assistance may include arranging accommodation or contributing towards maintenance while the young person continues at school or college.

Moreover, the Ombudsman for Children is another entity that plays a central role in the representation of the child needs and interests. Following the enactment of the Ombudsman for Children Act, 2002 the Office of the Ombudsman for Children was established in April, 2004. The office of the Ombudsman for Children provides an independent mechanism to vindicate the rights of children as required under the United Nation's Convention on the Rights of the Child. The Ombudsman is an independent person acting as an advocate for children and promoting the welfare and rights of the child.

The Ombudsman is an independent office and is accountable to the Oireachtas (Parliament). The reason the office was created was to clearly emphasise the special status of children and provide a clear focus for concerns regarding their treatment. More importantly it also allows for a promotional role for the Ombudsman for Children relating to welfare and rights of children and this is regarded as an essential element of the office and is a common feature of other Ombudsmen for Children internationally.

The principal functions of the Ombudsman for Children are as follows:

- to promote the welfare and rights of children
- to act as a catalyst for change
- to respond to individual complaints
- to establish mechanisms through which there will be regular consultation with children, and
- to provide an advisory role to Government

## 3.4 Italy

### 3.4.1 Structure

In the Italian experience an authority exclusively dedicated to the exercise of children's legal representation is not present at the national or at the local level. However, even though there is no form of children's legal representation in the extra-judicial field, there are some legal provisions that guarantee the child's legal representation within the judicial context. As regards judicial proceedings, the law states precisely who will be appointed for the exercise of the child's legal representation and through which modalities.

### 3.4.2 Judicial context

#### 3.4.2.1 Legislation

As mentioned above the Italian law states and guarantees the child's legal representation in the judicial context, in this regard we need first to explain that on the basis of the Italian civil code the under-age condition is considered from a legal point of view a moment during which the child or the adolescent is not able to legally act (art. 2 Civil Code – c.c.). As a consequence the legal representation of the child before the age of majority is exercised by the parents. Trying to better explain the concept, we can say that children are recognised as holders of specific rights (i.e.: the right to property), but only the parents, as holders of the so-called parental authority, have the competence and powers to legally exercise the rights recognised to their children.

The legal provisions establishing and regulating children's legal representation in Italy are contained in the Civil Code and in its connected legislations, in the Civil Procedural Code, in the Criminal Procedural Code and in the Juvenile Criminal Procedural Code. Thus, broadly speaking we could say that the founding legislation only with regard to the criminal procedural context is partly integrated into a children's act, whereas for the remaining context it is contained in the civil and criminal procedural law.

The founding legislation does not explicitly refer to the UN Convention on the rights of the child (1989) or to other international instruments dedicated to the condition of childhood. This is mainly due to the fact that majority of the Italian legislation on this subject had been adopted before the entry into force, within the domestic legal framework, of the main international instruments on children's rights (i.e. the CRC was ratified by the Italian Parliament through the adoption of Law n. 176 of 27 May 1991). The situation is essentially the same, also in relation to the European Convention on the exercise of children's rights (1996) and it was ratified only in 2003 by the adoption of the Law n. 77 of 20 March 2003. However, even if backdated in comparison to these international instruments, the Italian legislation accomplishes the international principles stated in both the documents mentioned, for example the three cases covered by the European Convention on the exercise of children's rights were already enclosed in the domestic legislation on family law<sup>32</sup>, even before the ratification of the Italian law.

#### 3.4.2.2 Appointment procedures

As far as the appointment procedures are concerned a distinction needs to be made between the civil and the criminal context.

In the Criminal context, in the case of children as perpetrators of a crime, for the appointment of the legal aid lawyer (*Difensore d'ufficio*) the local Councils of Lawyers provides a bar of lawyers with a specialization on children's rights (art. 11 DPR n. 448 of 22 September 1988). This provision completes that of the Criminal Procedural Code (art 97) related to the legal aid lawyer, who is appointed every time the accused lacks adequate legal assistance. Vice

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<sup>32</sup> To be precise: art. 145 c.c., art. 244 and articles related, and art. 322 c.c.

versa, when the child is the victim of a crime the law provides two options. First, if the crime is perpetrated by another child, the Italian system does not allow the child victim to be the plaintiff in litigation in the juvenile criminal proceeding, but rather he/she can litigate a civil judicial proceeding asking for the compensation of the suffered damages. Second, if the child is victim of a crime perpetrated by an adult, the law provides the opportunity of appointing a *Curatore speciale*, guardian ad litem, charged to act in the interest of the child victim. The legal provision regulating the latter case (art. 338, 2°, e 3° c.p.p.) states that the appointment of the Special guardian *Curatore speciale* is decreed by the competent judge. The request for the appointment could be submitted by the State Prosecutor as well as by those entities entrusted with the care, education, custody and/or assistance of the child victim.

In the Civil context, broadly speaking the minor is always legally represented by his/her parents (art. 320 c.c.) through the exercise of their parental authority (art. 316 c.c.) in all the civil acts and for the administration of his/her properties. The acts of ordinary administration, excluding those related to personal rights, can be exercised by the each parent separately. The parents legally represent the child even during civil judicial proceedings (art. 75 c.p.c.).

Moreover there are other specific cases: first, ex art. 321 c.c. appointment of the special guardian (*Nomina curatore speciale*) in all the cases in which the parents cannot or are not willing to operate acts of extraordinary administration in the interest of the child, the judge, upon request, can appoint for the child a *Curatore Speciale (special guardian)*. Secondly, ex art. 343 c.c. (*Apertura della tutela*) whether both parents died or for other reasons are unable to exercise their parental authority, the Italian Civil Code authorises the opening of the guardianship (*tutela*); the person exercising the guardianship is called *Tutore (Protector or Guardian ad litem)*. The child guardianship is normally exercised by a single person, however when the child cannot be fostered by relatives able to take care of him/her in an adequate manner, in the area of origin of the child, the judge can state that the guardianship will be exercised by entities dedicated to the care and assistance of children (art. 354 c.c.). Thirdly, ex art. 360 c.c. (Functions of the *Protutore*) the *Protutore* represents the interests of the child in the case in which the *Tutore* (guardian's) interests are in contrast with those of the child. Moreover, when also the interests of the *Protutore* are in conflict with those of the child, the judge appoints a *Curatore Speciale* for the fulfilling of a specific action.

Through the adoption of Law n. 149 of 28 March 2001<sup>33</sup>, the figure of the Lawyer of the Child was introduced in the Italian system. It plays a special role that, on the basis of the law, needs to combine the technical defence of the child with a particular attention to his/her characteristics and conditions, and to operate as a bridge between the right of defence and the child's maturity. At the moment the law is not fully implemented yet, the Italian authorities are in the process of drafting the official list requested by the law and indicating the Lawyers with such specific competences.

In addition, still within the Italian civil context, a more recent legal reform introduced, in the case of divorce, the option of the Shared Fostering between parents (Law n. 54 of 8 February 2006). In other words, the law adopted in 2006 states that in the case of divorce, instead of only one of the two parents fostering the children, the judge can invite both parents to foster them. In the case of shared fostering, parental authority is exercised by both parents. The most important decisions for the child (i.e.: education, health, etc.) are taken with the agreement of both parents and if it is not possible to reach a common position, the judge will take the most adequate decision. Besides, only in relation to activities of ordinary administration, can the judge state that the parents may exercise their authority autonomously.

Nevertheless, in case of constant contrast between the parents the judge can, upon request, revoke the previous provision of shared fostering. In case of grave violations of the judge's dispositions that could cause prejudice to the child's condition, the judge can modify the

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<sup>33</sup> Law 28 March 2001, n. 149, *Modifiche alla legge 4 maggio 1983, n. 184, recante «Disciplina dell'adozione e dell'affidamento dei minori», nonché al titolo VIII del libro primo del codice civile.*

previous disposition and ask the parent to compensate the other and the child for his/her behaviour.

Another distinction between the civil and the criminal context needs to be made in relation to the mandate of the legal representative. For the Civil Code the special guardian, *Curatore speciale*, ex art. 321 c.c. (*Nomina curatore speciale*), takes care of all the acts of extraordinary administration, whereas the *Tutore* exercises the powers recognised to the parents (ex art. 343 and art 316 c.c). On the basis of the Criminal Code the appointment of the legal representative (legal aid lawyer) is disposed only if the child, for several reasons, lacks the due legal representation. The competences of the legal aid lawyer are limited to providing adequate defence during the criminal judicial proceeding.

### 3.4.2.3 Composition

Children's legal representation is always exercised by a single person while a coordination structure for such functions does not exist. In general the Italian domestic legislation does not lay down the academic and professional background of those who are going to exercise the child's legal representation. Only in certain cases does the legal representative have a specific legal background, two examples are the lawyers registered on the legal aid list, who are obliged to attend special training course organised by the local Councils of lawyers, and the Child's Lawyer, who must have, as mentioned, a juridical background integrated with specific competences on the childhood condition and needs (ex law 448/88 art 15 disp. Att.). Moreover, it is worth mentioning that in certain Italian regions there are some exceptions. In those regions in which the offices of regional Ombudsman for children have already been established, these latter provide the professional training for *Curatori* and *Tutori* (e.g.: Veneto, Friuli Venezia Giulia and Marche Regions), whereas in other regions the local authorities are organising specific training courses for the voluntary legal representatives of unaccompanied foreign children (e.g. Toscana Region).

Concerning the criteria for the selection of children's legal representatives, the only one that the Italian legislation sets down at national level is related to registration on the legal aid list mentioned (degree in law, lawyer's certificate and participation in the *ad hoc* training courses). At the regional level there are some interesting exceptions. For instance some regional laws founding the regional Ombudsman for children recognise to this latter the authority to identify, select and train people available to act as *Tutori* and among those the competent judge can appoint the legal representative (e.g.: Veneto Region), whereas in others regions the regional Ombudsman for children keep a register of people adequately trained, from this register the competent judge can appoint *Tutori* and *Curatori* for the child representation (e.g. Marche Region).

### 3.4.2.4 Powers and procedures

In the Italian experience the legal representative is appointed for the child in the criminal context only when the child is the perpetrator of a crime and lacks the due legal support. In this case the legal aid lawyer is appointed (ex art. 11 of the DPR n. 448/1988).

In the civil context the appointment of the legal representative is stated for the *Curatore speciale* (ex art. 321 c.c.) when both parents do not want or cannot undertake acts of extraordinary administration for the interest of their child. The Guardianship is activated (ex art. 343 c.c) when both parents have died or when for others reasons they are unable to exercise parental authority and or legally represent their child, whereas the *Protutore* is appointed when the *Tutore* (exercising the guardianship) has conflicting interests with those of the child under guardianship (ex art. 360 c.c.). When the *Protutore* has a position contrasting with the child's interest, the competent judge can appoint a *Curatore Speciale*.

Concerning the regulation of parental authority with the appointment of a children's legal representative, the Italian Civil Code states that in the case in which the parents are not able or not willing to adequately exercise their parental authority or fulfil their duties towards their children, the judge, in the interest of the child, can order the forfeiture or suspension of parental authority (art. 330 and art. 333 c.c.). In this case if the order is related to one of the parents the other can still exercise the legal representation of his/her child, whereas if the judge's order is related to both parents, the legal representation of the child will be exercised by a different subject on the basis of the necessity (i.e.: fostering, appointment of a guardian, etc.).

Thus, the parental authority and the legal representation of parents over their children can be limited on the basis of the child's conditions and needs.

Concerning the length of the mandate of the child's legal representative, it is always temporary limited because it is a *rebus sic stantibus* measures. However, to be more precise we need to make a distinction: for the legal representation within a judicial proceeding the time length of the mandate is linked to the duration of the court proceeding (legal aid lawyer and lawyer for the child). In the case of the guardianship (*Tutore*), it will last until the child reaches the age of 18; in the other cases the mandate will last for the time needed for the realization of the mandate tasks (i.e.: *curatore speciale*).

As briefly mentioned before, the different forms of legal representation present in the Italian experience are characterized by a different framework of action, the different cases in which they could be appointed and also on the basis of the different tasks of their mandate. In relation to the latter, the legal aid lawyer and the Child's Lawyer are responsible for the care of the child's interests within the judicial context, whereas the legal representative exercising the Guardianship (*Tutore*) has the main tasks of undertaking, always in the child's interest, the act of ordinary and extraordinary administration and the *Curatore speciale* is responsible only for the acts of extraordinary administration.

In the Italian system there is no specific monitoring institution dedicated to the monitoring of the activity carried out by children's legal representatives. However, in the civil context the competent judge can appoint the *Protutore* and dismiss the legal representative exercising the guardianship, when the latter has contrasting interests with those of the child (ex art. 360 c.c. and art. 384 c.c.). Besides, in the criminal context the Italian legislation requests the replacement of the legal aid lawyer only for justified reasons (art.97 c.p.p.).

Also in relation to the financial resources, it is necessary to operate a distinction between the criminal and civil field. In the criminal context the case expenses are covered by the State only when in the case of the appointment of the legal aid lawyer the child is not able to pay for his/her legal defence (art. 98 c.p.p.). The civil law establishes that the Guardianship is free, however the competent judge can provide for Guardianship, in the specific cases identified by the law, with adequate financial resources and may authorise the employment for the exercise of the guardianship of remunerated staff members (art. 379 c.c.).

## **4. Comparative analysis of the national experiences**

This chapter is based on the information provided by 4 selected ChildONEurope partners (Austria, Germany, Ireland and Italy) through the compilation of the Questionnaire drawn up by the ChildONEurope Secretariat.

As a consequence the reference made in the text to the specific national activities carried out in the 4 Countries does not claim to be exhaustive, but rather aims at presenting different kinds of experiences as a basis for reflection and knowledge-sharing on children's legal representation.

More precisely, the different forms of children's legal representation presented include actions in the judicial and extrajudicial context aimed to facilitate and support: the expression of the child's opinions and needs; hearing the child; the representation of his/her own interest and as a consequence the child's participation in all the decision-making processes which he/she is involved or interested in.

### **4.1 Characteristics of the founding legislation and organizational structures and bodies involved in providing the child's legal representation**

Regarding the legislative framework leading to the institution of the entities dedicated to the representation of the child's interests and needs, there is a particular and variegated range of situations. Firstly, none of the States taken into consideration enacted specific legislation dealing with the issue of children's legal representation. Without making any kind of distinction between the judicial and extra-judicial context, we can say that in the majority of domestic experiences observed, references to this issue can be found in general legal provisions such as in the national Constitutional Law (i.e. in Austria), in the Civil Code (i.e. Austria, Italy), in the Civil Procedural Law (i.e. Italy) in the Civil Procedural Law in Family Matters (i.e. Germany), in Family Law (i.e. Ireland) and in the Criminal Procedural Law, (i.e. Italy).

In some cases, references to the issue of child representation are also present in the legal provisions addressing matters more strictly related to the child's rights and conditions. Some examples are the Italian and the German experiences in which references to child representation are included in the Criminal Law Procedure for Minors. In addition the German Youth Office, intervening in extra-judicial matters, was established by the Child and Youth Service Act (*Kinder- und Jugendhilfegesetz*, SGB VIII), while the Italian Child Lawyer in civil matters was introduced in the Italian system through the enactment of Law n. 149 of 28 March 2001 on adoption and fostering and the Irish system, in which the issue is addressed through the child protection law and legislation that implemented the institution of the national Ombudsman for Children.

In the majority of cases the founding legislation is much older than the main international instruments dealing with children's rights and childhood related matters (Austria, Germany and Italy). Thus, only in few cases where there are references to the CRC those cases are represented by the Irish Ombudsman for Children Act 2002 and the Irish Child Care Act 2001, whereas indirect reference to the CRC can be also found in Italian Law n. 149 of 28 March 2001 on adoption and fostering.

As regards the bodies and the referral framework of entities involved in the provision of the legal representation of the child, it is necessary to make a distinction between three different kinds of national experiences:

- I) States where there is no difference between the judicial and extra-judicial context;
  - II) States with a twofold system composed, on one hand, of entities dealing with the representation within the judicial context and, on the other, by different authorities tasked to provide the legal representation of children in the extra-judicial framework;
  - III) States where the legal representation intervenes strictly within the judicial context.
- I) An example of the first kind of system is provided by the Austrian experience in which there is no distinction between the entities allowed to intervene as representatives of the child in cases of judicial and extra-judicial events. The Child Welfare Authorities represent the institution in charge of children's legal representation. Referring to the setting up procedures, the institution has been established through the provisions of the Austrian Federal Constitution, whereas the Austrian Civil Code specifies the conditions which are to be fulfilled to impose legal representation of minors by the Youth Welfare Authority (*Jugendwohlfahrtsträger*). As regards its structure it is organised in a decentralised manner, the Child Welfare Authorities are established at the regional level within the decentralised local authorities of the Austrian Federal States (*Bundesländer*). Considering the mandate of the Child Welfare Authorities, we need to underline that in the judicial context, its main tasks are to represent the child in front of the Court in cases regarding child support suits and paternity suits. Besides in the extra-judicial context the representation is related to the negotiations regarding child support (alimony) and parenthood.
  - II) As regards experiences characterised by a twofold system operating through different entities within the judicial and extra-judicial framework, two interesting example are provided by the German and Irish practices. In particular, in Germany, as more extensively explained above, there are four entities whose task is to act in the interest of children, respectively the *Verfahrenspfleger* and *Jugendgerichtshilfe* in the judicial context, and the *Jugendamt* and *Kinderkommission* in the extra-judicial field. Concerning their organizational dimension the *Verfahrenspfleger* is an individual person, the *Jugendgerichtshilfe* and the *Jugendamt* are local authorities and the *Kinderkommission* is a sub-committee of the Federal Parliament. Analysing their mandate we can say that the tasks vary whether we are referring to *Verfahrenspfleger*, to the *Jugendgerichtshilfe*, to the *Jugendamt* or to the *Kinderkommission*. Referring to the judicial framework, the *Verfahrenspfleger* is in charge of the legal representation of a child involved in civil legal proceedings, he/she should act in the children's interests, while the *Jugendgerichtshilfe* provides the due support to both the Court and minors in criminal proceedings. On the other hand, concerning the extra-judicial framework, the Local Youth Office (*Jugendamt*) is in charge of youth matters in its district, i.e. protection of children who are neglected by their parents, provision of educational assistance to parents who are overstrained with bringing up their children, etc. Moreover, the opinion of the *Jugendamt* is also taken into consideration in some civil legal proceedings that concern the child's interest, such as child custody battles. Besides, the main tasks of the *Kinderkommission* are to represent the interests of children in the legislative process. In doing so, the *Kinderkommission* analyses legislative projects relating to child matters and the international standards.
  - III) Referring to States in which the legal representation intervenes strictly within the judicial context, the Italian case presents a variegated range of entities authorised to intervene for the representation of the child's interests and needs in the cases identified by the law in the civil and criminal fields. As regards the criminal context the Legal Aid Lawyer is appointed for the child only when the child is the perpetrator of a crime and lacks the due legal support, in this case the appointed (art. 11 of the DPR n. 448/1988) is responsible for the care of the child's interests within the judicial context. Still in the criminal field if the child is the victim of a crime perpetrated by an adult, the law provides the opportunity of

appointing a *Curatore speciale* (Special guardian *ad litem*) charged to act in the interest of the child victim. The *Curatore speciale* (art. 338, 2°, e 3° c.p.p.) is appointed, upon request, through a decree by the competent judge, the request of the appointment could be submitted by the State Prosecutor, as well as by those entities in charge of the care, education, custody and/or assistance of the child victim. In the civil context, with the intention to better suit the needs of the child, the Italian legislation identifies three different entities: first, the *Curatore speciale* (art. 321 c.c.) in all the cases in which the parents cannot or are not willing to perform acts of extraordinary administration; second, the *Tutore* (art. 343 c.c.) if both parents are dead or for other reasons are unable to exercise their parental authority. Thirdly, there is the authority of the *Protutore* (art. 360 c.c.), who represents the interests of the child in the case in which the *Tutore's* interests are in contrast with those of the child. Moreover, when the interests of the *Protutore* are also in conflict with those of the child, the judge appoints a *Curatore Speciale* for the fulfilment of a specific action. A peculiarity of the Italian system is the introduction in 2001, through the adoption of Law n. 149 of the figure of the Children's Lawyer, which operates as a bridge between the right of defence and the child's maturity, combining the technical defence with a particular attention to child conditions. At the moment the law is not yet fully implemented, but the Italian authorities are in the process of drawing up the official list of enrolment requested and indicating the Lawyers with such specific competences.

#### **4.2 Factors related to the procedures for appointing children's advocates and the parent's role therein**

As far as the appointment process of children's legal representation is concerned, we can underline that in compliance with the international provisions, all the national experiences taken into consideration have the common aim of providing the most effective instruments to guarantee and enhance the respect of the child's best interest.

In order to reach this aim the appointment procedure aims to respect the parental role of guidance and parental authority, thus the intervention of an external representative is requested only when the parents are not able or are unwilling to act in the child's interest in a constructive manner. This is the case, for example, of Austria, where the Austrian Child Welfare Authority intervenes when (both) parents are unknown or when a minor is born in Austria, but no parent legally represents his/her interests (§ 211 ABGB); and Italy, where the *Curatore Speciale* (art. 321 c.c.) is appointed in all the cases in which the parents cannot or are not willing to perform acts of extra-ordinary administration in the interest of the child and the *Tutore* (art. 343 c.c.) intervenes when both parents have died or for other reasons are unable to exercise their parental authority.

In particular for intervention in the extra-judicial context it can be underlined that German law requests the intervention of the Local Youth Office (*Jugendamt*) when the well-being of a child is at risk in the district of competence; mostly because the parents do not exercise their parental care for the benefit of the child's well being. It also declares that the legal representation service must be accessible to children, thus, if a child asks for assistance and claims that his/her well-being is at risk, the Youth Office has to act in his/her favour.

Alongside these kinds of interventions, some States have also enacted forms of parenting support. For instance, in the extra-judicial context it can be underlined that the German Local Youth Office (*Jugendamt*) as part of the local administration, apart from intervening, generally for the protection of children who are neglected by their parents, also provides educational assistance to parents who are overstrained with bringing up their children. Another form of support to parents is also present in the Austrian experience, where if considered necessary, the Youth Welfare Authority must inform a parent about the child's rights and offer support on this subject (§ 212 par 1 ABGB).

All States have also enacted specific provisions regulating the position of the children's legal representative in relation to parental authority. Therefore, it is possible to say that the parental authority and the parents' legal representation of their children can be limited on the basis of the child's conditions and needs.

For instance in Italy, the Italian Civil Code states that in the case in which the parents are not able or not willing to adequately exercise their parental authority and fulfil their duties in relation to their children, the judge in the interest of the child can order the forfeiture or suspension of the parents from their parental authority (art. 330 and art. 333 c.c.). In this case if the order is related to one of the parents the remaining other still has the right to exercise the legal representation of his/her child, whereas if the judge's order is related to both parents, the legal representation of the child will be exercised by a different subject on the basis of the necessities of the case (i.e.: fostering, appointment of a guardian, etc.).

This is also the case in Germany where the appointment is established during a civil law proceeding, the Court can appoint a *Verfahrenspfleger* for a minor, when this is necessary to protect the child's interests in the case identified by the domestic law. Besides the *Jugendgerichtshilfe* is always appointed in criminal law proceedings that deal with child matters.

Still in Germany, in the extra-judicial context the children's legal representative and the Youth Office act when the well-being of a child is at risk. The Youth Office can take children temporarily out of their homes and offer them temporary fostering. If, after a short period of time, the child cannot return to his/her family due to the same reason, the Youth Office has to take legal actions in Court to limit the parents' authority. The parental authority can only be limited by Court decision and the intervention of the Youth Office services.

Broadly speaking, in the majority of the experiences examined, in the judicial context as well as in the extra-judicial, when the child faces situations that could jeopardise his/her full and harmonious personal development, the appointment of the legal representative is based on a legal duty. Notwithstanding, only in certain cases are the parents involved in the appointment process, through the expression of their own consent. For instance in the Austrian system a legal representative is appointed either by agreement of the parents or by Court decision. The Child Welfare Authority obtains the legal representation over the child, by written consent of the parents, in the cases dedicated to the establishment of fatherhood or child support (§ 212 par 2 ABGB). In these situations the consent of one of the legal representatives (if both parents have parental responsibility) is an indispensable element for the intervention of the Child Welfare Authority. Whereas, in cases addressing issues not related to the establishment of fatherhood or child support, only through the written consent of (one of) the parents added to the consent of the Child Welfare Authority, the latter acquires the legal representation of the child (§ 212 par 3 ABGB).

These are the only two cases in which in the Austrian system the parents are asked to manifest their consent, in fact in all the other situations the appointment is based on a legal duty expressly stated by the domestic legislation. Moreover, in the case of an emergency the Youth Welfare Authority is authorised by law to establish the necessary measures in the field of childcare and education as the legal representative of the minor on condition that the Court is involved within 8 days (§ 215 ABGB). If the Court grants child support benefits, the Youth Welfare Authority becomes the legal representative of the child in the field of child support (§ 9 UVG).

As a consequence, in the case of voluntary appointment by the parents (§ 212 par 2 and 3 ABGB) the child representatives as well as the parents are legally responsible to represent the child, whereas in the case of appointment by Court decision only the child representative is liable to represent the child. There is a limitation of the parental legal representation of their children, only if the advocate is appointed by the judicial authority.

### 4.3 Conditions and professional knowledge required for children's advocates

Without distinction in relation to the organizational dimension of the entities in charge of the intervention (collective entities or a single person), it is worth mentioning that all the national experiences involved in this survey seem to dedicate a certain attention to the educational and professional background of the children's legal representative.

Nevertheless, each nation seems to dedicate a different attention to this issue in relation to the field in which the entities in charge of child representation will practically intervene.

For instance in the Italian legal framework only in certain cases does the law outline the professional skills required to cover the position of the children's legal representative. Two examples are the lawyers registered on the legal aid list, who are obliged to attend special training courses organised by the local Councils of lawyers and the Child's Lawyers who belong and who need to have a juridical background integrated with specific competences about the peculiarities of the childhood condition and needs (ex art. 11 DPR n. 448 of 22 September 1988 and art. 15 disp. att.). Even in relation to the selection criteria, the only one that the Italian legislation sets down is related to the registration on the aforementioned legal aid list (degree in law, lawyer's certificate and participation in the *ad hoc* training courses).

The Italian case represents an example of a system organised in individual entities (composed of one single person) in charge of the representation of the child, but an example of a system organised in a collective body is provided by the Austrian experience. In the latter, even though the law does not specify the numeric composition of the staff members of the Child Welfare Authority, it states that its composition must be characterised by a multidisciplinary team, including specialists on child support, social workers and psychologists. In this case, probably with the intention of giving the child the opportunity to have a direct relationship with his/her representative, only one employee of the Child Welfare Authority is assigned to handle a single case per time.

Broadly speaking, always in the Austrian practice, it is worth underlining that the academic and professional background of the staff office is variegated in accordance with the context of intervention. For example in the judicial field the staff member responsible for the single case will have a high school level preparation with juridical knowledge, but no college-degree in law, whereas in the cases of children's legal representation in the field of child care and education the person in charge of the case will be a social worker.

A totally different experience is the one developed by the German practice in which the selection of the legal children's representatives, the *Verfahrenspfleger* is appointed by a judge's decision. It is in the judge's power to select a person believed to have the required qualification for the child's representation in that particular proceeding. The procedures of appointing the *Verfahrenspfleger* differ from Court to Court. Some Courts have compiled lists with experienced *Verfahrenspfleger*, wherefrom the persons are selected. Besides, the *Jugendgerichtshilfe* is automatically present in a criminal law proceeding that deals with youth matters.

Still in the German system, the Youth Office authorized to intervene in the extra-judicial field is composed of a multidisciplinary team including psychologists, pedagogues and lawyers.

Moreover in some countries, such as in Italy, in those regions in which the offices of regional Ombudsman for children have already been established, these latter provide the professional training for *Curatori* and *Tutori* (e.g.: Veneto, Friuli Venezia Giulia and Marche Regions), whereas in other regions the local authorities are organising specific training courses for the voluntary legal representatives of unaccompanied foreign children (e.g. Toscana Region).

#### **4.4 Allocation of funds to cover the costs of the children's legal representation**

Concerning the allocation of funds for representation expenses, most of the national experiences taken into consideration address these sorts of problems in the domestic framework provisions establishing and regulating the variegated range of entities that are provided to better represent the child in the judicial and extra-judicial field.

In the totality of the cases analysed the costs of the activity are covered by the budget of the governmental authorities at the national, federal or regional level. In Austria, the federal States cover the case expenses, as well as the remuneration of the children's legal representatives.

A different situation is present in the German case where we need to make a distinction. In the judicial field the *Verfahrenspflegers* remuneration and the case expenses are paid by the child. If the child does not possess any funds, the costs of the intervention of the *Verfahrenspflegers* are paid by the State. On the other hand the *Jugendgerichtshilfe* (embodied in a local authority and operating in the judicial context) is entirely financed by the local community's funds and the remuneration of its staff is covered by the same local authority, as is the case of the Youth Office (extra-judiciary field). The employees of the Youth Office receive a regular salary from the State, which also pays for the expenses of every single case.

A similar situation is present in the Italian experience. In the criminal field the case expenses are covered by the State only when, in the case of the appointment of the Legal aid lawyer, the child is not able to pay for his/her legal defence (art. 98 c.p.p.). Referring to the civil context, although Italian law states that Guardianship is free, the competent judge can, in the specific cases identified by the law, provide the Guardian with adequate financial resources and authorise the employment of remunerated staff members (art. 379 c.c.) to exercise the guardianship.

## 5. Conclusions

The present survey highlights that the issue of children's legal representation seems to be a subject that receives increasing attention in particular because its implications are becoming day by day a source of increasing concern for the national and international community.

Children's legal representation is strictly linked to two fundamental principles of the CRC, we are referring to articles 3 and 12, respectively dedicated to the child's best interest and to the child's right to express his/her opinion and to be heard (right to participation).

Concerning article 3, the Committee has highlighted in paragraph 1, that the best interest of the child shall be a primary consideration in all actions concerning children, as one of the general principles of the CRC, alongside articles 2, 6 and 12. Interpretations of the best interests of children cannot trump or override any of the other rights guaranteed by other articles in the CRC. Moreover through the analysis of the CRC Committee's CO (positive comments and concerns), the attention of the Committee is mainly focused on the principle set down in article 3 paragraph 1 and 3 paragraph 3. While appreciating the fact that various initiatives have been developed in order to take into consideration the principles of the best interests of the child, that some Constitutional Courts have made a constitutional principle of the best interests of the child, that new legislative measures and programmes incorporating the principle of the best interests of the child have been adopted and that some national boards and institutions for the health and welfare of children and children's parliaments have been established, it has, first of all, expressed its concern about the fact that the principle of the best interest of the child is not appropriately analysed with regard to various situations and contexts for 7 EU Member Countries. Thus, the Committee has requested a greater effort to appropriately analyse the principle of the best interests of the child in all those situations having an impact on children as single persons or as a social group. In particular for 4 EU Member Countries the Committee demands that appropriate and efficient measures be taken in order to ensure that the principle of the best interests of the child forms the basis of the process and decisions in asylum cases involving children and requests the State to adopt this principle as a paramount consideration in all legislation and policy affecting children in the juvenile justice system and in immigration practices.

Referring to article 12, the Committee asserts that it is a general principle of fundamental importance to all aspects of implementation of the CRC and to the interpretation of all other articles. In particular the CRC states that children and young people should have the right to be involved and to state their opinions in matters which affect them and in those processes in which they may have an interest. Therefore, in the CRC the importance of involving children in decisions affecting their lives is made explicit in the following statement, "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." (article 12 CRC).

In its paragraph 1 it requires States to assure that any child capable of forming his/her own view has the right to express views freely in all matters affecting him or her and that the child's views are given due weight in accordance with his age and maturity. In paragraph 2, it specifically provides the child with the right to be heard in any judicial and administrative proceedings affecting him or her, covering a very wide range of court hearings and also formal decision-making affecting the child in, for example, education, health, planning, the environment and so on.

As regards the principle of respect for the views of the child (article 12), the Committee in its concluding observations recommended the following: to reinforce awareness campaigns among the public in general as well as the education and training of professionals with a view to the implementation of this general principle in daily life, in order to change the traditional perceptions of children as objects rather than subjects with rights (12 EU Countries); to

continue to promote respect for the view of the children within the family, schools, administrative bodies and other institutions and to facilitate their participation in all matters affecting them (9 EU Countries).

First of all it is significant to highlight that the Committee COs didn't deal frequently with children's legal representation. Only in two special measures of protection (unaccompanied, refugee and asylum-seeking children and administration of juvenile justice) did the Committee take this specific issue into consideration. However, also in those cases children's legal representation wasn't the central point of the Committee's COs. In its COs, the Committee focused its attention on child legal representation only in two special measures of protection, first of all because the EU Countries reports have spent very few words on it, secondly because the procedure of the reporting system follows the structure of the CRC and no articles are specifically related to children's legal representation.

We need to underline that we are dealing with an issue that is not widely addressed by the international community in a specific and comprehensive manner. Broadly speaking, references to children's legal representation or a child's legal advocate are contained in those international documents dedicated to the protection of child victims of crime, abuse, maltreatment and exploitation, to the protection of unaccompanied foreign children and to the regulation of juvenile justice. An example of this practice is the recent Resolution 1530 (2007)<sup>34</sup> of the Council of Europe in which particular attention to the legal representation is dedicated to child victims of the different forms of violence, exploitation and abuse. The Resolution aims to eradicate all forms of violence against children and from this standpoint it is indispensable – in so far as children are also subjects of law – to grant children adequate legal protection as well as legal representation outside the family whenever necessary. In particular in relation to legal representation the Resolution asks for the enactment of specific legal provisions civil and criminal law procedures which are suited to children, “comprising, for example, the right to be heard by a court where capable of discernment, the right to be assisted by a lawyer paid for by the State or the right to obtain appropriate legal aid”<sup>35</sup>

The only international document dealing with the aspect of the legal representation of the children is the European Convention on the Exercise of Children's Rights adopted in 1996 and implemented in 2000. Not ratified by all the COE Member States, the Convention aims to protect the best interests of children, providing procedural measures to allow the children to exercise their rights. It supplies measures which aim to promote the rights of children, in particular in family proceedings before judicial authorities. Special attention is also dedicated to types of family proceedings concerning custody, residence, access, questions of parentage, legitimacy, adoption, legal guardianship, administration of the property of children, care procedures, removal or restriction of parental responsibilities, protection from cruel or degrading treatment and medical treatment.

Referring to children's legal representation within the judicial context, the Convention states that the judicial authority, or person appointed to act before a judicial authority on behalf of a child, intervenes in order to facilitate the exercise of rights by children (article 10), for instance: the right to be informed and the right to either express their views themselves or through other persons or bodies. In particular article 2 provides the definition of the term "representative". It is a comprehensive definition, which refers not only to an individual person, such as a lawyer, who has been specifically appointed to act before a judicial authority on behalf of a child but also to a body so appointed such as a child welfare authority.

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<sup>34</sup> Resolution 1530 (2007), Child victims: stamping out all forms of violence, exploitation and abuse, adopted by the Assembly of the Council of Europe on 23 January 2007.

<sup>35</sup> Par. 14.4.4 of the Council of Europe Resolution 1530 (2007).

Concerning the national level, from the analysis undertaken on the EU Member States' experiences, there is clearly a general acknowledgement of the importance of these kinds of services. We can say that the national contexts analysed have the common aim of providing the due support to children in all those contexts in which they need to be represented in a constructive and effective manner in their own best interest. Moreover, there seems to be the awareness that it is necessary to set up or consolidate these kinds of services in order to meet the needs and exigencies manifested by the children and adolescents of today.

Notwithstanding this particular attention it is not possible to say that there is a common approach in relation to the setting up of the framework of actors involved in the legal representation of the child at the national level. In other words, without making a particular distinction between the different organizational dimensions developed at the national level, we can underline that there are some aspects that have not been given due attention by the national provisions founding and regulating the practice of children's legal representation.

In relation to the wording of the CRC on this subject the majority of the researchers cite the lack of international and national standards of practice or guidelines for children's representatives, as the major cause of substandard and ineffective legal representation of children at the national level. Considering that such practices for children is unique and of relatively recent development, the practice of children's legal representation has no commonly accepted guidelines for those who are charged with the child's representation. As a consequence, it emerges that representatives for children generally do not receive sufficient training or compensation to provide adequate representation.

Theoretically, whatever form of representation is implemented, every child must be provided with an independent, competent and keen representative, with a law background, specialization in children's rights and childhood related matters and with adequate time and financial and human resources to effectively fulfil his/her mandate. Therefore there seem to be three essential elements on which it is necessary to concentrate attention in the setting up or in the re-organization of this kind of system: the special competence and training of the child's representatives; the allocation of adequate human and financial resources for the fulfilling of the representative mandate; the representation model implemented needed to meet children's needs and interests.

Those three aspects receive little attention in the domestic legislation regulating their powers, procedures and mandate in general. Probably this is due, as stated before, to the absence of common guidelines or legally binding standards that the States need to fulfil at the national level. However, in particular the elaboration of inadequate provisions in relation to professional knowledge and training is also a consequence of the fact that the mandate, duties, roles and expectations of the representatives of children are not clearly defined. This probably partially reflects the ongoing theoretical and philosophical debate about how, once appointed, a child representative should approach the representation of the child. There are two main approaches to child representation: the so-called child's "best interests" model, in which the child representative needs to determine and advocate for the child's best interests, and the so-called "traditional client model" where the representation is carried out like in the case of an adult client, allowing the child to determine the direction of the representation and advocating for the child-client's wishes.

Moreover, at least apparently on the basis of the information received, broadly speaking, while from one point of view it is possible to say that the States seem to aim to reach the same objective – the best possible representation of children's interests – from the other, from the legal provisions analyzed the presence of specific attention to the child's position does not explicitly emerge. For instance, only in one case does the founding law state that the office of children's legal representative needs to be accessible to children.

The aim of this survey is twofold: firstly, to support and enhance the attention and the discussion related to this subject by providing a moment of reflection. As we said before we are referring to a rather recent field of debate, which needs to be strengthened and enlarged in order to reach a common understanding about the characteristics and contents of this kind of service in favour of childhood and adolescents. Secondly, to spread within the national contexts the CRC idea that participation is a moral and legal right for all children and adolescents. This is due to the fact that “participation” is a right, an inalienable entitlement, not a matter of goodwill or charity from others. Moreover, as far it is perceived as a right and not as an obligation, participation must always be voluntary and never coerced.

More information is needed on this subject, both by making a review of the most important international instruments on this issue and by identifying policies, programmes and actions carried out by the EU Member States at the national level as well as by sharing some of the most significant and innovative experiences in this field; this is just the first step.

# Annexes

## Questionnaire



European Network of National Observatories on Childhood

### Questionnaire on Children's Legal Representation National Systems

Country:

#### Institutional framework for action

##### I. Structure

1. Are there any institutional authorities, structures or/and mechanisms, including at federal, state/provincial, municipal and local level that are currently in charge of activity of child legal representation?  YES  NO  
If YES, please identify these authorities

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2. Is it a centralised authority?  YES  NO  
If YES, please describe briefly its organization and tasks

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3. Does it exist at the local level?  YES  NO  
If YES, please describe briefly its organization, tasks and how it is coordinated with the eventual central authority

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4. Is it a separated entity tasked with a specific responsibility for dealing with child legal representation?  YES  NO  
If YES, please describe its structure

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5. Is it a subsumed entity into a more general human rights office, government, ministry or other kind of Government and non-governmental authority tasked with responsibility for addressing the protection of children's rights?  YES  NO  
If YES, please describe how coordination between them is ensured

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6. Is there any procedure of appointing/dismissing the legal child representative?  YES  NO  
If yes, please describe it.

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## JUDICIAL CONTEXT

### II. Legislation

7. Has the institution been established by legislation?  
 YES       NO      (if no, go to question n. 14)  
 If YES, please identify it and specify which kind of law it is

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8. Please mark all the necessary options:

Is the establishing law:	YES	NO
- a separate and specialised bill?		
- integrated into a children's act?		
- integrated into a human rights act?		
- integrated into a law establishing an ombudsman?		
- integrated into an other kind of law? Please specify.....		

9. Does the legislation refer to the CRC or other human rights instruments (e.g.: European Convention on the Exercise of Children's Rights 1996?)       YES       NO  
 If YES, please describe briefly

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10. Does the legislation describe the process of appointment of the child legal representation?  
 YES       NO  
 If YES, please describe briefly how and its tasks

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11. Does the legislation regulate the appointment of the child legal representation in relation to the parental authority?       YES       NO  
 If YES, please describe briefly how

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12. Does the legislation specify the mandate of the child legal representation and the contexts in which he/she is able to intervene?       YES       NO  
 If YES, please describe it briefly and specify the various contexts

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13. Does the legislation specify if the legal representative service must be accessible to children?  
 YES       NO  
 If YES, please describe briefly how and when (e.g.: before or/and after the appointment)

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- If NOT,**  
 14. How was the institution established?  
 Please describe briefly its organization and tasks

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### **III Composition**

15. Are the Governmental authorities, structures or mechanisms composed of one person or does a board direct them?  
Please, describe it briefly

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16. What is the academic and professional background of the staff office and how many employees work in it?  
Please, describe it briefly

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17. Are the legal child representatives specially trained?  YES  NO  
If yes, on what field? Please, describe it briefly

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18. If it is an office composed of more than one person, is this a multidisciplinary team?  
 YES  NO  
Please, describe it briefly

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19. Do you have any criteria established in selecting legal child representatives?  
 YES  NO  
Please, describe it briefly

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### **Power and procedures**

20. How is the child legal representative appointed to the child? Please, describe it briefly  
(if it is the case please refer to question n. 10)

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21. In which cases do you appoint a legal representative to a child? Please, describe it briefly  
(If it is the case please refer to question n. 10)

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22. How is the appointment of the child legal representative in relation to the parental authority regulated? Please, describe it briefly  
(if it is the case please refer to question n. 11)

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23. When the child legal representative is appointed, what effect does the appointment have on the parental responsibility (is the parental responsibility limited and how; with legal act or on the other way?  
Please, describe it briefly

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24. Is the nomination of the child legal representative disposed automatically or only in specific cases?  
Please, describe it briefly

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25. Is the mandate as child legal representative subjected to any kind of time limitation?

YES             NO

Please, describe it briefly

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26. What are the main tasks (mandate) of legal child representative ?

Please, describe it briefly

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27. Is the staff office or the single child legal representative obliged to attend constant refresher course?

YES             NO

Please, describe it briefly

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28. Is there any kind of monitoring system evaluating the efficacy of the work carried out by the child legal representative?             YES             NO

Please, describe it briefly

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29. What kind of consequences are disposed if the child legal representative is not operating in the full interest of the child?

Please, describe it briefly

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30. Is the activity of the system of child legal representation covered by State funds?

YES             NO

Please, describe it briefly

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31. Is there provided any remuneration for the legal child representatives?

YES             NO

If yes, what is the average amount of the fee. Who is covering it ( parents, budget...)?

Please, describe it briefly

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32. Are the expenses of every single case of child legal representation covered by the State?

YES             NO

Please, describe it briefly

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## EXTRA-JUDICIAL CONTEXT

### I. Legislation

33. Has the institution been established by legislation?  
 YES       NO (if no, go to question n. 40)  
If YES, please identify it and specify which kind of law it is

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34. Please mark all the necessary options:

Is the establishing law:	YES	NO
- a separate and specialised bill?		
- integrated into a children's act?		
- integrated into a human rights act?		
- integrated into a law establishing an ombudsman?		
- integrated into an other kind of law? Please specify.....		

35. Does the legislation refer to the CRC or other human rights instruments (e.g.: European Convention on the Exercise of Children's Rights 1996?)       YES       NO  
If YES, please describe briefly

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36. Does the legislation describe the process of appointment of the child legal representation?  
 YES       NO  
If YES, please describe briefly how and its tasks

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37. Does the legislation regulate the appointment of the child legal representation in relation to the parental authority?       YES       NO  
If YES, please describe briefly how

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38. Does the legislation specify the mandate of the child legal representation and the contexts in which he/she is able to intervene?       YES       NO  
If YES, please describe it briefly and specify the various contexts

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39. Does the legislation specify if the legal representative service must be accessible to children?  
 YES       NO  
If YES, please describe briefly how and when (e.g.: before or/and after the appointment)

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**If NOT,**

40. How was the institution established?  
Please describe briefly its organization and tasks

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## **II Composition**

41. Are the Governmental authorities, structures or mechanisms composed of one person or does a board direct them?  
Please, describe it briefly

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42. What is the academic and professional background of the staff office and how many employees work in it?  
Please, describe it briefly

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43. Are the legal child representatives specially trained?  YES  NO  
If yes, on what field?  
Please, describe it briefly

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44. If it is an office composed of more than one person, is this a multidisciplinary team?  
 YES  NO  
Please, describe it briefly

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45. Do you have any criteria established in selecting legal child representatives?  
 YES  NO  
Please, describe it briefly

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## **Power and procedures**

46. How is the child legal representative appointed to the child? Please, describe it briefly  
(if it is the case please refer to question n.9)

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47. In which cases do you appoint a legal representative to a child? Please, describe it briefly  
(if it is the case please refer to question n.9)

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48. How is the appointment of the child legal representative in relation to the parental authority regulated? Please, describe it briefly  
(if it is the case please refer to question n.10)

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49. When the child legal representative is appointed, what effect does the appointment have on the parental responsibility (is the parental responsibility limited and how; with legal act or on the other way?  
Please, describe it briefly

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50. Is the nomination of the child legal representative disposed automatically or only in specific cases?  
Please, describe it briefly

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51. Is the mandate as child legal representative subjected to any kind of time limitation?  
 YES       NO  
Please, describe it briefly

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52. What are the main tasks (mandate) of legal child representative?  
Please, describe it briefly

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53. Is the staff office or the single child legal representative obliged to attend constant refresher course?  
 YES       NO  
Please, describe it briefly

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54. Is there any kind of monitoring system evaluating the efficacy of the work carried out by the child legal representative?  YES       NO  
Please, describe it briefly

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55. What kind of consequences are disposed if the child legal representative is not operating in the full interest of the child?  
Please, describe it briefly

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56. Is the activity of the system of child legal representation covered by State funds?  
 YES       NO  
Please, describe it briefly

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57. Is there provided any remuneration for the legal child representatives?  
 YES       NO  
If yes, what is the average amount of the fee. Who is covering it ( parents, budget...)?  
Please, describe it briefly

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58. Are the expenses of every single case of child legal representation covered by the State?  
 YES       NO  
Please, describe it briefly

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## Bibliography

This bibliography, relative to the years 2000-2008, is compiled from the bibliographic database developed by Istituto degli Innocenti on behalf of National Childhood and Adolescence Documentation and Analysis Centre and from the UNICEF Innocenti Research Centre Library catalogue.

All the documentation is available for consultation in the Biblioteca Innocenti Library ([www.biblioteca.istitutodegliinnocenti.it](http://www.biblioteca.istitutodegliinnocenti.it)), a special library on children's rights inaugurated in 2001 as a result of the cooperation between Istituto degli Innocenti and UNICEF Innocenti Research Centre.

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## **List of acronyms**

ChildONEurope = European Network of National Observatories on Childhood

CoE = Council of Europe

Committee = United Nations Committee on the Rights of the Child

COs = Concluding Observations

CRC = United Nations Convention on the Rights of the Child

EU = European Union

PIGEU = Permanent Intergouvernemental Group L'Europe de l'Enfance

UN = United Nations