The volume collects the results of the EU co-funded Project *Minor's Right to Information in EU civil actions – Improving children's right to information in cross-border civil cases – MiRI, European Union Justice Programme 2014-2020, JUST-JCOO-AG-2018-831608*. It critically addresses the fundamental right of the child to receive information during the course of civil proceedings affecting him or her, with particular reference to the peculiarities characterizing cross-border proceedings in family matters. In this context, the right to information is coinceived not only as a corollary of the right of the child to be heard during the course of the proceedings, but also in the light of the possible developments as an autonomous procedural right. The volume rationalizes the main criticalities emerging from the current practice in several EU Member States and offers a set of Guidelines, aimed at improving the situation of children involved in cross-border family proceedings, in order to enhance and protect their fundamental rights.

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€ 34,00

Children's right to information in EU civil actions

Pacini Giuridica

CHILDREN'S RIGHT TO INFORMATION IN EU CIVIL ACTIONS

Improving children's right to information in cross-border civil cases

Edited by
Laura Carpaneto, Francesca Maoli

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The present deliverable has been published and financed within the framework of the EU co-funded project "*Minor's Right to Information in EU civil actions* (MiRI) – *Improving children's right to information in cross-border civil cases*".

The project is co-funded under the Action Grants to support transnational projects to promote judicial cooperation in civil and criminal matters, JUST-JCOO-AG-2018 of the European Union under Grant Agreement No. 831608.

ISBN 978-88-3379-406-8

Realizzazione editoriale

Pacini Editore

Via A. Gherardesca
56121 Pisa

Responsabile di redazione
Gloria Giacomelli

Fotolito e Stampa
IGP Industrie Grafiche Pacini

INDEX

PREFACE

The present *Volume* collects the results of research activities conducted under the project "MiRI – Minor's Right to Information in EU civil actions – Improving children's right to information in cross-border civil cases". This project has been co-funded by the European Union Justice Programme 2014-2020, JUST-JCOO-AG-2018 JUST 831608, and has started the first of January 2020. The University of Genoa (Italy) has been the Coordinator and Partners institutions have been the European Association for Family and Succession Law, the University of Valencia (Spain), the Turiba University (Latvia), Defence for Children International – Italy, the Institute of Private International Law in Sofia (Bulgaria).

The project's main objective was to address the fundamental right of the child to receive information during the course of civil proceedings affecting him or her. In this context, and as will be argued in the first chapter of this *Volume*, the right to information is coinceived not only as a corollary of the right of the child to be heard during the course of the proceedings, but also in the light of the possible developments as an autonomous procedural right.

The following chapters – mainly consisting in the National Reports drafted within the project – present the result of the research activities carried out on different Member States, which include a state-of-the-art assessment on the fundamental right of the child to receive adequate information on the civil proceeding in which he or she is involved. The collected legislative provisions, case law and practices in the respective countries and have highlighted the current gaps and deficiencies – as well as the strengths – of the legal systems in the light of the scope and purposes (as well as the existing standards) that currently inspire the creation of an EU child-friendly justice.

Through the identification of national current practices regarding the right of the child to be informed in civil proceedings, the project aimed at identifying common best practices and create guidelines that might or should be applied in all EU Member States, also with the objective of harmonizing and integrating their national systems, both form a procedural and substantive perspective. The Guidelines, representing the main outcome of the MiRI project, are contained in Chapter 10 of the present *Volume*.

The content of the MiRI Project, and its deliverables, amongst which this *Volume* and the single chapters, represent(s) the view(s) of the single author(s) only and is/are his/her/their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains. The same disclaimer extends to any European institution, agency, or organization. Consistently with common practice, this *Volume* has been subject to linguistic revision and double blind review.

I take this opportunity to thank the many people that in all the Partner Institution have taken part to this Project, have cooperated in carrying out the research, and in the organization of the local exchange conferences in different Member States and of the final conference.

Genoa, September 2021

Ilaria Queirolo

Chapter 1

RECONSTRUCTING HUMAN RIGHTS INSTRUMENTS ON CHILD PARTICIPATION: THE RIGHT OF THE CHILD TO INFORMATION IN CIVIL PROCEEDINGS

*Ilaria Queirolo, Laura Carpaneto, Francesca Maoli**

SECTION 1
INTERNATIONAL LAW

1. *The right of the child to be heard and to be informed in international human rights law: the 1989 United Nations Convention on the Rights of the Child*

The concept and development of children's participation in proceedings and decisions affecting them has registered an important evolution in the recent decades and is part of the long and difficult process that has characterized the recognition and enhancement of children's rights in international law. As known, a uphill

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* Only for academic purposes, I. Queirolo has written Section 1, para. 1 and Section 2, para. 5; L. Carpaneto has written Section 1, para. 6; F. Maoli has written Section 1, para. 2, 3, 4 and 5 and Section 2, para. 1, 2, 3, 4, 4.1, 4.2.

road has been taken before children could be recognized as autonomous subjects and holders of fundamental rights: even if the recognition of children's rights had been expressed in declarations and other instruments that were not characterized by a binding legal force, the creation of treaties with binding effects towards States did not occur until the conclusion of the United Nations Convention on the Rights of the Child of 1989 (UNCRC).[1]

As one of the fundamental pillars of the UNCRC,[2] which also defines children as all persons under the age of 18, children have the right to be heard and have a say whenever a decision affecting them has to be taken. This implies the opportunity for all children to express their views and thus to influence the decision-making process, since the right to be heard involves the duty to give a proper weight to children's views in accordance with their age and maturity.[3] The provision, outlined in Article 12 UNCRC, states that:

> *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 appropriate body, in a manner consistent with the procedural rules of national law.*

Even if the UNCRC does not contain the term "participation" in its text, it is now clear that the right of the child to be heard is a component of participation, and it encompasses a broad spectrum of actions and duties for States, which qualify the hearing of the child as a genuine process of *active involvement*. The fundamental premise is that children are not only right-holders in need of protection, but also active members of society and capable of voicing their own rights.[4] There has been progress, since the adoption of the UNCRC in 1989, at local, national, regional and global levels, towards putting this principle into effect.[5] In doing so, another

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[1] Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of November 20, 1989, entered into force on September 2, 1990. See Y. BEIGBEDER, *Children*, in T. WEISS, S. DAWS (eds.), *The Oxford Handbook on the United Nations*, Oxford-New York, 2007, p. 513.

[2] The other general principles of the UNCRC are Article 2, on non-discrimination, Article 3, on best interests and Article 6, on the right to life and maximum survival and development.

[3] A. PARKES, *Children and International Human Rights Law: The Right of the Child to be Heard*, London, 2013, p. 31.

[4] See W. VANDENHOLE, G. ERDEM TÜRKELLI, S. LEMBRECHTS, *Children's Rights. A Commentary on the Convention of the Rights of the Child and its Protocols*, Cheltenham-Northampton, 2019, p. 144.

[5] On the other hand, this process was not free of difficulties inherent in different social beliefs, traditions and cultures. On the reservations of Contracting States on Article 12 UNCRC, see A. PARKES, *Children and International Human Rights Law*, cit., p. 64.

general principle of the UNCRC, namely the best interests of the child (Article 3), constitutes the central and guiding concept that is considered the focal point of the entire system of children's protection.

Unsurprisingly, the UNCRC contains many references to children's rights in the context of justice proceedings: even if Article 12 can be applied to a lot of different settings and affects children both as individuals and as a group, the focus of the present contribution is on (civil) judicial proceedings.

General Comment No. 12 of the Committee on the Rights of the Child (hereinafter, UNCRC Committee)[6] – which constitutes the main source of guidance for the interpretation of Article 12 UNCRC – emphasizes that the right under examination should not be subject to any age limit in State law or practice.[7] Instead, the capacity of the child to form his or her own views should be presumed[8] and depends not so much on the biological age, but rather on the child's experiences, context of life and development, social capacity and information. States should assess the capacity of children to form an autonomous opinion to the greatest extent possible.[9] This means that even very young children may not be excluded from expressing their views: in that case, a particular attention should be given to the modality of the hearing (for instance, taking into consideration non-verbal forms of communication), carried out by adults who are trained in how to understand children's perspectives.[10] Therefore, it is evident that the capacity to forming one's views does not necessarily imply that those views are mature.[11]

Less guidance is given by General Comment No. 12 as concerns the weight that should be given to the child's views: however, the UNCRC Committee has stressed that the parameters of age and maturity should be considered together as having the same value.[12] In particular, "maturity" is defined as «[*T*]*he ability to understand and assess the implications of a particular matter.* […]; *in the context of article 12, it is the capacity of a child to express her or his views on issues in a reasonable and independent manner*».[13] In any event, those determinations should be conducted on a case-by-case basis, in accordance with a number of parameters

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[6] UN Committee on the Rights of the Child, *General Comment No. 12 (2009): The Right of the Child to Be Heard*, UN Doc. CRC/C/GC/12 of July 20, 2009, available at https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf (last accessed April 8, 2021).

[7] UN Committee on the Rights of the Child, *General Comment No. 12*, cit., para. 21. On the topic, see S. Rap, E. Schmidt, T. Liefaard, *Safeguarding the Dynamic Legal Position of Children: A Matter of Age Limits?*, in *Erasmus Law Review*, 2020, p. 4.

[8] UN Committee on the Rights of the Child, *General Comment No. 12*, cit., para. 20.

[9] *Ibid.*

[10] F. Ang, E. Berghmans, L. Cattrijsse, I. Delens-Ravier, M. Delplace, V. Staelens, T. Vandewiele, C. Vandresse, M. Verheyde, *Participation Rights in the UN Convention on the Rights of the Child*, in IAP Children's Rights Network, *Participation Rights of Children*, Antwerpen-Oxford, 2006, p. 14.

[11] W. Vandenhole, G. Erdem Türkelli, S. Lembrechts, *Children's Rights*, cit., p. 145.

[12] UN Committee on the Rights of the Child, *General Comment No. 12*, cit., para. 29.

[13] UN Committee on the Rights of the Child, *General Comment No. 12*, cit., para. 30.

such as the concrete effect that the decision will have on the child,[14] the strength of the views of the child, and the potential harm that may derive from ignoring those views.[15] The legal doctrine[16] – with an approach also followed by General Comment No. 12[17] – has also highlighted the importance to give the child feedback on how his or her views were taken into account and how they affected the final decision.

The second paragraph of Article 12 states that the child has the right to be heard in any judicial and administrative proceedings affecting him or her. Clearly, this constitutes a specification of the right to be heard stated by the first paragraph of the provision, with the purpose to highlight a specific obligation for States in the judicial and administrative context. Civil proceedings falling under the provision at hand are, among others, custody, care and adoption proceedings, as well as child protection proceedings and any relevant judicial proceedings related to children's lives.[18] Moreover, it should be highlighted that the right of the child to be heard also applies in out-of-court contexts, such as conciliation, mediation or arbitration.[19]

The provision leaves to the procedural rules of the Contracting States the concrete determination of the modality of the hearing, which can be performed in many different ways, either directly or through a child's representative – the latter being either a parent or any other person appointed for this specific purpose. Thus, it seems that Article 12 does not affect the competences of Contracting States, nor has the effect to modify or integrate national procedural law, provided that States cannot enact rules restricting the right of the child to be heard under the UNCRC.[20]

The child should have the possibility to express his or her own views «*freely*». *This means that States are obliged to put into practice the conditions in order to create a safe space for the child, in which he or she is encouraged and facilitated in his or her expression*.[21] Expressing views freely also means that children must be able to choose whether or not to make their voices heard, without feelings of

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[14] F. Ang and others, *Participation Rights in the UN Convention on the Rights of the Child*, cit., p. 19.

[15] W. Vandenhole, G. Erdem Türkelli, S. Lembrechts, *Children's Rights*, cit., p. 150.

[16] E. Welty, L. Lundy, *A Children's Rights-Based Approach to Involving Children in Decision Making*, in *Journal of Science Communication*, 2013, p. 1 ff.; L. Lundy, *Voice is Not Enough: Conceptualizing Article 12 of the United Nations Convention on the Rights of the Child*, in *British Educational Research Journal*, 2007, p. 927; G. Lansdown, *Every Child's Right to Be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment No. 12*, Save the Children UK, p. 23 available at https://www.unicef.org/files/Every_Childs_Right_to_be_Heard.pdf (last accessed April 8, 2021).

[17] UN Committee on the Rights of the Child, *General Comment No. 12*, cit., para. 28.

[18] UN Committee on the Rights of the Child, *General Comment No. 12*, cit., para. 9.

[19] *Ibid*.

[20] S. Dietrick, *A Commentary on the United Nations Convention on the Rights of the Child*, The Hague-Boston-London, 1999, p. 224.

[21] L. Lundy, *Voice is Not Enough*, cit., p. 937; G. Lansdown, *Every Child's Right to Be Heard*, cit., p. 22.

pressure or coercion,[22] since Article 12 does not imply any obligation on children. Negative feelings should nevertheless be avoided when ensuring that the child is heard in the safest possible conditions and in order not to cause any (additional) trauma.

In order for the child to express his or her views freely, a fundamental precondition is that the child has adequate information at his or her disposal. It is undoubtful that relevant, appropriate and accessible information represent a component of the right to be heard, without which the latter cannot be implemented in a complete and safe way. This aspect is critical in order to ensure that children have a correct perception of any judicial proceedings in which they are involved, since they cannot realize their rights without receiving reliable and comprehensible information before, during and after the proceedings.

Legal literature has highlighted that children should receive information from their first involvement with the justice system, as a crucial starting point for the implementation of their rights:[23] at the same time, however, the implementation of this aspect by laws and policies has been subject to little scrutiny so far. Indeed, the importance of the information phase for children's participation in courts and children's hearing within civil proceedings should not be disregarded, since it is in this moment that the child experiences a direct and close contact with the justice system. It is not surprising that, in several cases, the right to be heard and the right to information are considered as one, the latter being a fundamental component for the effective implementation of the first.[24]

Article 12 UNCRC acknowledges this approach: even if the provision does not explicitly address this aspect,[25] it is an underlying assumption that a meaningful and safe participation of the child to the proceedings is not possible if he or she does not receive adequate information. The already cited General Comment No. 12 qualifies child participation as an «[*o*]*ngoing process, which includes information-sharing and dialogue between children and adults*»[26] and explicitly states that:

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[22] W. Vandenhole, G. Erdem Türkelli, S. Lembrechts, *Children's Rights*, cit., p. 147.

[23] H. Stalford, L. Cairns, J. Marshall, *Achieving Child-Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information*, in *Social Inclusion*, 2017, p. 208; H. Stalford, K. Hollingsworth, *"This Case is About You and Your Future": Towards Judgments for Children*, in *Modern Law Review*, 2020, p. 1030.

[24] L. Lundy, *Voice is not Enough*, cit., p. 927.

[25] Although the right to information is the object of other provisions of the UNCRC, being, among others, an explicit component of the right to freedom of expression stated in Article 13, and of the right to have access to information stated in Article 17.

[26] UN Committee on the Rights of the Child, *General Comment No. 12*, cit., para. 3. It should be noted that the right of the child to receive information is also mentioned in the Committee's *General Comment No. 14*, addressing the principle of the best interests of the child as enshrined by Article 3 of the United Nations Convention: see United Nations Committee for the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*

> *[T]he realization of the right of the child to express her or his views requires that the child be informed about the matters, options and possible decisions to be taken and their consequences by those who are responsible for hearing the child, and by the child's parents or guardian. The child must also be informed about the conditions under which she or he will be asked to express her or his views. This right to information is essential, because it is the precondition of the child's clarified decisions.*

Moreover, the delivery of child-friendly information has the advantage to make the judicial environment less intimidating for the child.[27] This, and other aspects, are expressly qualified as "core obligations" of States in the implementation of Article 12 of the Convention.[28] Moreover, General Comment No. 12 in the cited passage explicitly indicates those who are responsible to fulfil this duty to provide information to the child: for this purpose, the UNCRC Committee indicates not only «*those who are responsible for hearing the child*», but also «*the child's parents or guardian*».

Although Article 12 UNCRC does not directly impose specific modifications on procedural rules of the Contracting States, the latter are nevertheless subject to the general obligation to fulfil duties deriving from international law, and to the general duty stated by Article 4 UNCRC according to which «*States Parties undertake to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention*». As concerns the right to information, it is therefore evident that – at least with reference to the stage of the proceedings specifically dedicated to the hearing of the child – some adaptation to justice proceedings needs to be made in this direction. When dealing with children, a fundamental component of States' action does not only consist in amendments in national legislation, but in concrete guidance into everyday legal practice, in order to equip legal practitioners with specialistic expertise on how to deal with children and how to understand and fulfil their specific needs in the concrete case.

On the other hand, no direct obligation seems to emerge from Article 12 UNCRC as concerns the provision of information to children outside the hearing stage. The provision at hand focuses on the right to be heard, although some indications as concerns the right to information in a broader sense can be found in General Comment No. 12 of the UNCRC Committee. However, as it will be explored in the following paragraphs, it may be possible to build a general right to information on the basis of all the fundamental pillars of the UNCRC, as well as all the other relevant sources of human rights law.

(art. 3, para. 1), UN Doc. CRC/C/GC/14 of May 29, 2013, para. 89, available at https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (last accessed April 8, 2021).

[27] UN Committee on the Rights of the Child, *General Comment No. 12*, cit., para. 34.

[28] UN Committee on the Rights of the Child, *General Comment No. 12*, cit., para. 48.

2. *The 1996 European Convention on the Exercise of Children's Rights*

The 1996 European Convention on the Exercise of Children's Rights[29] is one of the first international treaties addressing children's rights from a procedural perspective. It provides a number of procedural rights for children in family law proceedings (both of mandatory and optional nature). Concluded in Strasbourg on January 25, 1996 under the auspices of the Council of Europe, the Convention applies to all children who have not reached the age of 18 years[30] and is specifically dedicated to judicial proceedings in family matters that are able to affect children, with particular reference on proceedings on the exercise of parental responsibilities.[31]

Indeed, the effective and precise determination of judicial proceedings that fall into the scope of application of the Convention is left to the discretion of the Contracting States, which at the moment of signature or ratification are requested to specify at least three categories of family cases before a judicial authority to which the Convention applies.[32] This means that the scope of application of the Convention is flexible and depends on the will expressed by each Contracting State. Nevertheless, the Convention can be considered as a good example of how children's rights in civil proceedings are given meaning and content in practice: as expressly stated by its Preamble, the objective of the Convention is to implement the UNCRC and to «*undertake to adopt all appropriate legislative, administrative and other measures*» as requested by Article 4 of the latter.[33] Therefore, the 1996 Convention aims at constituting an implementing instrument of children's rights in the European area and in the context of civil proceedings in family matters, in order to promote the exercise of those rights. In doing so, the Convention makes express reference to the principle of the best interests of the child, which is con-

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[29] European Convention on the Exercise of Children's Rights, ETS No. 160, opened for signature in Strasbourg on January 25, 1996 and entered into force on July 1st, 2000. The Convention has been ratified by 20 Member States of the Council of Europe so far: the full-text of the Convention and the updated status table are available on the official website of the Council of Europe at https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/160/signatures?p_auth=pNODLnBN (last accessed March 29, 2021).

[30] Article 1, para. 1 of the 1996 European Convention on the Exercise of Children's Rights.

[31] Article 1, para. 2 of the 1996 European Convention on the Exercise of Children's Rights.

[32] Article 1, para. 4 and 5 of the 1996 European Convention on the Exercise of Children's Rights. On the advantages and disadvantages of this mechanism of ratification and implementation of the Convention, see N. LOWE, *The Impact of the Council of Europe on European Family Law*, in J.M. SCHERPE (ed.), *European Family Law*, I, *The Impact of Institutions and Organizations on European Family Law*, Cheltenham, 2016, p. 104.

[33] As pointed out by M. KILLERBY, *The Draft European Convention on the Exercise of Children's Rights*, in *The International Journal of Children's Rights*, 1995, p. 127 ff., the 1989 United Nations Convention on the Rights of the Child leaves it to States to determine the measures which are appropriate to implement children's rights: therefore, an international convention (although with regional scope of application) providing appropriate procedures and procedural rights ensures that children are in fact able to exercise their substantive rights.

sidered the underlying objective of all its provisions, as well as to the right of the child to express his or her views (which shall be given due weight) and to receive relevant information.[34] At the same time, the Convention recognizes the primary importance of the parental role and the possibility to reach an agreement within the family before bringing the matter before a judicial authority.

From the abovementioned considerations, it is possible to infer how the provision of information to the child is considered a fundamental component for the exercise of children's rights, qualified by the Preamble of the Convention as a precondition «*to enable such rights and interests to be promoted*». This constitutes an element of modernity in the Convention, which was adopted in 1996, especially if compared with other conventions concerning children, adopted, for instance, under the auspices of the Hague Conference on private international law.[35] Accordingly, information is mentioned in Article 1 among the objectives of the Convention, in the sense that the exercise of the procedural rights granted by the Convention is only possible if children are «*informed and allowed to participate in proceedings affecting them before a judicial authority*».[36]

The importance given to the information stage also emerges from the decision to include an express definition of the term «*relevant information*» in Article 2 of the Convention, where it is defined as

> *«[i]nformation which is appropriate to the age and understanding of the child, and which will be given to enable the child to exercise his or her rights fully unless the provision of such information were contrary to the welfare of the child»*.[37]

In this way, the Convention makes clear that the provision of information is fundamental for the promotion and implementation of the procedural rights of the child, but at the same time not all information necessarily has to be shared with children: some information may be harmful to children's welfare and it may not be in the child's best interests to receive it. At the same time, information shall always be adapted to children's age and understanding.[38]

The structure of the Convention has been designed in order to make sure that the establishment of procedural rights for children is accompanied by provisions attributing specific roles and duties to judicial authorities and representatives of the

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[34] See the Preamble of the Convention, in which the member States of the Council of Europe recognize that «[c]*hildren should be provided with relevant information to enable such rights and best interests to be promoted and that due weight should be given to the views of children*».

[35] See below, para. 6.

[36] Article 1, para. 2 of the 1996 European Convention on the Exercise of Children's Rights.

[37] Article 2, lit. d) of the 1996 European Convention on the Exercise of Children's Rights.

[38] On this point, see the Explanatory Report to the European Convention on the Exercise of Children's Rights, para. 28, available online at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cb5ee (last accessed March 29, 2021).

child, in order to make the implementation of those rights more effective. For this purpose, Chapter II of the Convention is divided in three sections: while Section A (Articles 3 to 5) contains and describes the content of children's procedural rights, Sections B (Articles 6 to 9) and C (Article 10) of the same Chapter respectively indicate the duties and responsibilities of judicial authorities and representatives of the child, the latter being any subject that has been appointed to act before a judicial authority on behalf of the child.[39]

According to Article 3 of the Convention, the right to information has a prominent position within the right of the child to express views. The child affected by a judicial proceeding in family matters – with specific reference to proceedings subject to the Convention, according to the declaration made by each Contracting State – has the right to receive all relevant information, to be consulted and express views, as well as to be informed «*of the possible consequences of compliance with these views and the possible consequences of any decision*».[40] Those procedural rights should be guaranteed to children who are considered by internal law as having sufficient understanding: according to the Explanatory Report to the Convention, it is left to Contracting States to determine the criteria according to which this requisite is met, and it is possible that domestic law has fixed a specific age limit above which children are considered capable of understanding.[41] Nevertheless, the Report also specifies that, within the meaning of the Convention, internal law also covers «*international instruments when they are incorporated into the domestic legal system*».[42] Therefore, it could be argued that the Contracting States that are also bound by the UNCRC should respect the obligations stated by Article 12 UNCRC, as explained by General Comment No. 12 on the right of the child to be heard. According to the UNCRC legal framework, the capacity of the child to form his or

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[39] The Explanatory Report to the Convention, cit., states that the term "representative" may refer either to an individual person (such a lawyer) or to a body (such as a child welfare authority) specifically appointed to act on behalf of the child. The holders of parental responsibility fall into the meaning of the term "representative", and are therefore subject to the provisions of Article 10 of the Convention, only if they have been specifically appointed to act on the behalf of the child before the judicial authority.

[40] Being relevant any information that falls within the aforementioned definition contained in Article 2, lit. d) of the Convention.

[41] This, on the contrary, does not constitute an element of modernity in the Convention, since it allowed Contracting States to introduce specific and rigid age limits for the determination of the capacity of understanding.

[42] The obligations stated by the Convention have been widely recognized in the Italian case law: see, *ex multis*, the decision of the Corte di Cassazione, judgment May 15, 2013, No. 11687, according to which «[L]*'audizione del minore nelle procedure giudiziarie che li riguardano e in ordine al loro affidamento ai genitori è divenuta obbligatoria con l'art. 6 della Convenzione di Strasburgo sull'esercizio dei diritti del fanciullo del 1996 ratificata con Legge 7 del 2003, per cui ad essa deve procedersi, salvo che possa arrecare pregiudizio al minore stesso*».

her own views should be presumed and should not be subject to rigid age limits,[43] since it depends not so much on the biological age, but on many other factors.[44]

Article 6 of the Convention mirrors the obligations stated by Article 3, establishing that judicial authorities appointed with a case affecting a child shall make sure that children of sufficient understanding have been provided with all relevant information. If this is not the case, the judicial authority should inform the child in an appropriate modality or arrange for the child to be informed. Nevertheless, the same responsibility is also attributed to the representative of the child by Article 10 of the Convention, provided that this is in the best interests of the child and that the latter has sufficient understanding.

The 1996 European Convention – although still not ratified by all Member States of the Council of Europe[45] – represents a concrete step in promoting children's rights,[46] in its added value of explicitly stating the right of the child to receive all relevant information about a civil proceeding affecting him or her, as well as about the consequences of compliance with the views expressed in the proceedings and about the consequences of any decision that will be taken. Moreover, this initiative should be read in the broader context of many other actions undertaken by the Council of Europe to promote and protect children's rights and for the purposes of the creation of a child-friendly justice, which are currently on-going are acquiring a growing importance within the Council's action.[47]

3. *Child participation in the case law of the European Court of Human Rights: relevant elements for the determination of a fundamental right of the child to information*

The European Convention on Human Rights (ECHR) was adopted in 1950 by the newly founded Council of Europe and represents one of the most important regional sources of human rights law.[48] It does not contain provisions that are

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[43] UN Committee on the Rights of the Child, *General Comment No. 12*, cit., paras. 20 and 21.

[44] Above, para. 1 of this Chapter.

[45] The Convention has been ratified by Albania, Austria, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Italy, Latvia, Malta, Montenegro, North Macedonia, Poland, Portugal, Slovenia, Spain, Turkey, Ukraine.

[46] As observed by N. Lowe, *The Impact of the Council of Europe on European Family Law*, in J.M. Scherpe (ed.), *European Family Law*, I, *The Impact of Institutions and Organizations on European Family Law*, cit., p. 106.

[47] See the current Council of Europe Strategy for the Rights of the Child (2016-2021), adopted in Sofia in April 2016 and providing for «participation of all children» and «a child-friendly justice for all children» among its five priority areas. The Strategy is available online at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168066cff8 (last accessed June 29, 2021). Indeed, the term "child-friendly justice" has been coined by the Council of Europe itself in the context of its Guidelines on Child-Friendly Justice: see below, para. 4.

[48] Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No. 005, ope-

explicitly and specifically dedicated to children and it expressly mentions the best interests of the child only in Article 5, para. 1, lit. d), which concerns lawful detention of minors for educational supervision. Moreover, Article 6 ECHR declares that «*everyone*» has a right to fair hearing.

However, it is undoubtful that most of the rights listed in the ECHR also apply to children and are not reserved solely for adults: Article 1 ECHR states that the convention's rights and freedoms apply to "everyone", while Article 14 ECHR prohibits any discrimination in the enjoyment of the convention's rights. At the same time, the general and broad formulation of the provisions contained in the ECHR has allowed an evolutive interpretation over time, in order to make sure that the convention would survive and adapt to societal changes: as it is known, this is mainly due to the case law of the European Court of Human Rights (ECtHR), that has recognized how the convention is a living instrument and could not operate without taking into account legal, social and cultural influences.[49] The rules of the ECHR are therefore to be interpreted beyond the literal wording, taking into account the spirit and the aim of the convention. Moreover, the ECtHR has highlighted that «[i]*t is of crucial importance that the ECHR is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusionary*».[50]

Over time, the interest of the ECtHR for children's rights has expanded exponentially and has led to a vast jurisprudence in this regard.[51] Case law of the ECtHR has made reference to the UNCRC with increased frequency, affirming that the ECHR shall be applied consistently with the UNCRC, which constitutes a fundamental means of interpretation for the Strasbourg's court.[52] In this way,

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ned for signature in Rome on November 4, 1950 and entered into force on September 3, 1953. The Convention has been ratified by all 47 States of the Council of Europe. The procedure for the accession of the European Union to the ECHR is still on-going, following the Opinion 2/13 of December 18, 2014 delivered by the Court of Justice of the European Union that declared the incompatibility of the draft Accession Agreement with EU law: on the topic G. Gaja, *Lo statuto della Convenzione Europea dei Diritti dell'Uomo nel diritto dell'Unione*, in *Rivista di Diritto Internazionale*, 2016, p. 677; E. Spaventa, *A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13*, in *Maastricht journal of European and comparative law*, 2015, p. 35; J. Callewaert, *The accession of the European Union to the European Convention on Human Rights*, Council of Europe Publishing, 2014 (available at https://johan-callewaert.eu/wp-content/uploads/2015/05/eu-accession.pdf, last accessed March 30, 2021); P. Ivaldi, C.E. Tuo, D*iritti fondamentali e diritto internazionale privato dell'unione europea nella prospettiva dell'adesione alla CEDU*, in *Rivista di Diritto Internazionale Privato e Processuale*, 2012, p. 7; S. Peers, *The CJUE and the EU's accession to the ECHR: a clear and present danger to human rights protection*, in http://eulawanalysis.blogspot.com, December 2014.

[49] See Articles 19, 32 and 34 ECHR, according to which States have accepted the jurisdiction of the EctHR and the possibility to file individual applications to the latter. Already in ECtHR, judgment of 25 April 1978, App. No. 5856/72, *Tyrer* v. *the United Kingdom*, para. 31, the Court held that the ECHR is «[a] *living instrument which* [...] *must be interpreted in the light of present-day conditions*».

[50] ECtHR, judgment of July 11, 2002, App. No. 25680/94, *I* v. *United Kingdom*, para. 54.

[51] U. Kilkelly, *The Child and the European Convention on Human Rights*, London, 1999.

[52] See among others ECtHR, judgment of October 4, 2012, App. No. 43631/09, *Harroudj* v. *France*,

the ECHR benefitted from an external source of guidance, without going beyond its spirit and purpose. At the same time, the principle of the best interests of the child has acquired a prominent feature in the case law of Article 8 ECHR and with reference to family law:[53] the fundamental position of the ECtHR is that the best interests of the child shall be preserved and balanced with the interests of other family members.[54] In this direction there is a consolidated law on international child abduction, where the ECtHR human rights approach[55] needed to be coordinated and harmonized with the other relevant sources of international law and even with EU legislative acts.[56]

This has determined, *inter alia*, the recognition by the ECtHR of a child's right to participate and/or to be sufficiently involved in proceedings affecting him or her, on the basis of Articles 6 and 8 ECtHR. No provision in the ECHR addresses specifically the issue of children's right to information in judicial proceedings. Although the right of the child to be heard in court does not represent an absolute requirement under Article 8 ECHR, this aspect being left to the discretion of domestic courts, the ECtHR has sometimes addressed this issue by examining the circumstances of the specific cases, having due regard to the age and maturity of the child concerned.[57] In *Sahin* v. *Germany*,[58] the German court has denied a father

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para. 42. On the topic U. KILKELLY, *The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child*, in *Human Rights Quarterly*, 2001, p. 308.

[53] M. SORMUNEN, *Understanding the Best Interests of the Child as a Procedural Obligation: The Example of the European Court of Human Rights*, in *Human Rights Law Review*, 2020, p. 745.

[54] E. BERGAMINI, *Human Rights of Children in the EU Context – Impact on National Family Law*, in E. BERGAMINI, C. RAGNI (eds.), *Fundamental Rights and the Best Interest of the Child in Transnational Families*, Cambridge-Antwerp-Chicago, 2019, p. 5.

[55] ECtHR, Grand Chamber, judgment of July 6, 2010, App. No. 41615/07, *Neulinger and Shuruk* v. *Switzerland*, paras. 131-151; ECtHR, Grand Chamber, judgment of November 26, 2013, App. No. 27853/09, *X* v. *Latvia*, paras. 95-102.

[56] On the topic L. WALKER, P. BEAUMONT, *Shifting The Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice*, in *Journal of Private International Law*, 2015, p. 231; H. KELLER, C. HERI, *Protecting the Best Interests of the Child: International Child Abduction and the European Court of Human Rights*, in *Nordic Journal of International Law*, 2015, p. 270; M.C. BARUFFI, *A Child-Friendly Area of Freedom, Security and Justice: Work in Progress in International Child Abduction Cases*, in *Journal of Private International Law*, 2018, p. 385; M. ONYOJA, *The Interpretation and Application of Article 13(1) b) of the Hague Child Abduction Convention in Cases Involving Domestic Violence: Revisiting X v Latvia and the Principle of "Effective Examination"*, in *Journal of Private International Law*, 2019, p. 626; F. MAOLI, G. SCIACCALUGA, S. LEMBRECHTS, T. VAN HOF, L. CARPANETO, T. KRUGER, W. VANDENHOLE, *Understanding the Best Interests of the Child in EU Child Abduction Proceedings: Perspectives from the Case Law*, in *Diritti umani e diritto internazionale*, 2020, p. 337.

[57] For an analysis of the case law of the ECtHR with reference to the age requirement in the context of child participation, see C. MOL, *Maturity and the Child's Right to Be Heard in Family Law Proceedings: Article 12 UNCRC and Case Law of the ECtHR Compared*, in K. BOELE-WOELKI, D. MARTINY (eds.), *Plurality and Diversity of Family Relations in Europe*, Cambridge, 2019, p. 237.

[58] ECtHR, Grand Chamber, judgment July 8, 2003, App. No. 30943/96, *Sahin* v. *Germany*, para. 73.

access to his daughter, on the basis of a risk of harm for the latter, without hearing the opinion of the child. The ECtHR has relied on the expert witness delivered to the domestic court – according to which the involvement of the child in the procedure could have entailed a risk for her – and has therefore concluded that Article 8 ECHR does not require a mandatory direct participation of the child in the proceedings.

Over time, however, the ECtHR has affirmed the child's right of sufficient involvement in the decision-making process on the basis of Article 8 ECHR. In *M. and M.* v. *Croatia*,[59] the ECtHR stated that the parent's right to sufficient involvement also applies to children: in that case, the child had not been heard in the custody proceedings and her wish to live with her mother had not been taken into account. The ECtHR made an extensive analysis of Articles 3 and 12 UNCRC and stated that «[i]*n such cases it cannot be said that the children capable of forming their own views were sufficiently involved in the decision-making process if they were not provided with the opportunity to be heard and thus express their views*».[60] In *N.Ts.* v. *Georgia*, concerning parental responsibility, a breach of Article 8 in respect of children was based on the lack of an adequate and meaningful representation that would have allowed their views to be duly heard.[61] In that case, domestic procedural law was not clear in determining the type of representation, the functions and the power of the representative, with the consequence that an effective representation of children in practice was under question. Domestic courts have also been criticized for not considering (without any further reasoning) the active involvement of the oldest child, who was seven years old at the beginning of the proceedings.[62]

In general, although the case law of the ECtHR does not seem solid in stating the existence of a right of the child to be heard under the ECHR, it has been argued that such a right can be derived from an evolutive interpretation of the positive obligations inherent in Articles 6 and 8.[63] It is undoubtful that the case law of the ECtHR recognizes the fundamental rights of the child in the context of judicial proceedings in family matters, making extensive reference to the UNCRC as the main source of children's rights law. The explicit recognition of the need

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[59] ECtHR, judgment of September 3, 2015, App. No. 10161/13, *M. and M.* v. *Croatia*, paras. 176-187. See also ECtHR, judgment of July 19, 2016, App. No. 60281/2011, *E.S.* v. *Romania and Bulgaria*, para. 59; ECtHR, judgment of October 8, 2019, App. No. 58724/14, *Zalikha Magomadova* v. *Russia*, paras. 114-119.

[60] ECtHR, *M. and M.* v. *Croatia*, cit., para. 181.

[61] ECtHR, judgment of February 2, 2016, App. No. 71776/12, *N.Ts. and others* v. *Georgia*, paras. 74-78.

[62] *Ibid.*, para. 80. It should be pointed out that domestic legislation required the hearing of children over the age of seven.

[63] A. DALY, *The Right of Children to be Heard in Civil Proceedings and the Emerging Law of the European Court of Human Rights*, in *The International Journal of Human Rights*, 2011, p. 411.

to involve the child in the decision-making process has not yet extended to the examination by the court of the duty to provide the child with relevant and reliable information. Nevertheless, it has been observed that the right to fair trial stated by Article 6 ECHR, which includes the equality of arms principle, should apply to children involved in judicial proceedings.[64] Moreover, such procedural aspect is inherent in Article 12 UNCRC and it is therefore possible that the ECtHR will have the opportunity to address this aspect in the future.

4. *Guidelines on child-friendly justice: the experiences of the Council of Europe and the IAYFJM*

Child participation, in all its different forms and features, has also been the object of guidelines aimed at enhancing – from a practical point of view – a correct children's contact and treatment within the justice system. In this context, the action of the Council of Europe has been particularly remarkable, since this institution is showing great concern about how to address children's rights in a way that is useful and immediately applicable to practitioners. Even if guidelines and recommendations are a "soft law" instrument, lacking *per se* a binding force, the recourse to this instrument has relevant effects as concerns a better awareness of practitioners and a correct implementation of children's rights in practice. It has a bridging-the-gap function between the rules and principles in force at the international and regional level and the current laws and practices of States, thus favouring the correct implementation of children's right at the local and practical level. The guidelines are conceived as a practical tool for professionals that work with children within the justice system. They may be a response to the constant concern of human rights law, which is to be effective.[65] Moreover, the guidelines may shed the light on some practical and specific aspects that are not always easy to be found or included in legislative instruments.

With specific reference to the right of the child to information in civil proceedings, this matter constitutes a relevant part of the Guidelines on Child-Friendly Justice developed by the Council of Europe within its children's rights strategy.[66]

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[64] M. Bruning, C. Mol, *Child Participation in International and Regional Human Rights Instruments*, in W. Schrama, C. Mol, M. Bruning, M. Freeman, N. Taylor (eds.), *International Handbook on Child Participation in Family Law*, Cambridge, 2021, p. 13; T. Liefaard, M. Bruning, C*ommentary on the Judgment of the Hoge Raad of the 5th December 2014*, in H. Stalford, K. Hollingsworth, S. Gilmore (eds.), R*ewriting Children's Rights Judgments: From Academic Vision to New Practice*, Oxford, 2017, p. 173.

[65] D.J. Harris, M. O'Boyle, E. Bates, C. Buckley, *Law of the European Convention on Human Rights*, Oxford, 2014, p. 18.

[66] *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice*, adopted by the Committee of Ministers on November 17, 2010 at the 1098th meeting of the Ministers' Deputies, available at https://www.coe.int/en/web/children/child-friendly-justice. Following the guidelines, the Council has also adopted the *Recommendation of the Committee of Ministers to Member States on the*

More recently, Guidelines on Children in Contact with the Justice System have been developed by the International Association of Youth and Family Judges and Magistrates (IAYFJM).[67] Both guidelines are applicable to a wide range of contexts in which children may be involved in, or affected by, judicial or administrative proceedings. They concern not only family law proceedings, but also other criminal or civil proceedings, containing nevertheless useful recommendation as concerns separation of parents, custody, access and protection proceedings.

The Guidelines on Child-Friendly Justice developed by the Council of Europe (hereinafter, the CoE Guidelines) extensively address the issue of child's right to information, mentioning it in the very first one of the fundamental principles on which the entire set of Guidelines is built, namely the principle of «*Participation*».[68] According to this principle,

> *[T]he right of all children to be informed about their rights, to be given appropriate ways to access justice and to be consulted and heard in proceedings involving or affecting them should be respected. This includes giving due weight to the children's views bearing in mind their maturity and any communication difficulties they may have in order to make this participation meaningful.*

The second fundamental principle of the CoE Guidelines is the «*Rule of law*» *principle,* which applies to children as well as to adults and includes all elements of due process (including, *inter alia*, the right to a fair trial and the right to legal advice).[69]

The core of the CoE Guidelines starts with an express and extensive reference to children's right to information: the first paragraph of section IV lit. A., entitled «*General elements of child-friendly justice», is dedicated to «Information and advice». According to this paragraph, children should be promptly and adequately informed about a wide range of elements,* which are listed in a non-comprehensive manner. This should happen «*from their very first contact with the justice system»* and throughout all stages of the proceedings. With reference to the modality in which the information should be provided, the Guidelines recommend an adaptation related to the age and maturity of the child, other than the fact that the child should understand the language used and that information should be gender and

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participation of children and young people under the age of 18, CM/Rec(2012)2, adopted by the Committee of Ministers on 28 March 2012 at the 1138th meeting of the Ministers' Deputies. It is worth mentioning the Council of Europe's *Strategy for the Rights of the Child (2016-2021)* and its mid-term evaluation *Redefining Power: Strengthening the Rights of the Child as the Key to a Future-Proof Europe* (presented in Strasbourg on November 13-14, 2019).

[67] Adopted by the Council of the IAYFJM London on October 21, 2016, and available at http://www.aimjf.org/en/documentation/?1.

[68] CoE Guidelines, section III, lit. A, para. 1.

[69] CoE Guidelines, section III, lit. E, para. 2.

culture sensitive.[70] Reference is made to child-friendly materials and special information services, which should be made available and widely distributed.[71]

This general and accurate recommendations on the provision of information to children are further elaborated and specified in the following sections and paragraphs of the CoE Guidelines. In particular, it is specified that, before the start of the judicial proceedings, the child should be thoroughly informed about and consulted on the possibility to have recourse to alternative dispute resolution methods, as well as on the possible consequences of each option, making sure that adequate legal and other assistance is available in order to determine the appropriateness and desirability of the alternatives.[72] During the course of the judicial proceedings, the child should have the right to legal advice and representation – in situations where there is a conflict of interests between the child and the parents or the other parties – and the lawyer should provide the child with all necessary information concerning the possible consequences of his or her views and opinions.

In the CoE Guidelines, a specific attention is dedicated to the hearing of the child within the proceedings. Other than reiterating the importance of respecting this right and of offering the child a genuine opportunity to express his or her opinion,[73] it is specified that children should be consulted as concerns the manner in which they wish to be heard (which must, in any event, adapted to the child's level of understanding and ability to communicate and take into account the circumstances of the case).[74] It is stated that the child shall «*be provided with all necessary information on how effectively to use the right to be heard*».[75] An important element – highlighted by the Guidelines – is that the child should be informed that his or her opinion may not necessarily determine the final decision.[76] The modalities of the hearing should be adapted to the needs of the child, especially as concerns the organization of a child-friendly environment, the correct attitude of judges and other professionals, and the use of a language that is appropriate to the children's age and level of understanding.[77]

At the same time, the CoE Guidelines specify the duty of judicial authorities and other authorities (such as the child's lawyer, the guardian *ad litem* or the legal representative) involved in the proceedings to explain the final decision to the children, in a language that they can understand.[78] In particular, the decision shall be duly reasoned and well explained to the child in the hypothesis that the views

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[70] CoE Guidelines, section IV, lit. A, para. 2.
[71] CoE Guidelines, section IV, lit. A, para. 4.
[72] CoE Guidelines, section IV, lit. B, para. 25.
[73] CoE Guidelines, section IV, lit. D, para. 44.
[74] *Ibid*.
[75] CoE Guidelines, section IV, lit. B, para. 48.
[76] *Ibid*.
[77] CoE Guidelines, section IV, lit. B, paras. 54-63.
[78] CoE Guidelines, section IV, lit. B, paras. 49 and 75.

of the child have not been followed.[79] Children shall also receive the necessary information about possible measures that could be taken against the decision,[80] or about the available remedies that can be activated in case a decision has not been enforced.[81]

The IAYFJM Guidelines follow a similar approach, addressing children's rights to information extensively and throughout all stages of the judicial proceedings. They share with the CoE Guidelines the five fundamental principles of rule of law, best interests of the child, dignity, non-discrimination, as well as the right of the child to participate and have his or her views taken into consideration.[82].Since the IAYFJM Guidelines have been developed by professionals from different continents, they have a global character.

With specific reference to the right of the child to information, the IAYFJM Guidelines explain that the right of the child to participate in the proceeding is strictly interconnected with the right to information:[83] the latter is qualified in the explanatory comments as a «[p]*recondition for children's ability to make appropriate decisions concerning their participation*».[84] Information and advice are also a general element of children's contacts with justice,[85] it being specified that children should be provided adequate information from their very first involvement with the justice system or other authorities.[86] This must be done in a manner adapted to the child's age, maturity, abilities, gender and culture.[87] In particular, children shall be informed of their rights, the proceedings, the possible outcomes and consequences of the proceedings on them, the option of either communicating directly or through a representative, the availability of services that can provide help and support, and the availability of review of decisions.[88] While it is specified that the same information should also be provided to the child's parents and legal representatives, the explanatory comments recommend that this should nevertheless be avoided when deemed prejudicial to the child.[89] In any event, the same circumstances justify the omission of information to the child.[90]

In the IAYFJM Guidelines, the provision of information to the child represents a duty for all persons appointed with the legal assistance or the legal representa-

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[79] *Ibid*.
[80] CoE Guidelines, section IV, lit. B, para. 75.
[81] CoE Guidelines, section IV, lit. B, para. 77.
[82] IAYFJM Guidelines, part 2.
[83] IAYFJM Guidelines, para. 2.3.3.
[84] IAYFJM Guidelines, p. 17.
[85] IAYFJM Guidelines, section 3.1, paras. 3.1.1-3.1.5.
[86] IAYFJM Guidelines, section 3.1, para. 3.1.1.
[87] IAYFJM Guidelines, section 3.1, para. 3.1.2.
[88] IAYFJM Guidelines, section 3.1, para. 3.1.3.
[89] IAYFJM Guidelines, section 3.1, p. 23.
[90] IAYFJM Guidelines, section 3.1, para. 3.1.5.

tion of the child.[91] Those subjects, as well as all justice professionals who interact with children, should be able to do so with respect, sensitivity and in a language that is appropriate to their age and level of understanding.[92] Moreover, the Guidelines recommend that the legal documents should be explained to the child, in order to be sure that their content is understood.[93] Finally, the effectivity of participation rights of the child and of the right to information should be guaranteed by the assistance of an interpreter – or other intermediaries, for children with communication disabilities – when the child does not understand or speak the language used in the proceedings.[94]

5. *Perspectives for a reconstruction of the right to information as an autonomous right of the child*

Although the examined legislation, case law and practice have shown a growing consideration for the right of the child to information in civil proceedings, it is still controversial whether such a right to information enjoys an autonomous nature notwithstanding the fact that the child is heard or not. Research[95] and soft law instruments[96] are promoting the strengthening of an autonomous right to information, although an explicit recognition in international conventions is still to be found.

The UNCRC explicitly mentions the right to information in its Articles 13 and 17 that concern the access to information in a broad sense and in a wide range of contexts.[97] The aim of those provisions is to make sure that the child is considered an active member of society, having access to information that enables him or her to hold and express opinions. Access to information is a fundamental precondition

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[91] IAYFJM Guidelines, section 3.3, para. 3.3.2.

[92] IAYFJM Guidelines, section 3.3, para. 3.3.6, and section 3.4, para. 3.4.2.

[93] IAYFJM Guidelines, section 3.4, para. 3.4.2.

[94] IAYFJM Guidelines, section 3.6, paras. 3.6.1-3.6.2.

[95] H. STALFORD, L. CAIRNS, J. MARSHALL, *Achieving Child-Friendly Justice through Child-Friendly Methods*, cit., p. 208; S. LEMBRECHTS, M. PUTTERS, K. VAN HOORDE, T. KRUGER, K. PONNET, W. VANDENHOLE, *Conversations Between Children and Judges in Child Abduction Cases in Belgium and The Netherlands*, in *Family & Law*, 2019, available online; K. HERBOTS, J. PUT, *The Participation Disc: A Concept Analysis of (a) Child('s Right to) Participation*, in *International Journal of Children's Rights*, 2015, p. 165 and p. 176.

[96] Other than the instruments already cited and examined in the previous paragraphs of the present contribution, see the recent Council of Europe's handbook on child participation: A. CROWLEY, C. LARKINS, L.M. PINTO, *Listen – Act – Change: Council of Europe's Handbook on Child Participation for Professionals Working for and with Children*, October 2020, available at https://rm.coe.int/publication-handbook-on-children-s-participation-eng/1680a14539 (last accessed April 8, 2021).

[97] W. VANDENHOLE, G. ERDEM TÜRKELLI, S. LEMBRECHTS, *Children's Rights. A Commentary*, cit., p. 160 and p. 194; see also M. KOREN, *Human Rights of Children: Their Right to Information*, in *Human Rights Review*, 2001, p. 54.

for children to exercise each of their rights, and not only a procedural safeguard for children's involvement in administrative and judicial proceedings. Articles 13 and 17, together with Article 12 UNCRC, are part of the so-called "participation rights" of children. Child participation is a concept that is broader than the child's right to be heard, encompassing the involvement of children in all stages of a decision-making process that affects them, on the basis of their recognized capacity to have an active role and of the value of their views and opinions.

The first, fundamental step for genuine child participation (defined as an "umbrella term" for a cluster of rights)[98] is that children should be made aware of their participation rights. The child should nevertheless be able to form his or her opinion, being aware of the matters at hand, of the possible consequences and scenarios of the situation, of the ways in which his or her opinion can be conveyed to the person(s) that is(are) responsible for taking the final decision.

It is undoubtful that informing the child is an essential component of child-friendly justice, particularly as concerns the procedures for the involvement of children *before* the start of a judicial proceedings or as an adequate preparation to the hearing of the child (especially by the judge). There is less certainty as concerns the provision of information to the child *after* the hearing by the judicial authority (as a form of feedback), or *after* the end of judicial proceedings, concerning whether and how the final decision is communicated to the child. In both cases, few references are to be found in international conventions and other binding instruments.

For instance, the 1996 European Convention on the Exercise of Children's Rights seems to establish the right to information as an autonomous right of the child involved in a judicial proceeding. The provision of information is construed as a fundamental passage to enable the rights and best interests of the child to be promoted by the parents, by other holders of parental responsibility and, last but not least, by the State.[99] Accordingly, Article 3 of the convention states the right to information as an element that is separated from the right of the child to express his or her views (respectively, in lit. a) and b) of the provision at hand). Even though the 1996 European Convention does not have a global character, and rather represents only a regional example in the European area, this approach could constitute a good source of inspiration. Moreover, it should once again be highlighted that the

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[98] W. VANDENHOLE, G. ERDEM TÜRKELLI, S. LEMBRECHTS, *Children's Rights. A Commentary*, cit., p. 157. The authors cite the definition of participation provided by E.K.M. TISDALL, *Children and Young People's Participation: A critical consideration of Article 12*, in W. VANDENHOLE, E. DESMET, D. REYNAERT, S. LEMBRECHTS, *Routledge International Handbook of Children's Rights Studies*, London, 2015, p. 186, according to which participation is «[T]*he process of sharing decisions which affect one's life and the life of the community in which one lives*».

[99] See the preamble of the 1996 European Convention: «[R]*ecognising that children should be provided with relevant information to enable such rights and best interests to be promoted and that due weight should be given to the views of children*».

convention was adopted in 1996, when the issue of child participation in judicial proceedings was only starting to be a matter of consideration, as a result of the impulse given by the UNCRC.

The right to information is addressed in greater detail by the CoE Guidelines and by the IAYJFM Guidelines, as described in the previous pages of this contribution.[100] Those soft law instruments are the "litmus test" of the international community's effort to recognize and promote children's rights in a judicial context, also following research dedicated to this particular aspect of child participation. In the Lundy model,[101] adopted as a way to conceptualize Article 12 UNCRC, child participation is composed of four fundamental elements: space, voice, audience, and influence. The provision of information is part of the element "voice" and is aimed at facilitating the expression of children's views, also in accordance with an interpretation and application of Article 13 UNCRC in synergy with other UNCRC provisions, such as Article 12. Herbots and Put, citing previous research, identify information not only as a form of participation, but also as a basic requirement in order to denote a certain situation as participative:[102] in this, it is important to guarantee a "bi-directional flow" of information, making sure that the child does not have a passive role and that he or she has the possibility to ask for clarifications or require additional information.[103] Stalford, Cairns and Marshall,[104] while addressing the right to information in the context of the creation of child-friendly justice, have identified three distinct layers of information: the first layer is dedicated to "practical and procedural information", addressing how the legal process works, where and when it will take place, the roles of the various actors involved; the second layer concerns the "foundational right-based information" and serves the need to make children aware of their rights in the context of judicial proceedings (*e.g.* the right to be heard); finally, the third layer is the "agency asserting information", where the latter becomes a space for children to assert their rights and have a meaningful role in the decision-making process.

With specific reference to the provision of information to children *after* the end of the judicial proceedings, this passage has not been explored in international conventions or other binding instruments, apart from the already examined interpretation of the 1996 European Convention on the Exercise of Children's Rights in favour of an autonomous dignity of the right to information. The CoE and IAYFJM Guidelines are clear in establishing the need to communicate the final decision in a

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[100] Above, para. 4.

[101] L. LUNDY, *Voice is Not Enough*, cit., p. 935.

[102] K. HERBOTS, J. PUT, *The Participation Disc*, cit., p. 165.

[103] *Ibid*.

[104] H. STALFORD, L. CAIRNS, J. MARSHALL, *Achieving Child-Friendly Justice through Child Friendly Methods*, cit., p. 211.

child-friendly way.[105] Undoubtedly, conveying the final decision to children represents a delicate and fundamental passage in the perspective of child participation, especially if the child has expressed his or her views and those views have not been followed by the court.[106] Moreover, communicating the decision to the child represents a crucial moment of preparation if the decision is to be enforced in any way.

In this context, a good practice can be relieved from the United Kingdom and the Netherlands, where some case law has resulted in the adoption of child-friendly judgments.[107] More specifically, some decisions have been written in a language accessible to children, or even tailored as letters to children. This reflects a child-centered approach to the decision making process, aimed at engaging children as individuals that are impacted by the judgment. However, those examples still represent a jeopardized and rare phenomenon, as there is no consistent practice in this regard, even though the sensitivity towards the subject that is to be found in the CoE and IAYFJM Guidelines may be the start of a more widespread implementation. This, without disregarding the fact that other professionals involved in the proceedings (such as lawyers or service providers) may be better equipped to communicate the final decision to children, especially if an adequate training is provided by States.

6. *The interaction between human rights instruments and the Hague Conventions on matters concerning children*

One of the most significant *trends* characterizing the evolution of private international law is its interaction with human rights instruments.

In matters concerning children, the UNCRC is a source of inspiration for the adoption of international instruments of private international law and, when instruments pre-existed, the UNCRC has promoted the intensification of the international cooperation (also) in this specific field as a mean for the enhancement of the rights enshrined in the convention itself.

Reference is made to the pillars of the UNCRC, such as the principle of non-discrimination, the best interests of the child and the right of the child to be

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[105] CoE Guidelines, section IV, lit. B, paras. 49, 75 and 77; IAYFJM Guidelines, section 3.1, para. 3.1.1; IAYFJM Guidelines, section 3.4, para. 3.4.2.

[106] As observed by H. Stalford, K. Hollingsworth, *"This Case is About You and Your Future"*, cit., p. 1031, while there is guidance as to how children's views should be communicated to the judge, there is less certainty and consistency regarding how the views of the judge should be communicated to the child.

[107] See the case law cited in H. Stalford, K. Hollingsworth, *"This Case is About You and Your Future"*, cit., p. 1031 and 1032. In particular, the authors commented the decision of the England and Wales Family Court in *Re A (Letter to a Young Person)* [2017] EWFC 48, of July 26, 2017, where the judgment has been written as a letter addressed to the child involved in the custody dispute. The full text of the judgment is available online at https://www.bailii.org/ew/cases/EWFC/HCJ/2017/48.html (last accessed April 14, 2021).

heard, but also to (i) Article 11, which makes reference to the obligation of the Contracting States to adopt measures aimed at combating the illicit transfer of children and their non-return, (ii) Article 35, referring to the duty of the States to prevent abduction of children as well as their sale and traffic "for any purpose or in any form", and (iii) Article 21, referring to adoption and to the duty of the States to grant that the system of adoption ensures the best interests of the child.

The Hague Conference is the global actor working «*for the progressive unification of the rules of private international law*»,[108] which enhances constructive co-existence and co-operation (also) between national family law systems.[109]

With regard to matters concerning children, the main instruments adopted are (i) the 1980 Convention on the civil aspects of international child abduction, (ii) the 1993 Convention on inter-country adoption, (iii) the 1996 Hague Convention on the protection of children and (iv) the Convention and protocol on maintenance obligations.

The interaction of the above instruments and the UNCRC is surely confirmed[110] as well as the need to grant the "incorporation" of children's rights principles in their application.[111] This topic is here considered with regard to the right of children to participate and to express their views in all proceedings concerning them.

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[108] See Article 1 of the Statute.

[109] See Article of the Statute of the Hague Conference available here https://www.hcch.net/en/instruments/conventions/full-text. On the birth and relevance of the organization, see H. VAN LOON, *The Hague Conference on Private International Law*, in *Hague Justice Journal*, vol. 2, available at http://www.haguejusticeportal.net/Docs/HJJ-JJH/Vol_2%282%29/Article%20van%20Loon-EN.pdf (last accessed July 2, 2021). On the Hague Conference's work with regard to matters concerning children, see N. LOWE, *International Conventions Affecting the Law Relating to Children – A Cause of Concern?*, in *International Family Law*, 2001, p. 171; P. MCELEAVY, *Luxembourg, Brussels and now The Hague: congestion in the promotion of free movement in parental responsibility matters*, in *International and Comparative Law Quarterly*, 2010, p. 505.

[110] On this topic, see C. BERNASCONI, P. LORTIE, *La CRC e i lavori della Conferenza dell'Aja di diritto internazionale privato nel settore della protezione delle persone di minore età*, in AUTORITÀ GARANTE DELL'INFANZIA E DELL'ADOLESCENZA (ed.), *La Convenzione delle Nazioni Unite sui diritti dell'infanzia e dell'adolescenza: conquiste e prospettive a 30 anni dall'adozione*, Roma, 2019, p. 107; E. D'ALESSANDRO, *Verso una giustizia a "misura di minore" nella giustizia civile: garanzie e giusto processo*, *ibid*., p. 334; R. CLERICI, *Il diritto all'ascolto e i diritti di partecipazione*, *ibid*., p. 203; ID., *L'ascolto del minore alla luce della giurisprudenza italiana ed europea*, in F: POZZOLINI (ed.), *Quando la giustizia incontra il minore*, Firenze, 2013, p. 67; R. LOMBARDI, *L'ascolto del minore nei procedimenti di separazione e divorzio su accordo delle parti tra fonti sovranazionali e diritto interno*, in *Familia*, 2019, available online at https://www.rivistafamilia.it/2019/05/30/lascolto-del-minore-nei-procedimenti-separazione-divorzio-accordo-delle-parti-fonti-sovranazionali-diritto-interno/ (last accessed July 2, 2021).

[111] See, with reference to the 1980 Hague Convention on the civil aspects of international child abduction, M. FREEMAN, *The Child Perspective in the Context of the 1980 Hague Convention*, study requested by the European Parliament's Committee on Legal Affairs, Policy Department for Citizens' Rights and Constitutional Affairs, Brussels, 2020, p. 5 and 8, available online at https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/659819/IPOL_IDA(2020)659819_EN.pdf (last accessed May 6, 2021); C. FENTON-GLYNN, *Participation and Natural Justice: Children's Rights and Interests in Hague Abduction Proceedings*, in *Journal of Comparative Law*, 2014, p.129.

The 1980 Hague Convention, adopted few years before the adoption of the UNCRC, establishes that a child illicitly abducted by one parent and taken abroad shall be promptly returned to the State of previous habitual residence.

The focus is, therefore, on jurisdiction, but children's welfare is considered within the exceptions to the return mechanism, i.e. under Articles 12, 13 and 20 of the Convention.

The abducting parent can oppose to return (i) if the period of one year has not expired and the child has not settled in his or her new environment (Article 12.2); (ii) if the person, institution or other body having the care of the child is not exercising the custody rights at the time of removal or retention, or has consented to or subsequently acquiesced in the removal or retention (Article 13.1 lit. a); (iii) if there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation (Article 13.1 lit. b); (iv) if the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views (Article 13.2); (v) if return would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

Whilst the human rights and fundamental freedoms exception is of a general nature and may be applied also for the protection of the abducting parent, the exception grounded on the objections of the child under Article 13.2 is strictly connected to children participation to child abduction proceedings.

The rule focuses on the age and maturity of the child as elements to be considered by the judge when deciding whether hearing or not hearing the child. The application of this exception is clearly left to the discretion of the judges.[112]

On the contrary, Article 12 of the UNCRC clearly states the right of the child to be heard in all proceedings concerning him or her. All children capable of forming their views shall be granted the right to express those views freely in all matters affecting them. Age and maturity will be relevant in a second moment, when the court will have to consider the weight to be attributed to the views of the child.

The existing tension between the two rules should be composed by granting priority to the child's right to express his or her views as expressed by Article 12 UNCRC.

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[112] From the E. PÉREZ-VERA *Explanatory report on the 1980 Hague Child Abduction Convention*, available at https://assets.hcch.net/docs/a5fb103c-2ceb-4d17-87e3-a7528a0d368c.pdf (last accessed July 2, 2021), it results (see para. 30) that «[s]*uch a provision is absolutely necessary given the fact that the Convention applies,* ratione personae, *to all children under the age of sixteen; the fact must be acknowledged that it would be very difficult to accept that a child of, for example, fifteen years of age, should be returned against its will. Moreover* [...] *all efforts to agree on a minimum age at which the views of the child could be taken into account failed, since all the ages suggested seemed artificial, even arbitrary. It seemed best to leave the application of this clause to the discretion of the competent authorities*».

In some cases, the 1980 Hague Convention has been implemented in national law in such a way to extend the hearing of the child to situations other than those under Article 13.2.[113]

Relevant is also the decision rendered by the English judges in the case *Re D*, where it has been stated that the principle concerning the hearing of the child, given the existing obligations deriving from Article 12, shall apply «*not only when a 'defence' under Article 13 has been raised*», but in every Hague Convention case, since «*it erects a presumption that the child will be heard unless this appears inappropriate*». On the other hand, hearing the child does not mean that effect to the views of the child shall be given at any cost.[114]

More recently, the issue has been addressed in the 2017 Special Commission,[115] which highlights (i) the support received by the participant States to extend the hearing of the child to all abduction proceedings independently of whether the defence under Article 13(2) has been raised, and where (ii) the importance of ensuring that the person interviewing the child should have appropriate training has been "emphasized" and (iii) the need for the child to be informed on the process as well as on the possible consequences of it has been recognized.[116]

Crucial is the impact of abduction in the entire lives of children, in their wellbeing and interpersonal relationships. Crucial is, therefore, their participation in the decision making-process.[117]

The above examples confirm a growing attention in this respect at legislative and judicial level.

The 1993 Hague Convention on intercountry adoption was signed after the entrance into force of the UNCRC and, therefore, in a context more oriented to children's rights: beside the express reference to the respect of the fundamental rights of the child and to the main international instruments protecting them, among

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[113] See, for example, Article 7 of the Law 64/1994 through which Italy has ratified the 1980 Hague Convention, which extends the hearing of the child also to the situations where the exception of Article 13.1 is invoked. On this issue, see R. CLERICI, *Il diritto all'ascolto e i diritti di partecipazione*, cit., p. 211.

[114] See Re D (2006) UKHL 51, para. 58. The decision is particularly relevant since it regards a purely intra-EU case, where the Convention applies by virtue of its incorporation within the Brussels II bis Regulation (on which, see *infra*, para. 4.1), and where the hearing of the child is an obligation deriving from Article 11.2 of the Brussels II bis Regulation. But the idea is that the hearing of the child plays such an important role in child abduction proceedings, that it applies in all child proceedings and, in particular, in "pure" 1980 Hague Convention proceedings.

[115] Under Article 8 of the Statute of the Hague Conference of Private International Law, the Council may set up Special Commissions (i) to prepare draft Conventions or (ii) to study all questions of private international law which come within the purpose of the Conference. The Special Commissions operate on the basis of consensus "to the furthest extent possible".

[116] See Seventh Meeting of the Special Commission on the practical operation of the 1980 Child Abduction Convention and of the 1996 Child Protection Convention – 2017, Preliminary Document No July 6, 2017, available at https://assets.hcch.net/docs/a093695a-5310-42df-92bb-068abfde67c2.pdf, para. 63 (last accessed July 2, 2021).

[117] See M. FREEMAN, *The Child Perspective in the Context of the 1980 Hague Convention*, cit., p. 8.

which the UNCRC, Article 1 states that the first aim of the Convention is «[t]*o establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law*».

Child participation in the adoption procedure is envisaged in the context of the adoption procedure in the State of origin (Article 4 lit. d) as well as the hearing when his or her staying in the family which would like to adopt him or her is not anymore in his or her best interests (Article 21, para. 2).

Under Article 4 lit. d), where it is required that in the context of the procedure taking place in the State of origin of the child, the competent authorities «[h]*ave ensured, having regard to the age and degree of maturity of the child, that (1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required, (2) consideration has been given to the child's wishes and opinions, (3) the child's consent to the adoption, where such consent is required, has been given freely, in the required legal form, and expressed or evidenced in writing, and (4) such consent has not been induced by payment or compensation of any kind*».

Aimed at giving effect to Article 12 of the UNCRC,[118] the rule considers three key elements: the need for the child to be properly informed of the effects of the adoption, the child's wishes and opinions and the need for the consent of the child (where required) to be freely expressed.

As pointed out in the Explanatory Report, the consent of the child shall be given not to the adoption in general, but to the specific adoption; otherwise it would be against his or her fundamental rights to have the child adopted «*without even knowing who the adoptive parents are going to be*».[119]

The weak point of the rule lays in the fact that it is for the applicable law to establish whether or not the consent of the child is necessary.[120] In the negative, the child does not take part in the proceedings, which will have everlasting consequences on his or her life.

The second relevant rule is Article 21, which considers the situation where the adoption procedure takes place after the transfer of the child to the receiving State, and it results that the adoption is not in the child's best interests. As a consequence, a different measure of protection shall be considered for the child, such as a new placement of the child with a view to adoption or, if this is not appropriate, a solution of alternative long-term care (or, as a last resort measure, the return of the child to the State of origin).

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[118] See *Explanatory Report*, para. 156.
[119] See *Explanatory Report*, para. 161.
[120] See *Explanatory Report*, para. 162.

In such a contest, Article 21.2 states that «[h]*aving regard in particular to the age and degree of maturity of the child, he or she shall be consulted and, where appropriate, his or her consent obtained in relation to measures to be taken*».

Consultation of the child is provided for in the very specific situation of failure of the intercountry adoption, not resulting in the best interest of the child, who is in the receiving State and needs to be granted a new measure of protection. In consulting the child, his or her age and degree of maturity shall be taken into consideration.

Beside the consultation, also the consent of the child shall be obtained «*where appropriate*». It is, therefore, for the competent authority to evaluate whether the child's consent is relevant for the measure to be put into place.

The importance of children's opinion and consent in adoption procedures has been highlighted in the case law and in particular in the case *Pini and others v. Romania*.[121]

The European Court of Human Rights stressed the importance to take into account children's interest and opinions and consequently stated that the conscious opposition of the children would make their harmonious integration in their adoptive family unlikely.

The 1996 Hague Convention's preamble states the will to have the best interests of the child as a primary consideration, as well as the desire to establish common provisions «*taking into account*» the UNCRC.

The Convention's aim is to provide the widest possible range of protection measures for the child, including the *kafala* of Islamic tradition. However, it does not "directly" provide for any duty to hear the child in proceedings concerning or affecting him or her. There is just one indirect reference to the hearing of the child: under Article 23, para. 2, lit. b, it is possible to stop recognition and execution of a decisions in case the child has not been heard.

Given that the hearing of the child is left to the procedural autonomy of the Contracting States, which have different legal cultures and traditions, it is possible that this ground of refusal is also triggered when perhaps this is not the case. This is detrimental to the purpose of granting continuity of protection to the children in cross-border situations.

As authoritatively stressed, it is therefore important to share good practices, which can raise trust and confidence between different international actors.[122]

During the 2017 Special Commission, in order to facilitate the recognition and enforcement of an order for measures, it was recommended that the competent

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[121] ECtHR, judgment of September 22, 2004, App. No. 78028/01 and 78030/01, para. 157 and 164-165.

[122] See M. Freeman, N. Taylor, *The Child's Voice – 15 years later*, in *The Judges' Newsletter on International Child Protection*, 2018, p. 3, available at https://assets.hcch.net/docs/a8621431-c92c-4d01-a73c-acdb38a7fde5.pdf (last accessed July 2, 2021).

authority should incorporate into the order a record of the way the child was heard, or if a decision is made not to hear the child, an indication that consideration was given to doing so and the reasons for the decision not to hear the child.[123]

The last two Hague instruments concerning children matters, i.e. the 2007 Convention on maintenance obligations and the 2007 Protocol concerning the specific aspect of the applicable law, focus on "economic" (not personal) interests and, as a consequence, the involvement of the child is not envisaged.

Article 29 of the 2007 Convention expressly clarifies that the "physical presence" of the child (as well as of the applicant for maintenance) in maintenance proceedings is not required.

This does not affect the duty of the Contracting States (i) to have the best interests of the child as a primary consideration in maintenance proceedings, too and (ii) to protect the rights of every child to have a standard of living adequate for the child's physical, mental, spiritual, moral and social development, and also (iii) to take all appropriate measures to secure the recovery of maintenance for the child, in particular when cross-border situations are at stake.

Such principles, deriving from Articles 3 and 27 of the UNCRC, are expressly recalled in the preamble of the Convention.

As for the Protocol, it focuses on conflict-of-law rules and no specific reference to children's rights is provided and no specific right of participation is granted.

However, it is worth mentioning the presence of a rule excluding the possibility to designate the applicable law in all cases concerning maintenance obligations in respect to persons under the age of eighteen years old, i.e. to children.[124] As pointed out in the Explanatory Report, party autonomy in the above cases has been excluded «[b]*ecause the potential risks presented by this choice seem in this case to outweigh the possible benefits*».[125]

This limitation (as well as the similar limitation existing as for the choice of court in maintenance proceedings in respect to children under EU law) has been subject to criticisms, being too strict in excluding at all the possibility to exercise party autonomy. Different solutions connected to the principle of the child's best interests might be considered.[126]

In concluding this paragraph on the relationships existing between the UNCRC and the main Hague instruments concerning children matters, it is useful to mention the ongoing work of the Institute of International Law on a resolution

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[123] Conclusions and recommendations adopted by the Special Commission on the practical operation of the 1980 and 1996 Hague Convention (October 10-17, 2017), available at https://assets.hcch.net/docs/edce6628-3a76-4be8-a092-437837a49bef.pdf (last accessed July 2, 2021).

[124] See Article 8 para. 3 of the Protocol.

[125] See A. Bonomi's *Explanatory Report*, para. 73. The text of the Explanatory Report is available at the following address: https://assets.hcch.net/upload/wop/maint_pd33e.pdf (last accessed June 28, 2021).

[126] For references to the different opinions on the topic, with regardo the EU law instruments, see L. Carpaneto, *Autonomia privata e relazioni familiari nel diritto dell'Unione europea*, Roma, 2020, p. 235.

concerning the relationships between human rights and private international law instruments.[127]

The draft resolution highlights the importance of the private international law method and instruments for the protection of human rights and in its preamble states that «[p]*rivate international law can inspire and guide the implementation and interpretation of human rights, notably by ensuring respect for the plurality of traditions, cultures and legal systems*». Some articles are expressly devoted to the protection of children's rights with specific reference to matters which are regulated by the Hague Conventions above mentioned.

Noteworthy is Article 15, establishing that the 1993 Hague Convention on intercountry adoption «[i]*s based on universally accepted principles and notably on the best interests of the child*» and, as a consequence, it should be applied universally, also in relation to non-contracting States.

Similarly, Article 16 focuses on the protection of persons «*in vulnerable situations*», among which the recovery of child support is expressly considered, and a clear invitation to the accession to existing instruments and the conclusion of other international instruments of private international law are provided.

With regard to international child abduction, it is also worth mentioning the provision under Article 17, where, once again, accession to the existing instruments as well as the adoption of further instruments (also bilateral agreements) are provided for.

The draft resolution pays specific attention to one of the most delicate issues in the application of the existing international and regional instruments on child abduction, which is finding a correct balance between the principle of immediate return of the abducted child in the country of origin (as an expression of the principle of the child's best interests, considered "*in abstracto*") and the non-return of the child when specific circumstances justify it (as an expression of the principle of the child's best interests, considered "*in concreto*", i.e. in the specific case at stake).[128]

Child participation is not expressly mentioned or considered.

However, the last article of the resolution (Article 20) states that the right to a fair hearing encompasses effective legal protection, also meaning for the decisions to be recognized and enforced.

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[127] See draft resolution on "human rights and private international law", available here https://eapil.org/2021/06/24/idi-draft-resolution-on-human-rights-and-private-international-law/ (last accessed June 2, 2021).

[128] See Article 17 para. 2, stating that «[I]*n applying these instruments or their domestic law provisions, the authorities seized with return application shall act with urgency in view of obtaining the return of the child in the State of origin, considering the best interests of the child both in deciding on the return and in taking appropriate measures for its safety*».

Against this background, Article 20, para. 2 clarifies that recognition and enforcement shall not be at any cost and, therefore, that a decision shall not be recognized and enforced «[a]*gainst a party's will if the proceedings in the foreign court violated the party's right to a fair hearing*».

Children, more than "parties" to proceedings, are "affected" by the proceedings. However, the principle under Article 20 surely applies to children as well and to the possibility to deny recognition and enforcement of decisions which are against the will of the child and in case the child has not been heard.

Finally, noteworthy in this respect is Article 14 on parentage, establishing that human rights protection requires the recognition of a parentage relationship established in one State in other States «[t]*aking into account the best interests of the child, which should prevail over consideration of international public policy of the State where recognition is sought*».

The Hague Conference of Private International Law is currently working on the "parentage/surrogacy" project, with a view to tackling the main private international law issues deriving from cross-border parentage and from the growing recourse to assisted reproductive techniques.[129] The adoption of instruments concerning parentage in cross-border situations is now considered by the European Union as well.[130] Such a topic is perhaps the most delicate one with regard to the search of a correct "incorporation" of human rights in private international law rules as well as to the search of the appropriate means for the protection of children's rights. The solutions adopted will, therefore, be particularly interesting.

Section 2.
European Union Law

1. *The action of the European Union towards the enhancement of children's rights: the inclusion of children's rights at the Treaty level*

A supranational approach to children's rights has shown its positive results in recent decades. The efforts of the international community towards a global recognition of the fundamental rights of the child has allowed a greater acknowledgment of the necessity to provide special protection for children. Nevertheless, the common standards reached at the international level are influenced by the legal traditions and context of each national legal system. The main cornerstones when

[129] See https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy (last accessed June 2, 2021).

[130] See https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12878-Cross-border-family-situations-recognition-of-parenthood/public-consultation_en (last accessed June 2, 2021).

speaking of children's rights, such as the principle of the child's best interests,[131] are usually filled with content and implemented differently by States with different approaches. For this reason, a common action seems to be even more important in building and fostering higher standards.

This necessity is well acknowledged in the context of the European Union, which recognizes the need to protect human rights in general and the rights of children in particular. The competences and the action of the European Union for the protection of fundamental rights have increased throughout the years,[132] and the protection of children's rights has made its way into the agenda of EU institutions, in continuity with the action undertaken at the international level.

The process started with the inclusion in the Treaty of Maastricht of provisions anchoring the European Union to the protection of fundamental rights[133], already preceded by the Court of Justice recognizing this objective as a general principle of community law,[134] on the basis of the constitutional traditions common to the Member States and of the existence of the European Convention on Human Rights (ECHR).

The Treaty of Lisbon marks an important structural step in this regard, together with the adoption of the European Union Charter of Fundamental Rights and its express qualification as an act of primary EU law having the same value of the founding Treaties.[135] The Treaty of Lisbon has included the respect for fundamental rights among the core values of the EU[136] and has explicitly introduced in Article 3 of the Treaty on European Union (TEU) the protection of children's

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[131] See for instance M. ZUPAN, *The Best Interests of the Child: a Guiding Principle in Administering Cross-Border Child-Related Matters*, in T. LIEFAARD, J. SLOTH-NIELSEN (eds.), *The United Nations Convention on the Rights of the Child. Taking Stock after 25 Years and Looking Ahead*, Leiden-Boston, 2017, p. 213; J. EEKELAR, *The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children*, in *International Journal of Children's Rights*, 2015, p. 3; J. EEKELAAR, J. TOBIN, *Article 3. The Best Interests of the Child*, in J. TOBIN (ed.), *The UN Convention on the Rights of the Child. A Commentary*, Oxford, 2019, p. 73.

[132] On the progressive action of the European Union towards the protection of fundamental rights, see among others A. VON BOGDANDY, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, in *Common Market Law Review*, 2000, p. 1307; E. CANETTA, N. MEURENS, P. MCDONOUGH, R. RUGGIERO, *EU Framework of Law for Children's Rights*, study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Brussels, 2012, p. 19, available online at https://www.europarl.europa.eu/RegData/etudes/note/join/2012/462445/IPOL-LIBE_NT(2012)462445_EN.pdf (last accessed April 16, 2021); with particular reference to family matters, E. BERGAMINI, *Human Rights of Children in the EU Context*, cit., p. 5; I. QUEIROLO, L. SCHIANO DI PEPE, *Lezioni di diritto dell'Unione europea e relazioni familiari*, Torino, 2019, p. 263; P. CELLE, La tutela dei diritti fondamentali nell'Unione europea, Rome, 2016.

[133] Article F.2 of the Maastricht Treaty.

[134] Starting with the Judgment of the Court of November 12, 1969, Erich Stauder v City of Ulm – Sozialamt, case 29/69, para. 7.

[135] On which see below, at para. 3.

[136] Article 2 TEU.

rights among its core aims and objectives.[137] This means that any measure adopted by the European institutions shall comply with the applicable human rights standards in order to be consistent with primary law.[138] Moreover, EU institutions and Member States have the obligation to promote, protect and fulfil the rights of the child in all relevant EU policies and actions.

The construction of the legal basis for the EU action in the field of children's rights, although not having the effect of attributing a general legislative competence to the EU in this field, consists in the present moment of a complex system of primary and secondary law where children's rights have a cross-cutting role.[139] The EU competence has therefore to be determined on a case-by-case basis. In this context, it was of outmost importance the recognition – in the EU Agenda for the Rights of the Child developed by the European Commission in 2011[140] – of the UNCRC as a reference point for an effective action in this direction.[141] The Agenda identified four priority areas for a concrete EU action on children's rights, among which there was the promotion of a child-friendly justice. With specific reference to children involved in family law disputes, the Commission underlined that

> *[T]he adequate provision of information to children and parents about their rights under EU law and national law is a prerequisite to enable them to defend their rights in family law litigation. Information should be easily accessible and provide clear guidance on the relevant procedures.*[142]

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[137] Article 3, para. 3 TEU: «[T]*he Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child. It shall promote economic, social and territorial cohesion, and solidarity among Member States. It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced*».

[138] On the topic, see the contributions in S. Douglas-Scott, N. Hatzis (eds.), *Research Handbook on EU Law and Human Rights*, Cheltenham/Northampton, 2019.

[139] See E. Canetta, N. Meurens, P. McDonough, R. Ruggiero, *EU Framework of Law for Children's Rights*, cit., p. 19.

[140] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: An EU Agenda for the Rights of the Child*, COM(2011) 60 final, followed by the European Commission's recommendation of 20 February 2013 *Investing in Children: Breaking the Cycle of Disadvantage*, 2013/112/EU. See also the European Parliament resolution of 28 April 2016 on safeguarding the best interests of the child across the EU on the basis of petitions addressed to the European Parliament (2016/2575(RSP)), in OJ C 66, 21.2.2018, p. 2, and the study of the European Commission, *EU Acquis and Policy Documents on the Rights of the Child*, last updated July 16, 2020.

[141] European Commission, *An EU Agenda for the Rights of the Child*, cit., p. 3.

[142] *Ibid*., p. 6.

The recent EU Strategy on the Rights of the Child[143] represents the latest milestone of a long process of progressive involvement of EU institutions in the field, whose policy line is now more structured. This means that, even in the absence of a general competence to adopt legislative provisions in the field of children's rights, the European Union has nevertheless acknowledged many ways in which it is possible to take concrete steps in this direction.

Within the 2021 Strategy, the UNCRC is confirmed as the most important guide for the EU action, the latter focusing – among other thematic areas – on the promotion of a child-friendly justice system where children are able to «[p]*articipate effectively in the proceedings*»[144] and be heard. Even though substantial family law is a national competence, the EU has renewed its intention to protect the rights of children involved in cross-border cases, which present specific challenges *per se*.[145] The Strategy is of particular interests in the part in which it points out the need to foster the training of justice professionals in interacting with children in an age-appropriate way, including when communicating about the results of proceedings. Moreover, there is an explicit intention to strengthen the implementation of the 2010 CoE Guidelines on Child-Friendly Justice, in cooperation with the Council of Europe.[146]

2. *The UNCRC and the European Union*

As known, the European Union is not a party of the UNCRC, which is open for signature and accession to States only. On the other hand, all EU Member States have ratified the convention and – as noticed – the UNCRC still represents the fundamental guide of the EU institutions when operating in the children's rights sector. The convention has become more and more relevant over the years, as an effect of the extension of the EU competences in many areas where children's rights are at stake.

The UNCRC is an integral part of the EU primary hard law as an effect of the incorporation of children's rights in the Treaties. According to Article 6 TEU, fundamental rights are general principles of EU law and the UNCRC plays a central

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[143] European Commission, *Communication of 24th March 2021 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions. EU Strategy On The Rights Of The Child*, COM(2021) 142 final, available at https://ec.europa.eu/info/sites/info/files/1_en_act_part1_v7_0.pdf (last accessed April 15, 2021).

[144] European Commission, *EU Strategy for the Rights of the Child*, cit., p. 13.

[145] *Ibid*., p. 13.

[146] *Ibid*., p. 14.

role in this regard.[147] Moreover, it should be considered that some of the UNCRC rules are believed to be a codification of customary international law.[148]

The relevance of the UNCRC has been recognized also by the Court of Justice of the European Union (CJEU), which has expressly stated the need of EU law to take the convention into adequate consideration[149]. Therefore, the UNCRC is a relevant parameter when evaluating whether EU law complies with fundamental rights.[150] Even if the Court has not directly cited the UNCRC many times[151] – with a preference for making reference to the EU Charter, once it has become binding – it is undoubtful that the reality and relevance of the convention has been valorized when stating that children's rights are incorporated into EU law.

When the UNCRC and the rights it enshrines are incorporated in EU acts and instruments, the principle of the primacy of the EU law has the effect to reinforce the position of the UNCRC within Member States law.[152].This creates coherence between the duty of Member States to comply with UNCRC provisions[153] and the action of EU institutions in matters attributed to the competence of the EU. Therefore, when a legislative act of the EU cites, recalls or mentions the UNCRC as a whole or one or more specific rights, the latter benefit of a reinforced protection and application by EU institutions and Member States. This is particularly evident, for instance, in migration and international protection law.[154] The same is true when the UNCRC is recalled in the preamble of an EU legislative instrument, since the provisions of the latter shall be interpreted in conformity with the convention: this is the most recurring circumstance, which is to be found in many instruments adopted by the EU within the Area of Freedom, Security and Justice.[155]

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[147] H. STALFORD, *Children and the EU: Right, Welfare and Accountability*, Oxford, 2012, p. 34; H.-J. BLANKE, *The Protection of Fundamental Rights in Europe*, in H.-J. BLANKE, S. MANGIAMELI (eds.), *The European Union after Lisbon*, Berlin, 2012, p. 159.

[148] See L.D. ELROD, *'Please Let Me Stay': Hearing the Voice of the Child in Hague Abduction Cases*, in *Oklahoma Law Review*, 2011, p. 672; B. DOHRN, *Something's Happening Here: Children and Human Rights Jurisprudence in Two International Courts*, in *Nevada Law Journal*, 2006, p. 749.

[149] See the Judgment of the Court (Grand Chamber) of June 17, 2006, European Parliament v. Council of the European Union, case C-540/03, para. 37.

[150] H. STALFORD, E. DRYWOOD, *Using the CRC to Inform EU Law and Policy-Making*, in A. INVERNIZZI, J. WILLIAMS (eds.), *The Human Rights of Children: From Visions to Implementation*, New York, 2016, p. 207.

[151] Other than the abovementioned judgment, see the Judgment of the Court (Third Chamber) of February 14, 2008, Dynamic Medien Vertriebs GmbH v. Avides Media AG, case C-244/06, paras. 39-40.

[152] A. ADINOLFI, *La rilevanza della CRC nell'ordinamento dell'Unione europea*, in AUTORITÀ GARANTE DELL'INFANZIA E DELL'ADOLESCENZA (ed.), *La Convenzione delle Nazioni Unite*, cit., p. 66.

[153] According to the general clause of art. 4 UNCRC.

[154] For instance, the Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States mentions the UNCRC within its Article 28, establishing that an expulsion decision shall not be taken against a minor, except if it is necessary for the best interests of the child as provided by the UNCRC.

[155] As concerns migration law, reference to the UNCRC in the preamble is made, *inter alia*, by the

With specific reference to private international law of the EU in family matters, the relevance of the UNCRC has been valorized to a great extent, even considering the ambiguous position of international conventions in the EU legal system.[156] Human rights are not only one of the reasons why the EU engaged itself in the harmonization of private international law, but also a guideline for the interpretation of such legislation.[157]

At the same time, as previously said with reference to the case law of the Court of Justice, explicit references to the UNCRC have been substituted with making direct recourse to the EU Charter of Fundamental Rights, for which the UNCRC was a direct source of inspiration.

3. *The binding nature of the EU Charter of Fundamental Rights and its Article 24*

The creation of a European Union Charter of Fundamental Rights represents a crucial step towards the progressive interest of the EU in the protection of human rights. The Charter is now part of a multilevel system of protection of fundamental rights and its content has been inspired mostly by the ECHR and other human rights treaties that are part of the common constitutional traditions of the Member States,[158] among which there is the UNCRC.

Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (recital 22); by the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (recital 18); by the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recital 33); and by the Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recital 13). On the best interests of unaccompanied children and children in migration, see J.M. POBJOY, *The Best Interests of the Child Principle as an Independent Source of International Protection*, in *International and Comparative Law Quarterly*, 2015, p. 327; M. KALVERBOER, D. BELTMAN, C. VAN OS, E. ZIJLSTRA, *The Best Interests of the Child in Cases of Migration: Assessing and Determining the Best Interests of the Child in Migration Procedures*, in *International Journal of Children's Rights*, 2017, p. 114.

[156] See G. BIAGIONI, *The Convention on the Rights of the Child and the EU Judicial Cooperation in Civil Matters*, in *Diritti Umani e Diritto Internazionale*, 2021, p. 365.

[157] P. FRANZINA, *The Place of Human Rights in the Private International Law of the Union in Family Matters*, in E. BERGAMINI, C. RAGNI (eds.), *Fundamental Rights and the Best Interest of the Child*, cit., p. 145. On the relationship between private international law and human rights law see also L.R. KIESTRA, *The Impact of the European Convention on Human Rights on Private International Law*, The Hague, 2014, p. 1; J.J. FAWCETT, M. NÍ SHÚILLEABHÁIN, S. SHAH, *Human Rights and Private International Law*, Oxford, 2016, p. 1.

[158] See I. QUEIROLO, L. SCHIANO DI PEPE, *Lezioni di diritto dell'Unione europea e relazioni familiari*,

Undoubtedly, one of the EU Charter's strengths is to explicitly address the rights of children in its Article 24,[159] which can be considered as a structural and conceptual link between children's rights – as consecrated at the international level – and the EU legal framework. Although this is not the only provision in the Charter that is relevant for children's rights, Article 24 enhances the specific needs of children in an autonomous and innovative way. As an effect of Article 6 TUE,[160] Article 24 is part of EU law and it binds the EU institutions and the Member States in the application of EU law, including situations having cross-border implications. As affirmed by the doctrine, the Charter can be considered the "shadow" of EU law, in the sense that there can be no situation that is governed by EU law in which the Charter does not apply.[161] However, Article 24 and the general principles on the protection of children's rights should also be considered in their potential to influence national legislations even outside the scope of EU law.[162]

As explicitly stated in the Explanation to the EU Charter, Article 24 is «[b]*ased on the New York Convention on the Rights of the Child* [...] *and ratified by all Member States, particularly Articles 3, 9, 12 and 13 thereof*».[163] The cited provisions of the UNCRC represent the four pillars on which Article 24 of the EU Charter is built, namely: *i*) providing children with the protection and care that is necessary for their well-being, *ii*) hearing children and taking into account their opinion in accordance with their age and maturity, *iii*) take into primary consideration the best interests of children, and *iv*) ensure that children maintain a personal relationship with both their parents. The fact that the EU Charter has incorporated the rights stated by the UNCRC has led the Court of Justice to make recourse directly to Article 24 the Charter in its case law (often invoked in combination with Article 7 concerning the right to private and family life)[164] and not to the Conven-

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Torino, 2019, p. 269.

[159] R. Lamont, *Article 24*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights. A Commentary*, Oxford, 2014, p. 678.

[160] The provision also consecrates fundamental rights as general principles of EU law and provides for the EU to accede to the European Convention of Human Rights. See H. Stalford, M. Schuurman, *Are We There Yet? The Impact of the Lisbon Treaty on the EU Children's Rights Agenda*, in *International Journal of Children's Rights*, 2011, p. 381; P. Ivaldi, C.E. Tuo, *Diritti fondamentali e diritto internazionale privato dell'Unione europea nella prospettiva dell'adesione alla CEDU*, in *Rivista di diritto internazionale privato e processuale*, 2012, p. 7.

[161] K. Lenaerts, J.A. Gutiérrez-Fons, *The Place of the Charter in the EU Constitutional Edifice*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights*, cit., p. 1568.

[162] As highlighted by the *Fundamental Rights Report 2020* of the Fundamental Rights Agency (FRA), p. 6, available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-fundamental-rights-report-2020_en.pdf (last accessed April 19, 2021). On the topic also T. Kerikmäe, *EU Charter: Its Nature, Innovative Character, and Horizontal Effect*, in T. Kerikmäe, P*rotecting Human Rights in the EU: Controversies and Challenges of the Charter of Fundamental Rights*, Heidelberg, 2014, p. 5.

[163] See the Explanations relating to the EU Charter of Fundamental Rights, in OJ C 303, 14.12.2007, p. 25.

[164] R. Lamont, *Article 24*, cit., p. 685.

tion. The core principles of the UNCRC are considered an integral part of EU law and, at the same time, the Court has enjoyed a wider discretion in defining the rights of the child in the EU legal system.[165]

Nevertheless, since the provision relies on the principles enshrined in the UNCRC, it has to be interpreted accordingly. This rule is stated by Article 52, para. 4 of the Charter, establishing that «[I]*n so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions*».[166] This means that Article 24 of the Charter is filled with content by the UNCRC provisions, as interpreted and applied over the years. The General Comments to the UNCRC, *inter alia*, play a relevant role in this regard.

4. *Child participation in the EU instruments of private and procedural international law: towards the creation of an EU child-friendly justice through the adoption of uniform rules of civil procedure*

Over the years, an increasing number of children-related issues have been covered by EU legislative acts on private and procedural international law. The judicial cooperation in civil matters has gradually expanded its scope of application and many family law matters now enjoy a uniform discipline in Member States as concerns jurisdiction, applicable law, and recognition and enforcement of judgments and authentic instruments. Where unanimity of Member States has not been reached, the EU has acted through enhanced cooperation.[167]

While EU legislative acts have not intervened on substantial family law or on some aspects of national civil procedure – lacking the EU competences in this field – there has been a growing interaction between private international law and human rights law, with the effect of putting the protection of children's rights at the centre of the EU attention when acting in the field of judicial cooperation.[168] This

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[165] In this sense G. BIAGIONI, *The Convention on the Rights of the Child*, cit., p. 369.

[166] Similarly, since the EU Charter takes inspiration from the ECHR, art. 52, para. 3 establishes that «[I]*n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection*».

[167] As it happened with Council Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation), Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, and Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships.

[168] On this huge topic, other than the contributions cited above, at fn. 131, see also A. DAVÌ, *Diritto internazionale privato e diritti umani*, in A. DI STEFANO, R. SAPIENZA (eds.), *La tutela dei diritti umani e il*

means that the rights of the child have become an integral part of the EU legal framework in this context, in a twofold sense: in fact, not only children's rights have inspired the drafting of the EU legislative acts, but they also serve as a relevant component for the interpretation and application of those instruments.[169] Therefore, many references to the rights and principles of the UNCRC are to be found in the preamble or in the text of EU regulations. The principle of the best interests of the child is the most common reference, as it is clear, for instance, in the Regulation (EC) No. 2201/2003 (Brussels II-*bis*)[170] and in its Recast Regulation (EU) No. 2019/1111 (Brussels II-*ter*).[171] This has been done directly, or by mentioning Article 24 of the EU Charter, as incorporating the fundamental rights of the child stated in the UNCRC. Being the EU Charter a legally binding instrument addressed to the Member States when they implement EU law, every situation that is governed by EU law is covered by the Charter. Therefore, even if the Regulations do not seek to establish uniform substantive and procedural rule, they have been drafted with the intent to protect the fundamental rights of the child, and should nevertheless be interpreted in the light of those principles.[172] This occurs in the presence of signi-

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diritto internazionale, Napoli, 2012, p. 209; R. Baratta, *Derechos Fundamentales y Derecho Internacional Privado de Familia*, in *Anuario Español de Derecho Internacional Privado*, 2016, p. 103; P. Pirrone, *I diritti umani e il diritto internazionale privato e processuale tra scontro e armonizzazione*, in *Circolazione dei valori giuridici e tutela dei diritti e delle libertà fondamentali*, Torino, 2011, p. 3.

[169] On the topic F. Bestagno, *I rapporti tra la Carta e le fonti secondarie di diritto dell'UE nella giurisprudenza della Corte di giustizia*, in *Il Diritto dell'Unione Europea*, 2015, p. 259.

[170] Reference to the principle of the best interests of the child is to be found in recital 12 and in Articles 12, 15 and 23 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, in OJ L 338, 23.12.2003, p. 1. Indeed, the best interest of the child has increased its role in the application of all provisions of the regulation through the case law of the European Court of Justice: see O. Lopes Pegna, *L'interesse superiore del minore nel regolamento n. 2201/2003*, in *Rivista di Diritto Internazionale Privato e Processuale*, 2013, p. 357; K. Lenaerts, *The Best Interests of the Child Always Come First: the Brussels II bis Regulation and the European Court of Justice*, in *Jurisprudencija*, 2013, p. 1302; M.C. Baruffi, *Il principio del* best interests of the child *negli strumenti di cooperazione giudiziaria civile europea*, in A. Di Stasi, L.S. Rossi (eds.), *Lo Spazio di libertà sicurezza e giustizia. A vent'anni dal Consiglio europeo di Tampere*, Napoli, 2020, p. 233.

[171] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, in OJ L 178, 2.7.2019, p. 1. This new regulation will replace the Regulation No. 2201/2003 from August 1st, 2022. See C. Honorati, *La proposta di revisione del regolamento Bruxelles II-*bis*: più tutela per i minori e più efficacia nell'esecuzione delle decisioni*, in *Rivista di Diritto Internazionale Privato e Processuale*, 2017, p. 247; L. Carpaneto, *La ricerca di una (nuova) sintesi tra interesse superiore del minore «in astratto» e «in concreto» nella riforma del Regolamento Bruxelles II-*bis, in *Rivista di Diritto Internazionale Privato e Processuale*, 2018, p. 944; L. Carpaneto*, Impact of the Best Interests of the Child on the Brussels II* ter *Regulation*, in E. Bergamini, C. Ragni (eds.), *Fundamental Rights and Best Interests of the Child*, cit., p. 265; C.E. Tuo, *Superiore interesse del minore e regolamenti UE di diritto internazionale privato della famiglia*, in *Nuova giurisprudenza civile commentata*, 2020, p. 676.

[172] On the topic H. Stalford, *The CRC in Litigation Under EU Law*, in T. Liefaard, J. E. Doek (eds.), *Litigating the Rights of the Child. The UN Convention on the Rights of the Child in Domestic and International Jurisprudence*, p. 211. See also CJEU, 22 December 2010, C-491/10 PPU, *Joseba Andoni Aguirre*

ficant stratification of international, European and national legal sources that give origin to a complex dynamics of coordination and balancing among different legal values and objectives.

With specific reference to child participation in civil proceedings, there has been an increasing concern on the right of the child to be heard and have his or her views given due weight, recognized in Article 12 UNCRC and incorporated in Article 24 EU Charter. A special emphasis was placed on this right in the context of parental responsibility proceedings, in the acknowledgment that those proceedings may impact greatly on children's life, but a human-rights-oriented interpretation may conduct to a greater relevance of the right to be heard also within other civil proceedings involving children, such as maintenance matters.[173]

The implementation of the right to be heard has been done through the introduction of specific provisions stressing the duty of judicial authorities to give children a genuine opportunity to express their views within the proceedings. Indeed, at least in the beginning, the EU lawmaker did not impose clear-cut and binding rules as concerns the hearing of the child, but rather provisions that – in specific matters – have constituted a "reminder" of a duty already existing upon States and stemming from Article 12 UNCRC.[174] However, the increased attention for the creation of a child-friendly justice over the years[175] and the on-going effort of EU institutions in this regard have led to the progressive introduction, in the legislative instruments, of provisions stressing in a more sharp and precise way Member States' obligations concerning child participation. As it will be seen in the following paragraph, this evolution shall be considered in the light of a well-rounded definition of child participation and all the elements that are fundamental for the implementation of the right of the child to be heard and have his or her opinion given due weight in the context of cross-border civil proceedings. In this sense, private international law pursues the objective to avoid situations that may be harmful for human rights and faces the difficulties inherent in the differences existing between national legal systems and the delimitation of the competences of the European Union and the Member States.

Zarraga v. Simone Pelz.

[173] T. Kruger, F. Maoli, *The Hague Conventions and EU instruments in private international law*, in W. Schrama, M. Freeman, N. Taylor, M. Bruning (eds.), *International Handbook on child participation in family law*, cit., p. 84.

[174] T. Kruger, F. Maoli, *The Hague Conventions and EU instruments*, cit., p. 79.

[175] As explained by G. Biagioni, L. Carpaneto, C*hildren Under Brussels II* ter *Regulation*, in *Yearbook of Private International Law*, 2020/2021, forthcoming.

4.1. *Regulation (EC) No. 2201/2003 and Recast Regulation (EU) No. 2019/1111*

The lack of EU's competences in intervening on civil procedure rules of the Member States does not mean that the EU legislative instruments do not address aspects of child participation: on the contrary, it has been mentioned how the respect of the fundamental rights of the child has been promoted in different ways through common rules of international civil procedure in family matters, also with reference to child participation.

In this context, the Brussels II-*bis* Regulation provides uniform rules as concerns jurisdiction, as well as the recognition and enforcement of judgment in parental responsibility and international child abduction proceedings (other than in matrimonial matters).[176] The Regulation does not impose on judicial authorities an express duty to hear the child or to provide him or her with adequate information in all proceedings falling into its scope of application, but it nevertheless recognizes the importance of child participation in some of its provisions.[177]

Firstly, national authorities shall provide the child with a genuine opportunity to be heard in international child abduction proceedings (Article 11, para. 2). The intent of the EU lawmaker was to promote a certain procedural unification among Member States in return proceedings dealing with the wrongful removal or retention of a child, according to the 1980 Hague Convention on the civil aspects of international child abduction.[178] A provision of this kind has been considered more as a reminder than a new obligation, given that all EU Member States are already bound by Article 12 of the UNCRC. On the other hand, a reminder in a piece of EU legislation has proved to be useful, as EU law is directly applicable in the Member States.[179]

Secondly, a decision in matters on parental responsibility may not be recognized in another Member State if the child has not been heard during the proce-

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[176] On the Brussels II-*bis* Regulation see U. Magnus, P. Mankowski, (eds.), *Brussels IIbis Regulation*, Munich, 2012; K. Trimmings, *Child Abduction Within the European Union*, Oxford, 2013; G. Biagioni, *Regolamento (CE) n. 2201/2003*, in F. Pocar, M.C. Baruffi (eds.), *Commentario breve ai Trattati dell'Unione europea*, Padova, 2014, p. 553; L. Carpaneto, *On the Recast of the Brussels II-bis Regulation's Regime on Parental Responsibility: few Proposals* de jure condendo", in B. Heiderhoff, I. Queirolo (eds.), *Party Autonomy in European Private (and) International Law*, Rome, 2015, p. 247; I. Queirolo, *EU Law and Family Relationships: Principles, Rules and Cases*, Rome, 2015, p. 153; T. Kruger, L. Samyn, *Brussels II bis: Successes and Suggested Improvements*, in *Journal of Private International Law*, 2016, p. 132.

[177] Recital 19 of the Brussels II-*bis* Regulation states that «[t]*he hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify national procedures applicable*». See B. Ubertazzi, *The Hearing of the Child in the Brussels IIa Regulation and its Recast Proposal*, in *Journal of Private International Law*, 2017, p. 576.

[178] C. Honorati, *Sottrazione internazionale dei minori e diritti fondamentali*, in *Rivista di diritto internazionale privato e processuale*, 2013, p. 5. On child participation in the context of the 1980 Hague Convention, see also M. Freeman, *The Child Perspective in the Context of the 1980 Hague Convention*, cit., p. 4.

[179] T. Kruger, F. Maoli, *The Hague Conventions and EU instruments*, cit., p. 79.

edings, except in case of urgency (Article 23, lit. b)). More precisely, the ground for non-recognition of a foreign judgment applies when the judgment was given «[w]*ithout the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought*». Therefore, the principles of procedure of the State still represent the main parameter when establishing the existence of children's right to be heard.

Thirdly, the hearing of the child is one of the conditions for the issuing of the certificate allowing recognition and enforcement of privileged decisions, namely the judgments on the rights of visit and on the return of the child after a wrongful removal or retention (Articles 41 and 42). The certificate allows for automatic recognition and enforcement of those decisions in another Member State, without the need of any intermediate procedures, but it shall be issued by the court of origin only if the child was given the opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity. The practice has shown that, in many cases, domestic courts still issue the certificate even if the child has not been heard.[180] The European Court of Justice, when filed with an application concerning the non-return of a child from Germany to Spain, has stated that a manifestly false declaration does not allow the requested Member State to refuse enforcement of a privileged decision.[181] The Brussels II-*bis* Regulation rests on the principle of mutual trust and it is therefore presumed that each Member State offers an equivalent protection of fundamental rights.[182] This principle – along with the rules on automatic recognition and enforcement of decisions – does not allow the court of a Member State to contest the content of a foreign certificate delivered on the basis of Articles 41 or 42 of the Regulation.[183]

From the above, it results that the Brussels II-*bis* Regulation did not introduce any obligation to hear the child in all proceedings on matters of parental responsibility. The hearing of the child is required only in child abduction procedures and is encouraged in other cases, but reference is always made to national rules of civil procedures. Therefore, the hearing of the child does not find a uniform discipline in the Regulation and is still subject to the Member States' legal systems. The same

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[180] See K. LENAERTS, *The Best Interests of the Child Always Come First*, cit., p. 1316; L. WALKER, P. BEAUMONT, *Shifting the Balance Achieved by the Abduction Convention*, cit., p. 239; A. DUTTA, A. SCHULZ, *First Cornerstones of the EU Rules on Cross-Border Child Cases: The Jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation from C to Health Service Executive*, in *Journal of Private International Law*, 2014, p. 26; T. KRUGER, L. SAMYN, *Brussels II bis*, cit., p. 157.

[181] Judgment of the Court (First Chamber) of December 22, 2010, Joseba Andoni Aguirre Zarraga v. Simone Pelz, Case C-491/10 PPU, paras. 54-56.

[182] Judgment of the Court (First Chamber) of December 22, 2010, Joseba Andoni Aguirre Zarraga v. Simone Pelz, Case C-491/10 PPU, para. 70.

[183] Judgment of the Court (First Chamber) of December 22, 2010, Joseba Andoni Aguirre Zarraga v. Simone Pelz, Case C-491/10 PPU, para. 74.

is true for other procedural rights of the child – whether or not connected with the right to be heard – that are recalled (but not regulated) by the instrument.

On the other hand, the Regulation shall be interpreted in accordance with the fundamental rights' instruments to which Member States and EU institutions are subject. A human-rights-oriented implementation of the Regulation has already been stressed over the years, since there is relevant international law in this regard.[184] If Article 24 EU Charter does not impose an absolute obligation to hear the child, it provides for the child to be offered a genuine opportunity to express his or her views. Since the provision of information is a fundamental precondition for the child to be aware of his or her rights, as well as to take a conscious decision, this indeed constitutes a crucial passage in order for the child to have the genuine opportunity to be heard. Furthermore, when the child is heard during the proceedings, human rights law requires the court to take all the appropriate measures in the light of the child's best interests and the circumstances of each individual case. Among all the safeguarding measures, the provision of information to the child is an integral part of safe and fruitful child participation.

In this context, the Recast Regulation No. 2019/1111 makes a great step forward in the enhancement of the fundamental rights of the child,[185] and with specific reference to the child's right to be heard. The new Regulation (that will be applicable from August 1st, 2022) expressly mentions Article 24 of the EU Charter, the UNCRC and the ECHR,[186] specifying at Recital 19 that any reference to the best interests of the child made in the Regulation shall be interpreted in accordance to the aforementioned instruments. Hopefully, the existence of this express mention and the direct link between the Charter and the convention will lead the Court of Justice to take into more careful consideration the protection of children's rights. Moreover, already in its Recital 2, it is stated that «[t]*his Regulation* clarifies *the child's right to be provided with an opportunity to express his or her views in proceedings to which he or she is subject*»,[187] thus recognizing the already existing obligations stemming from international law.

The Brussels II-*ter* Regulation introduces in its Article 21 a very detailed obligation to hear the child in all proceedings on parental responsibility.[188] In line

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[184] T. Kruger, F. Maoli, *The Hague Conventions and EU instruments*, cit., p. 78.

[185] One of the most important achievements of the new Regulation was the abolition of *exequatur* for all decisions falling into its scope of application: see B. Musseva, *The recast of the Brussels IIa Regulation: the sweet and sour fruits of unanimity*, in *ERA Forum: Journal of the Academy of European Law*, 2020, p. 138.

[186] Recitals 19, 39, 71, 83 and 84.

[187] Emphasis added. It should be highlighted that «[o]*ffering the child a genuine opportunity to express her/his views freely is crucial for the best interests of the child principle's effectiveness*»: see L. Carpaneto, *Impact of the Best Interests of the Child on the Brussels II* ter *Regulation*, cit., p. 279.

[188] See G. Biagioni, *Il nuovo regolamento (UE) 2019/1111 relativo alla competenza, al riconoscimento e all'esecuzione delle decisioni in materia matrimoniale e di responsabilità genitoriale, e alla sottrazione internazionale*, in *Rivista di Diritto Internazionale*, 2019, p. 1173; D. Danieli, *I diritti dei minori*

with the wording of the UNCRC, national courts must give children capable of forming their own views the opportunity to express those views. The latter shall be given due weight in accordance with the age and maturity of the child. The same provision is reiterated in Article 26 with specific reference to child abduction proceedings, as a gentle reminder that this is opportune in the light of the importance of an effective examination of the child's situation.[189]

In the same way as the Brussels II-*bis* Regulation, the new instrument does not point out "how" the hearing shall be conducted, since it depends on national legal systems. Article 21 states that the opportunity to be heard is provided by Member States «[i]*n accordance with national law and procedure*».[190] The Regulation only makes some recommendations, such as to make use of communication technologies or to the mechanisms laid down by the Evidence Regulation.[191] Thus, the principle of procedural autonomy is preserved and child participation is still not harmonized. However, the EU lawmaker has stretched the boundaries between private international law and national procedural law: the inclusion of specific and detailed provisions makes clear that Member States are now required to respect the already existing obligations under international law. The explicit references to the EU Charter and the UNCRC makes it clear that EU law should be applied in line with those sources of law.

As highlighted above, the right of the child to information is a fundamental component of the right to be heard. It follows that the latter aspect should be considered when interpreting and applying the EU Regulations and the provisions, especially if the child shall be given a "genuine and effective" opportunity to be heard, as expressly stated by Article 21 of the Brussels II-*ter* Regulation.[192] This is even more true if considering the possible relevance of the right to information not only as a component of the right to be heard, but also as an autonomous right of the child involved in (cross-border) civil proceedings. Thus, there is an opportunity to further explore this matter under the application of the new Regulation from August 1st, 2022 onwards.

As the right of the child to be heard, also the right to information is at higher risk of be compressed in cross-border situations, especially where the lack of cooperation between judicial authorities and other authorities involved may undermine its effectiveness.

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nei casi di sottrazione internazionale: esigenze di tutela dei diritti fondamentali nel nuovo regolamento Bruxelles II-ter, in *Ordine Internazionale e Diritti Umani*, 2020, p. 651.

[189] G. BIAGIONI, L. CARPANETO, *Children Under Brussels II* ter *Regulation*, cit.

[190] This indication is reiterated two times, at paras. 1 and 2 of art. 21.

[191] Recitals 39 and 53.

[192] Information being one of the components of effective child participation: L. LUNDY, *Voice is Not Enough*, cit., p. 937; UN Committee on the Rights of the Child, *General Comment No. 12*, cit., para. 3. On this point see also S. ARAS KRAMAR, *The Voice of the Child: Are the Procedural Rights of the Child Better Protected in the New Brussels II Regulation?*, in *Open Journal for Legal Studies*, 2020, p. 93.

For instance, even if the general ground of jurisdiction of the habitual residence of the child[193] – is also inspired by human rights considerations *per se*[194] – should ensure the proximity between the child and the country's court seized, there are cases in which this proximity may not exist. This may occur in international child abduction proceedings and in the context of the so-called "second chance procedure" or "trumping order" under Article 11 of the Brussels II-*bis* Regulation (or under 29 of the Brussels II-*ter* Regulation).[195] Both provisions intervene on international child abduction proceedings that are subject to the 1980 Hague Convention: after an order for non-return delivered by the court of the State of refuge, the court of the former habitual residence of the child maintains jurisdiction to decide on the merits of rights of custody. This custody proceeding may take place while the child is not present in the same State of the judicial authority.

In order to provide the child with adequate information on the ongoing proceedings or on the decision that has been taken, as well as to prepare the child for the eventual enforcement of a return order, a country's court may benefit from an appropriate interstate coordination or more effective cooperation mechanisms. This is even more important considering that the Brussels II-*ter* Regulation qualifies the second chance procedure as a procedure on the merits of rights of custody,[196] and it is therefore relevant to acquire the point of view of the child when there are the right preconditions.

In such a case, it may also happen that the child is heard twice, during the return proceedings and during the second chance proceedings on custody. Thus, the child should receive explanations as to the reasons of this "double" hearing, otherwise he or she might get the impression that judges are not listening to his or her voice.[197]

The principle of the child's best interests, inspiring the entire Brussels II-*bis* and – even more – the Brussels II-*ter* Regulations should suggest that children shall be given an adequate preparation before their involvement in judicial proceedings. Moreover, the fact that the fundamental rights of the child (above all,

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[193] Art. 8 Brussels II-*bis* Regulation; art. 7 Brussels II-*ter* Regulation.

[194] P. FRANZINA, *The Place of Human Rights and the Private International Law of the Union in Family Matters*, cit., p. 150; G. BIAGIONI, *Jurisdiction in Matters of Parental Responsibility Between Legal Certainty and Children's Fundamental Rights*, in *European Papers*, 2019, p. 285; R. LAMONT, *Care Proceedings with a European Dimension under Brussels IIa: Jurisdiction, Mutual Trust and the Best Interests of the Child*, in *Child and Family Law Quarterly*, 2016, p. 67.

[195] On the topic, with specific reference to the new discipline on child abduction contained in the Brussels II-*ter* Regulation, see S. CORNELOUP, T. KRUGER, *Le règlement 2019/1111, Bruxelles II: la protection des enfants gagne du ter(rain)*, in *Revue critique de droit international privé*, 2020, p. 215; M.C. BARUFFI, *A Child-Friendly Area of Freedom, Security and Justice*, cit., p. 393; D. DANIELI, *I diritti dei minori nei casi di sottrazione internazionale*, cit., p. 656; C. HONORATI, *La proposta di revisione del regolamento Bruxelles II*-bis, cit., p. 336.

[196] Article 29, paras. 3, 5 and 6 Brussels II-*ter* Regulation.

[197] As observed by T. KRUGER, F. MAOLI, *The Hague Conventions and EU instruments*, cit., p. 83.

the UNCRC) are part of EU primary law should constitute a sufficient basis for a greater promotion in the EU judicial space.

It is understood that the right to information in cross-border civil proceedings is strongly dependent on the cooperation between the (judicial or administrative) authorities of the States involved. Stressing the duty to inform the child at the supranational level would encourage this kind of cooperation, by raising awareness on the already existing obligations under human rights law and by providing practical guidelines. As concerns this latter aspect, the European Commission will probably prepare a practice guide on the Brussels II-*ter* Regulation: this document could be the soft law instrument where to implement the right of the child to be heard, to be informed and therefore to better participate.

4.2. *Regulation (EC) No. 4/2009*

The Regulation (EC) No. 4/2009 (Maintenance Regulation) establishes uniform rules on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.[198] Adopted after the Brussels II-*bis* Regulation, this instrument is part of the ambitious program of EU institutions for a progressive and complete intervention on private and procedural international law in family matters.[199]

From the perspective of children's rights, the Regulation is sensitive to the position of children as weaker parties, provided that parents have a legal responsibility to provide financially for their children even if they no longer live with them.[200] Thus, the Regulation pursues the objectives stated by Article 27 UNCRC, according to which the child has the right to a standard of living adequate for the

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[198] Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, in OJ L 7, 10.1.2009, p. 1. On the Regulation see F.C. VILLATA, *Obblighi alimentari e rapporti di famiglia secondo il regolamento n. 4/2009*, in *Rivista di Diritto Internazionale*, 2011, p. 731; H. MUIR WATT, *Aliments sans frontiéres. Le reglément CE n° 4/2009 du 18 décembre 2008 relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et la coopération en matière d'obligations alimentaires*, in *Revue Critique du Droit International Privé*, 2020, p. 457; P. BEAUMONT, B. HESS, L. WALKER, S. SPANCKEN (eds.), *The Recovery of Maintenance in the EU and Worldwide*, Oxford, 2014; F. PESCE, *Le obbligazioni alimentari tra diritto internazionale e diritto dell'Unione Europea*, Rome, 2013.

[199] As known, maintenance matters were previously covered by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in OJ L 12, 16.1.2001, p. 1 (Brussels I Regulation). The provisions of the Brussels I Regulation dealing with maintenance have then been replaced by the Maintenance Regulation, which takes a step forward towards free circulation of judgments in the area of freedom, security and justice. Moreover, it can be affirmed that the EU lawmaker's decision to adopt a specific Regulation on maintenance obligations, separating the subject from the general legal framework provided for civil and commercial matters, was motivated by a greater attention to the rights of the child.

[200] The will to protect children also emerges from Article 4 of the Regulation, which excludes the possibility of concluding choice-of-court agreements in disputes relating to a maintenance obligation towards a child under the age of 18.

child's physical, mental, spiritual, moral and social development. In particular, the cConvention establishes that

> *[S]tates Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad.*

The general obligation to hear the child stated by Article 12 UNCRC is also relevant in the context of support and family maintenance. However, it is always necessary to ascertain whether the matter under discussion 'affects' the child and, subsequently, that the child is capable of forming his or her own views. This is true in all the contexts in which Article 12 UNCRC applies. This seems to be the position of the Committee on the Rights of the Child within the General Comment No. 12 to the UNCRC, which states that:

> *[i]n cases of separation and divorce, the children of the relationship are unequivocally affected by decisions of the courts. Issues of maintenance for the child as well as custody and access are determined by the judge either at trial or through court-directed mediation*[201].

While judicial determinations on maintenance may be issued in the context of separation, divorce or parental responsibility proceedings, it may also happen that autonomous proceedings deal exclusively with maintenance issues related to a child.[202] In any event, it is undoubtful that a decision on maintenance contributes to affecting the child's living conditions, health, education or general well-being.

However, the Maintenance Regulation does not explicitly address the issue of child participation in legal proceedings.[203] Unlike the Brussels II-*bis* Regulation (which was adopted a few years before), it does not prescribe the duty for judicial authorities of the Member States to hear the child before issuing a decision on maintenance. Article 24 of the Maintenance Regulation, establishing the grounds for refusal when the recognition of a decision is sought, does not provide for a specific ground if the child was denied the right to be heard within the proceedings.

On the other hand, the Maintenance Regulation is part of EU law and national authorities are nevertheless bound by the UNCRC and by Article 24 of the EU

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[201] UN Committee on the Rights of the Child, *General Comment No. 12*, cit., para. 51.

[202] It should be highlighted that the Maintenance Regulation adopts a broad definition of the term "court", which includes administrative authorities of the Member States that comply with the requisites stated in Article 2, para. 2 of the Regulation. This in the acknowledgment that Member States provide for various ways of resolving maintenance obligation issues: see Recital n. 12 of the Regulation.

[203] The same is true for the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance, and for the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations.

Charter. Since the Maintenance Regulation was also inspired by the objective of protecting children from the difficulties that may arise in the recovery of maintenance obligations among EU Member States, the principle of the best interests of the child and the respect of his or her fundamental rights play a role in the application of the instrument. This means that the duty to listen to children also applies to maintenance matters, provided that it is for national law to determine the modalities and the conditions of child participation.[204] As previously highlighted, this does not mean that the child shall be always heard within the proceedings: the parameters stated by Article 12 UNCRC and other relevant international law instruments still apply, and it is always necessary to ascertain if the child is capable of discernment and whether participation would not be harmful. In some cases, hearing the child in maintenance proceedings may also be superfluous.

On the other hand, the opportunity to hear the child should not be disregarded, and – for this purpose – an adequate preparation of the child may be useful in acquiring a fruitful participation in line with the child's best interests. The provision of adequate, relevant and reliant information still plays an important role in this regard. Moreover, the opportunity to provide the child with information can be appreciated not only as an essential component of the hearing of the child, but also as a modality to involve children in matters that will affect their life. Notwithstanding the need to evaluate carefully whether and how to inform the child, on the basis of his or her best interests and in accordance with his or her capacity of understanding, age and maturity, this right of the child fully applies to maintenance matters.

Therefore, there is space for better implementation of the right of the child to information in maintenance proceedings in the EU, starting from an awareness-raising activity towards judicial authorities and other professionals involved in those proceedings, highlighting the beneficial effects of the provision of information for the general well-being of the children involved.

5. *Perspectives* de iure condendo *as concerns the right of the child to information in the field of judicial cooperation in civil matters*

The analysis on the EU legal system on the topic of child participation and children's right to information has highlighted that many efforts have been made in the field by EU institutions and other actors. However, there is still room for improvement, especially as concerns the explicit recognition of this right of the child in legislative instruments.

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[204] On the topic T. KRUGER, F. MAOLI, *The Hague Conventions and EU instruments*, cit., p. 84.

The efforts of the international community have led to an increased promotion of child participation – in all its different forms – starting with the recognition of the right in international conventions. Those rights have been filled with content by relevant institutional documents and by soft law instruments.[205] Thus, for instance, the principles underlying the right of the child to be heard and to have his or her views given due weight have been better specified by General Comment No. 12 of the UNCRC Committee, which has also valorized the importance of information as a preparatory stage for an efficient, effective and safe child participation.[206]

The EU area of freedom, security and justice has been, and still is, greatly impacted by the UNCRC and other fundamental rights instruments. Together with the adoption of the EU Charter of Fundamental Rights, which takes direct inspiration from the UNCRC, the instruments adopted in the field of judicial cooperation in civil matters have shown an increased attention for the position of the child involved in judicial proceedings. Even if the EU Regulations mostly deal with matters of jurisdiction, applicable law, and recognition and enforcement of judgments, those rules are not neutral anymore, but are more and more inspired by human rights considerations.

On the other hand, the principle of procedural autonomy of Member States must be respected,[207] especially where national authorities are responsible for implementing EU legislative instruments.[208] For this reason, EU regulations in the field of judicial cooperation in civil matters did not discipline in a capillary way the modalities in which the child is heard and involved in judicial proceedings falling into their scope of application.[209] The balance between the competences of Member States and the interests of the EU for the fundamental rights of the child is still to be found, but the general tendency seems to go towards a greater influence of supranational sources of law over national legal systems.

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[205] Among the most recent initiatives, it is worth mentioning the new Committee of experts on the rights and the best interests of the child in parental separation and in care proceedings, born within the Council of Europe (CJ/ENF-ISE, more information available online at https://www.coe.int/en/web/children/cj/enf-ise, last accessed May 5, 2021). The Committee will develop a practical instrument that will specifically address children's rights in situations of parental separation and care proceedings, such as a Recommendation to develop standards or social policies, and/or practical tool(s) aimed at practitioners, institutions and possibly parents, or common guidelines, for example on best interests determination or the child's right to be heard.

[206] UN Committee on the Rights of the Child, *General Comment No. 12*, cit., paras. 3, 34, 48, and 41. See above, Section I, para. 1.

[207] On the topic see E. CANNIZZARO, *Il diritto dell'integrazione europea. L'ordinamento dell'Unione*, Turin, 2014, p. 317; D.U. GALETTA, *Procedural Autonomy of Member States: Paradise Lost? A Study on the 'Functionalized Procedural Competence' of EU Member States*, Berlin-Heidelberg, 2010, p. 2.

[208] As stated by the Court of Justice, Judgment of the Court of 11 Febraury 1971, Norddeutsches Vieh- und Fleischkontor GmbH v Hauptzollamt Hamburg-St. Annen, Case 39-70, para. 4.

[209] In general, on the adoption of uniform rules of civil procedure at the EU level, see T. KRUGER, *The Disorderly Infiltration of EU Law in Civil Procedure*, in *Netherlands International Law Review*, 2016, p. 1.

In recent years, this delicate balance between EU activism in the field of children's rights and procedural autonomy of Member States is shifting towards a growing intervention of the EU lawmaker: it has been examined how rules aimed at improving the position of children in civil proceedings have made their way in EU regulations. However – as also testified by the renewed intentions expressed in the 2021 Children's Rights Strategy[210] – a lot can still be done for child-friendly justice in the EU.

Firstly, a greater implementation of children's rights to information may derive from the valorization of the principle of the child's best interests. This principle already represents the cornerstone of the Brussels II-*ter* Regulation and the main criterion for the interpretation of its provisions. This, together with the binding nature of the EU Charter of Fundamental Rights, may lead national courts (and even the Court of Justice itself) to be more sensitive on the issue of child participation and children's right to information.[211]

The principle of best interests of the child may inspire a more incisive interpretation of the new provisions of the Brussels II-*ter* Regulation focusing on children's right to be heard within the proceeding (Articles 21 and 26). The regulation has just been adopted after a long legislative process and another recast is not foreseeable in the short term, at least before a genuine test on the application of new provisions has been done. On the other hand, since the Regulation has (also) focused on the objective to make judicial proceedings more accessible for children and more attentive towards their rights and needs,[212] a human-rights-oriented interpretation of Articles 21 and 26 may lead to an effective application of children's right to information, at least as concerns the importance to provide children with an adequate preparation before they enter into contact with the justice system.

Another important aspect concerns international child abduction proceedings and, in particular, the enforcement of return orders.[213] The Brussels II-*ter* Regulation has recognized the need to hear children involved in those kind of proceedings and seems also sensitive to changes in the factual situation or contingencies that may happen after a return order is issued, but *before* its effective enforcement.

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[210] It has been highlighted how an important part of the Strategy is focused on the promotion of a child-friendly justice system where children are able to «[p]*articipate effectively and be heard*»: see European Commission, *EU Strategy for the Rights of the Child*, cit., p. 13.

[211] The Court of Justice has a wide discretion in the interpretation of the EU Charter (see P.P. Craig, *The Charter, the ECJ and National Courts*, in D. Ashiagbor, N. Countouris, I. Lianos (eds.), *The European Union after the Treaty of Lisbon*, Cambridge, 2012, p. 104.) and it is not excluded that, in the future, issues connected with child participation may become more relevant in the Court's case law when examining the application of EU regulations by Member States.

[212] See the Opinion of the European Economic and Social Committee on the *Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast)*, COM(2016) 411 final, para 1.2.

[213] On the topic C. Honorati, *La proposta di revisione del regolamento Bruxelles II*-bis, cit., p. 274.

Also return orders are subject to Article 56 of the Regulation, which allows the judicial authority to suspend the enforcement of the decision if it «[w]*ould expose the child to a grave risk of physical or psychological harm due to temporary impediments which have arisen after the decision was given, or by virtue of any other significant change of circumstances*».[214] As highlighted by Recital no. 69, a manifest objection of the child voiced after the decision can be qualified as a significant change of circumstances, if such objection is so strong that, if disregarded, it would amount to a grave risk of physical or psychological harm.[215]

The provision at hand demonstrates a concern for the position of children involved in enforcement procedures, and gives relevance to their position, needs and voice. In order for this provision to fully produce its effects, it would be advisable to adequately prepare children for enforcement, through correct information and through the intermediation of professionals such as social workers or psychologists. This would significantly reduce the risk of physical or psychological harm and would make enforcement procedures more child-friendly.

More precise references to children's rights in general – and to children's right to be heard and to receive information in particular – should be also included in a future recast of Regulation No. 4/2009 on maintenance matters. At the moment, the Regulation does not prescribe the duty for judicial authorities of the Member States to hear the child before issuing a decision on maintenance. However, also decisions on maintenance are capable to affect children's life. Moreover, Article 12 UNCRC also applies to maintenance proceedings. Therefore, also in the view of considering children as capable to participate in the decisions that will affect their lives (according to their capacity of understanding, age and maturity), a specific provision on the hearing of children involved in maintenance proceedings – as well as on their right to receive information – should be part of a possible recast of Regulation No. 4/2009.

The above considerations have highlighted that there are many opportunities to improve recognition and implementation of children's right to information in civil proceedings and within the EU istruments on family law. Even if the recast of the Brussels II-*ter* Regulation somehow constitutes a "missed opportunity" for

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[214] D. Danieli, *I diritti dei minori nei casi di sottrazione internazionale*, cit., p. 658.

[215] Recital No. 69 stresses the importance to ensure correct and safe enforcement of a decision, also trough recourse to the assistance of professionals such as social workers or child psychologists. Full text: «[E]*nforcement should be resumed as soon as the grave risk of physical or psychological harm ceases to exist. If it continues to exist, however, before refusing enforcement any appropriate steps should be taken in accordance with national law and procedure including, where appropriate, with the assistance of other relevant professionals, such as social workers or child psychologists, to try to ensure implementation of the decision. In particular, the authority competent for enforcement or the court should, in accordance with national law and procedure, try to overcome any impediments created by a change of circumstances, such as, for example, manifest objection of the child voiced only after the decision was given which is so strong that, if disregarded, it would amount to a grave risk of physical or psychological harm for the child*».

the EU lawmaker, the instrument has made many steps forward and is the result of a delicate balance between EU law and the procedural autonomy of Member States. A human-rights-oriented interpretation of EU instruments may make this right more structured in practice, together with many initiatives that are being taken at the EU and international levels. Therefore, other than providing for possible legislative amendments, it is important to raise the awareness of practitioners on already existing obligations under human rights law. From this perspective, a good solution would be to improve the training of justice professionals dealing with children,[216] setting common EU standards in this regard.

[216] See the 2021 EU Strategy on the Rights of the Child, cit., p. 13, highlighting that «[W]*hile EU action in this field has been significant so far, and standards have been set within the Council of Europe framework, national justice systems must be better equipped to address children's needs and rights. Professionals sometimes lack training to interact with children in an age-appropriate way, including when communicating about the results of a proceeding, and to respect the child's best interests*».

Chapter 2

CUSTODY AND INTERNATIONAL CHILD ABDUCTION PROCEEDINGS IN BELGIUM: HOW, WHEN, ABOUT WHAT AND BY WHOM SHOULD THE CHILD BE INFORMED? ON THE RIGHT OF THE CHILD TO RECEIVE ADEQUATE INFORMATION

Tine Van Hof, Leontine Bruijnen, Sara Lembrechts

If I were abducted, I wouldn't know what to do. I would not know whether to talk to a judge because I do not know how the procedure works. I think, if I had known more, I might make different choices (young person, INCLUDE, 2019).[1]

[1] INCLUDE, *Country Report - Belgium*, 2019, available at https://missingchildreneurope.eu/?wpdmdl=1372. Throughout the paper, quotes representing children's perspectives are used to underpin the findings. These perspectives are derived from the empirical deliverables in two research projects funded by the European Union in which the University of Antwerp was involved as a project partner (EWELL and INCLUDE), about children's wellbeing before, during and after procedures of international child abduction. The first study (EWELL on "Enhancing the well-being of children in cases of international child abduction", 2016-2017) covers qualitative semi-structured interviews with 19 young people between 12 and 19 years old in Belgium, France and the Netherlands. All participants had a personal experience with parental abduction in their childhood and reflected on matters affecting their wellbeing. As a follow-up to EWELL, the second study (INCLUDE on "Enhancing the well-being of children in cases of international child abduction by providing guidelines and good practices to legal and other professionals", 2019-2021) presents the results of four in-depth focus groups with 24 Belgian participants between 14 and 17 years old. These young people were not recruited on the basis of any particular personal experience, but instead engaged through a fictional scenario of an abducted child to discuss how judges and other professionals could support children and young people in contact with the family justice system. Despite the focus on child abductions, some of the findings have a broader relevance and can be transposed to the other proceedings in which the parents are in conflict. The full research reports and partnerships of both projects can be consulted online at https://missingchildreneurope.eu/include/.

1. *Introduction*

Children have a right to receive adequate information in legal procedures affecting them. This right is codified in legal instruments, recognised in academic literature[2] and further explored in empirical findings about the way in which children and young people experience this right in practice.[3] Nevertheless, the application of children's right to information in civil proceedings[4] remains challenging. It is often unclear what 'adequate' information entails, which information should be provided, when this should be done and who should be responsible. These issues become apparent especially in proceedings characterised by high levels of conflict within the family, where parents may not be best placed to provide adequate information to their children.

To address these challenges, this paper discusses how, when and by whom the child should be informed in Belgian legal proceedings of custody (including residence and access)[5] and international child abductions. Through the lens of the national and international legal framework on the child's right to information, the analysis seeks to clarify what the implications of this right are and should be for the Belgian legal practice.

We identify three phases throughout the legal procedures where the right to information could come in – a first phase taking place before the first hearing of the family court, a second phase between the first hearing and the court's decision, and a third phase after the court's decision has been made. For each of these phases, we discuss what information is or should be provided to children. In addition, we map

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[2] See *inter alia* A. DALY, *Children, Autonomy and the Courts: Beyond the Right to be Heard*, Leiden, 2018, p. 7; S. LEMBRECHTS, M. PUTTERS, K. VAN HOORDE, *Kinderen en Rechters in Gesprek in Familiezaken van Internationale Kinderontvoering*, in *Tijdschrift voor Jeugd en Kinderrechten*, 2018, p. 289; T. LIEFAARD, *Child-Friendly Justice: Protection and Participation of Children in the Justice System*, in *Temple Law Review*, 2016, p. 905-928; L. LUNDY, *'Voice' is not enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child*, in *British Educational Research Journal*, 2007, p. 927-942; R. O'DONNELL, *The Role of the EU Legal and Policy Framework in Strengthening Child Friendly Justice*, in *ERA Forum - Journal of the Academy of European Law*, 2013, p. 516 and p. 519-520; S. RAP, *The Right to Information of (Un)Accompanied Refugee Children*, in *International Journal of Children's Rights*, 2020, p. 322-351; H. STALFORD, L. CAIRNS, J. MARSHALL, *Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information*, in *Social Inclusion*, 2017, p. 207-218.

[3] Cfr. *supra* note 1.

[4] We recognise that the right of the child to information is also relevant in other legal proceedings (administrative proceedings such as asylum cases, criminal proceedings such as juvenile justice cases, and public child protection proceedings such as care, fostering, or adoption cases), as well as in mechanisms of alternative dispute resolution (such as mediation). However, those proceedings are not within the scope of this paper. The right to information of the child in these contexts might be an interesting course for further research.

[5] This paper only focusses on Belgian national custody proceedings and will not discuss cross-border custody proceedings. Consequently, the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children will not be taken into account for the analysis.

the different actors involved in the proceedings and analyse their responsibilities regarding the right of the child to receive adequate information during each phase of the proceedings. These actors can be the parents, the parents' lawyers, the youth lawyer, judges, justice assistants, experts, and Central Authorities.[6] The analysis is conducted with the Belgian legal proceedings in mind. However, when relevant, attention is given to inspiring practices of professionals in other jurisdictions.[7]

After a brief presentation of the applicable legal instruments and their implications (part 2), the paper continues with a description of the course of custody and child abduction cases in Belgium (part 3). In part 4 we analyse per phase of the proceedings what the right to information requires and which actor is or should be responsible to make it happen. Lastly, in part 5 we make some concluding remarks.

2. *Legal framework*

Children's right to receive adequate information is not disputed in the international, European and national legal instruments applicable to Belgian legal proceedings affecting children whose parents are in conflict. This section first presents the key legal instruments applicable in Belgium (2.1). It then continues with a discussion of the legal implications that derive from specific provisions in these instruments in the context of Belgian justice procedures (2.2), including information as a precondition for meaningful participation, information as a procedural safeguard and quality criteria of information.

2.1. *Key legal instruments applicable in Belgium*

On an international level, Belgium is a State party to the United Nations Convention on the Rights of the Child (UNCRC). Even though the UNCRC does not explicitly cover 'information in legal proceedings affecting the child' as an independent right, its supervising body, the Committee on the Rights of the Child, has made the connection between information and family proceedings in its interpretation of other rights in the Convention and its Optional Protocols.[8] Where

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[6] We decided not to include the child as one of the actors since in this context the child is in the first place the recipient of information and not an active actor in providing for it.

[7] Focus will mostly be on the figure of the guardian *ad litem* in the Netherlands. Previous research has shown that this foreign legal figure is the most prominent with regard to the interaction with the child during international child abduction procedures (cfr. the VOICE project on "The voice of the child in international child abduction proceedings in Europe", 2018-2019), The full research report and partnership can be consulted online at https://missingchildreneurope.eu/the-voice-project/.

[8] In particular, UN Committee on the Rights of the Child, General Comment No. 12 (2009): The right of the child to be heard UN Doc. CRC/C/GC/12 of July 1st, 2009 and UN Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his/her best interests taken as a primary consideration (Article 3, para. 1) UN Doc. CRC/C/GC/14 of May 29, 2013. See also: UN Committee on the Rights of the Child, General comment No. 2 (2002): The Role of Independent National Human

Article 12 UNCRC on the child's right to be heard stands out in this regard, also Article 13 UNCRC on children's right to seek, receive and impart information and ideas of all kinds, Article 17 UNCRC on access to appropriate information via the public domain and Article 3 UNCRC on the child's best interests, contain legal obligations on children's information rights.[9]

In national law, children's right to participate in matters affecting them is guaranteed in Article 22-*bis*, section 2 of the Belgian Constitution, which directly reflects the provisions of Articles 3 and 12 UNCRC.[10] Articles 1004/1 and 1004/2 of the Belgian Judicial Code further specify this right in relation to participation in legal proceedings concerning the exercise of parental authority, residence, and contact. Minors above 12 years of age are informed by the court that they can be heard by the judge if they wish. Younger children can request to be heard on their own initiative but are not automatically informed about this possibility.

At the level of the Council of Europe (CoE), the 2010 Guidelines on Child Friendly Justice encourage justice systems to ensure «*the respect and the effective implementation of all children's rights at the highest attainable level*».[11] These Guidelines constitute a non-binding yet authoritative interpretation of how Belgium, as a CoE Member State, could implement children's rights before, during and after legal proceedings. The Guidelines have established information as the first of 'General Elements of Child Friendly Justice'.[12] It asserts that children should be informed promptly and adequately, in a child-friendly and direct manner.[13]

Rights Institutions in the Promotion and Protection of the Rights of the Child UN Doc. CRC/GC/2002/2 of November 15th, 2002; UN Committee on the Rights of the Child, General comment No. 19 (2016) on public budgeting for the realization of children's rights (Article 4) UN Doc. CRC/C/GC/19 of July 20th, 2016; UN Committee on the Rights of the Child, General comment No. 21 (2017) on children in street situations UN Doc. CRC/C/GC/20 of June 21, 2017; UN Committee on the Rights of the Child, Rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, UN Doc. CRC/C/62/3 of April 16, 2013, Rule 14.

[9] Other information-related legal obligations contained in the UNCRC are rather about 'personal information' in the context of the child's origins (Article 7 UNCRC), his/her identity (Article 8 UNCRC), the whereabouts of absent family members (Article 9 UNCRC) or the right to privacy (Article 16 UNCRC). Adopted children (Article 21 UNCRC), asylum seeking and migrant children (Article 22 UNCRC), children with disabilities (Article 23 UNCRC) and children suspected or convicted of committing a crime (Article 40.2 UNCRC) have a specific right to information in legal procedures affecting them (cfr. W. VANDENHOLE, G. ERDEM TÜRKELLI, S. LEMBRECHTS, *Children's Rights: A Commentary on the Convention on the Rights of the Child and its Protocols,* Northampton, 2019). Even though these rights may be applicable in certain situations of family conflict, divorce or child abduction, they do not fall within the scope of this paper.

[10] Article 22*bis*, section 2 of the Belgian Constitution reads as follows: «*Each child has the right to express his or her views in all matters affecting him or her, the views of the child being given due weight in accordance with his or her age and maturity*».

[11] COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 17 November 2010, p. 17.

[12] COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, cit., p. 20, para. 1.

[13] COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, cit., pp. 20-21, paras. 1-5.

Other thematic instruments (including the Hague Convention on Child Abduction[14] and the Brussels II-*bis* Regulation[15]), regional human rights treaties (including the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union (EU Charter)) and legal bodies (including the European Court on Human Rights and the UN Human Rights Committee) can be mentioned. Even though these instruments do not cover information as a separate right, they have offered additional guidance on how to interpret legal obligations and good practices in relation to information rights when it comes to the participation of children in legal procedures.[16]

2.2. *Legal implications of the right to information in the context of justice proceedings*

Information as a precondition for meaningful participation

As STALFORD *et al*. have pointed out, «*[w]ithout access to reliable, relevant information, children cannot meaningfully engage in any decision-making process*».[17] Access to appropriate information is a precondition for the right of children capable of forming their own views, to express those views freely in all matters affecting them. Information is thus essential to realise children's right to be heard in matters affecting them (e.g. enshrined in Article 12 UNCRC, Article 24 of the EU Charter or Article 22-*bis* of the Belgian constitution).[18] Not only does adequate information contribute to the development of children's capacities to form a view,[19] it is also crucial for the child to assess various outcomes of a decision and their possible consequences.[20]

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[14] Convention of 25 October 1980 on the Civil Aspects of International Child Abduction.

[15] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338, 23.12.2003, p. 1–29. This Regulation will still apply for legal proceedings instituted before 1 August 2022. For legal proceedings instituted on or after that date, the Brussels II*bis* Recast, officially Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), OJ L 178, 2.7.2019, p. 1-115, will apply.

[16] Where the CoE Convention on the Exercise of Children's Rights (European Convention on the Exercise of Children's Rights of the Council of Europe of January 25th, 1996, ETS No. 160) contains various Articles with explicit reference to children's information rights in legal procedures (namely Articles 3, 6, 10 and 12), this Convention has not been signed by Belgium and is thus not legally binding for Belgian authorities.

[17] H. STALFORD, L. CAIRNS, J. MARSHALL, *Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information*, cit., p. 210.

[18] UN Committee on the Rights of the Child, General Comment No. 12, cit., paras. 25, 48 and 80-83 (see also, amongst others, H. STALFORD, L. CAIRNS, J. MARSHALL, *Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information*, cit., p. 208; S. RAP, *The Right to Information of (Un)Accompanied Refugee Children*, cit., p. 326)

[19] UN Committee on the Rights of the Child, General Comment No. 12, cit., paras. 29, 34.

[20] UN Committee on the Rights of the Child, General Comment No. 12, cit., para. 25; G. LANSDOWN, *Every child's right to be heard: A resource guide on the UN committee on the rights of the child general comment No. 12*, Save the Children UK, 2011, p. 22.

Specifically in legal proceedings (e.g. under the Hague Convention, the Brussels II-*bis* Regulation or the Belgian Judicial Code), children should be informed about the nature, scope and purpose of the procedures.[21] As a minimum, practical matters such as where, when, why, for how long and with whom the procedure takes place, should be clearly explained.[22] The child must also be informed of the option and implications of either communicating directly or through a representative,[23] and of the fact that voicing an opinion is a right and not an obligation.[24] This has also been recognised in the context of the child's right to be heard in proceedings under the Hague Convention, where the 2011 Special Commission highlighted «*the need for the child to be informed of the ongoing process and possible consequences in an appropriate way considering the child's age and maturity*».[25]

In addition, attention should be paid to information about the potential impact of the procedure. It must be explained to children how their views will be considered, on what matters, and what weight will be given to them.[26] This includes information about the fact that children's views may not necessarily determine the final decision.[27] Feedback about the legal reasoning after the decision has been made is also crucial, especially when children's views have not been followed in the final decision.[28] Children must receive information about the outcome and how their views have influenced the decision:[29] «*[this] information may prompt the child to insist, agree or make another proposal or, in the case of a judicial or administrative procedure, file an appeal or a complaint*».[30]

Information as a procedural safeguard to realise other children's rights

Regarding the child's rights under Article 3 UNCRC,[31] the Committee has explained that this provision contains an obligation on States to inform children

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[21] UN Committee on the Rights of the Child, General Comment No. 12, cit., paras. 48 and 134.

[22] H. STALFORD, L. CAIRNS, J. MARSHALL, *Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information*, cit., p. 210.

[23] UN Committee on the Rights of the Child, General Comment No. 12, cit., para. 41.

[24] UN Committee on the Rights of the Child, General Comment No. 12, cit., para. 16.

[25] Special Commission on the practical operation of the 1980 and 1996 Hague Conventions, *Conclusions and Recommendations*, 1-10 June 2011, available at https://assets.hcch.net/upload/wop/concl-28sc6_e.pdf, p. 50.

[26] G. LANSDOWN, *Every child's right to be heard: A resource guide on the UN committee on the rights of the child general comment No. 12*, cit., p. 24; UN Committee on the Rights of the Child, General Comment No. 12, cit., paras. 25, 34 and 45.

[27] COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, cit., p. 28, para. 48.

[28] COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, cit., p. 28, para. 49.

[29] UN Committee on the Rights of the Child, General Comment No. 12, cit., para. 45.

[30] UN Committee on the Rights of the Child, General Comment No. 12, cit., para. 45.

[31] see also Article 24 EU Charter and Article 22bis Belgian Constitution.

about the scope of children's rights in relation to the best interests principle.[32] The Committee also pointed out that the right to receive adequate information is an integral part of the procedural safeguards that must be in place to guarantee the implementation of children's rights.[33] For children to experience meaningful participation in a best interests assessment (e.g. under the Hague Convention, the Brussels II-*bis* Regulation or the Belgian Judicial Code), «*children must be informed about the process and possible sustainable solutions and services*».[34]

Beyond practical matters, children should be informed about their rights in legal proceedings and how to exercise them. It should be made clear to children what they can expect from the hearing, what mechanisms for support or protection they can rely on, what the possible outcomes or consequences of the proceedings are, how they can follow-up on certain issues after the procedure and whether there are any alternatives to the procedure.[35] For children to experience genuine agency in legal proceedings, information should «*provide children and young people with the reassurance they need in order to be able to insist that their voices are heard*».[36]

Quality of information

The mere provision of information in itself is not sufficient to fulfil the full scope of legal obligations inherent in children's information rights. For information to be meaningful, it needs to meet certain criteria. High-quality and child-friendly characteristics of information have been emphasised in detail throughout the CoE Guidelines, as well as throughout the legal work of the Committee on the Rights of the Child.[37] Information for children should be transparent, full, appropriate, available and accessible to children. Information should be provided not only in a language the child can understand,[38] but also in a manner sensitive to diversity[39]

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[32] UN Committee on the Rights of the Child, General Comment No. 14, cit., para. 15(g).

[33] UN Committee on the Rights of the Child, General Comment No. 14, cit., para. 89.

[34] UN Committee on the Rights of the Child, General Comment No. 14, cit., para. 89.

[35] Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, cit., p. 20, para. 1 and p. 59; see also H. Stalford, L. Cairns, J. Marshall, *Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information*, cit., p. 212.

[36] H. Stalford, L. Cairns, J. Marshall, *Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information*, cit., p. 212.

[37] In particular UN Committee on the Rights of the Child, General Comment No. 12, cit. and UN Committee on the Rights of the Child, General Comment No. 14, cit. See also: UN Committee on the Rights of the Child, General comment No. 19 (2016) on public budgeting for the realization of children's rights (Article 4), UN Doc. CRC/C/GC/19 of July 20th, 2016, para. 54; UN Committee on the Rights of the Child, General comment No. 21 (2017) on children in street situations, UN Doc. CRC/C/GC/20 of June 21th, 2017, para. 42; UN Committee on the Rights of the Child, Rules of procedure, cit., Rule 14.

[38] UN Committee on the Rights of the Child, General Comment No. 14, cit., para. 15(g); UN Committee on the Rights of the Child, General Comment No. 12, cit., para. 134.

[39] UN Committee on the Rights of the Child, General Comment No. 12, cit., para. 134.

– including diversity in age, maturity, abilities, gender and cultural background of the child.[40] While some children will have the capacity to act and exercise their information rights independently, other children will need support due to their specific needs or vulnerabilities.[41]

Moreover, in line with Articles 13 and 17 UNCRC, States must ensure information and material aiming at the promotion of the child's social, spiritual and moral well-being and physical and mental health, including information «*relating to their rights, any proceedings affecting them, national legislation, regulations and policies, local services, and appeals and complaints procedures*».[42] These provisions oblige States, on the one hand, to refrain from illegitimate interference restricting children in accessing information[43] and, on the other hand, to eliminate any obstacles to and accessibility of such information.[44]

The UN Human Rights Committee has specified that States have a positive obligation to proactively put relevant information in the public domain, while at the same time ensuring that access to this information is easy, prompt, effective and practical.[45] At the same time, when authorities fail to respond to information requests or refuse to provide access to information, they should provide reasons and arguments to support this.[46] Keeping in mind other legal obligations of States pointed out above, this response should be made in a language and manner children can understand.[47]

3. *The course of the legal proceedings and the involved actors*

To assess which information should be provided, when this should be done and who should be responsible, a basic understanding of the specific Belgian legal proceedings is required. The following sections therefore outline the course of

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[40] COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, cit., p. 21, para. 2.

[41] UN Committee on the Rights of the Child, General comment No. 2, cit., para. 5; see also W. VANDENHOLE, G. ERDEM TÜRKELLI, S. LEMBRECHTS, cit., Article 13.

[42] UN Committee on the Rights of the Child, General Comment No. 12, cit., para. 80.

[43] W. VANDENHOLE, G. ERDEM TÜRKELLI, S. LEMBRECHTS, cit., Article 13; See also UN Committee on the Rights of the Child, General Comment No. 12, cit., para. 80.

[44] W. VANDENHOLE, G. ERDEM TÜRKELLI, S. LEMBRECHTS, cit., p. 195.

[45] Human Rights Committee, *General Comment No. 34 on Article 19: Freedoms of Opinion and Expression*, UN Doc. CCPR/C/GC/34 of September 12, 2011, para. 19. As VANDENHOLE ET AL. explain, *"[t]he ECtHR has however been reluctant to recognise a positive obligation on States to provide information to individuals. In certain circumstances, States are not obliged to disclose information"* (see e.g. Judgement of the European Court of Human Rights of 1998, *Guerra v. Italy (Application no. 116/1996/735/932)*, para. 53; Judgement of the European Court of Human Rights of 1989, *Gaskin v. United Kingdom (Application no. 10454/83)*, para. 49) (W. VANDENHOLE, G. ERDEM TÜRKELLI, S. LEMBRECHTS, cit., p. 162).

[46] Human Rights Committee, General Comment 34, cit., para. 19.

[47] See also: UN Committee on the Rights of the Child, General Comment No. 12, cit., para. 60.

both custody proceedings, including residence and access, and international child abduction proceedings.[48]

3.1. *Custody, residence and access proceedings*

When parents decide to separate, they will in principle continue to exercise joint parental custody.[49] However, when parents are in conflict about this arrangement, they can initiate proceedings before the family court to ask for exclusive parental custody.[50] If the family court grants this request and entrusts the exclusive parental custody to one of the parents, the other parent has a right to personal contact (access) with the child. The family court will determine the way in which this personal contact will be maintained.[51] When parents do not have a conflict about the joint parental custody, they can still be conflicted about the child's residence arrangement. The family court will then examine how best to establish the child's accommodation.[52]

The legal proceedings to resolve custody, residence or access conflicts follow the same course. First, the parent can institute these proceedings before the family court of the child's place of residence.[53] If the parent instituted the procedure by a contradictory petition or a joint petition, the first hearing of the family court will take place maximum 15 days after the application has been lodged with the Registrar.[54] If the parent instituted the procedure by a writ of summons, the first hearing will take place minimum two days after the writ of summons was served.[55]

After the first hearing, there will be a hearing at which questions concerning the children are discussed and plea hearings.[56] Because the custody proceedings concern minors, parents must appear in person at all hearings.[57] During the proceedings, the

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[48] This outline is by no means an exhaustive discussion of these proceedings, but rather aims to provide a starting point to discuss the right to information of the child. For an extensive discussion on the procedure of custody cases in Belgium, see e.g. P. SENAEVE (ed.), Handboek Familieprocesrecht, Mechelen, 2020. For an extensive discussion on the procedure of international child abduction cases in Belgium, see *inter alia* F. COLLIENNE, S. PFEIFF, Les Enlèvements Internationaux d'Enfants Convention de La Haye et Règlement Bruxelles IIbis. Pratique et Questions de Procédure, in Revue Trimestrielle de Droit Familial, 2009, p. 351; L. GEERTS, De Internationale kinderontvoering voor de Belgische rechtbanken, Antwerpen-Cambridge, 2012; B. LAMBERSY, C. VERGAUWEN, De rechtspleging inzake internationale kinderontvoering door een ouder, in P. SENAEVE (ed.), Handboek Familieprocesrecht, Mechelen, 2020, p. 1025-1051.

[49] Article 374, §1, section 1 Belgian Judicial Code.

[50] Article 374, §1, section 2 Belgian Judicial Code.

[51] Article 374, §1, section 3 Belgian Judicial Code.

[52] Article 374, §2, section 2 Belgian Judicial Code.

[53] Article 629*bis* Belgian Judicial Code.

[54] Article 1253*ter*/4, §2, section 4 Belgian Judicial Code.

[55] Article 1253*ter*/4, §2, section 3 *juncto* Article 1035, section 2 Belgian Judicial Code.

[56] Implied in Article 1253*ter*/2, section 1 Belgian Judicial Code.

[57] Article 1253*ter*/2, section 2 Belgian Judicial Code. For a discussion, see: S. MOSSELMANS, *Persoonlijke verschijning voor de familierechtbank*, in P. SENAEVE (ed.), *Handboek Familieprocesrecht*, Mechelen, 2020, p. 381-386.

family court will hear the parents concerning their dispute.[58] In many cases, parents will choose to be assisted by a lawyer.[59] Children also have the right to be heard by the judge,[60] and have the right to receive free legal advice and assistance from a youth lawyer.[61] However, the interview between the judge and the child «*shall take place without the presence of anyone*»,[62] including the youth lawyer.[63]

Next to speaking to the parents and the child, the court can conduct all investigations necessary to get to know the personality of the child and the environment in which he/she is being brought up, to determine his/her best interests.[64] Two investigative acts are explicitly mentioned in the Belgian Judicial Code.[65] The court may carry out a social study.[66] Such a social study is carried out by a justice assistant[67] who will talk to the parents separately and to each of the children, in principle with children from the age of six.[68] The justice assistant will visit the child in the places where he/she lives and will observe the child's behaviour and interaction with the parents and other members of the family.[69] Before sending

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[58] Article 1253*ter*/3, §1, section 1 Belgian Judicial Code.

[59] Article 728, §1 Belgian Judicial Code. In Belgium it is not mandatory for the parties to be represented by a lawyer (except in proceedings before the Court of Cassation – Articles 478 and 1080 Belgian Judicial Code). The parties may therefore appear in person before the court and present their own submissions and defences. However, the judge may deprive them of this opportunity if he/she finds that they are unable to discuss their case properly or with sufficient clarity due to temperance or inexperience (Article 758 Belgian Judicial Code).

[60] Article 1253*ter*/6, section 6 *juncto* Article 1004/1, §1 Belgian Judicial Code. This right will be discussed more in detail later.

[61] Articles 508/13/1, §4 Belgian Judicial Code; E. VAN DER MUSSELE, *Verblijfsregeling, initiatiefrecht en positie van de minderjarige: kinderen niet toegelaten?*, in CENTRUM VOOR BEROEPSVERVOLMAKING IN DE RECHTEN (ed.), *Verblijfsregeling*, Antwerpen, 2008, p. 125-144; www.jeugdadvocaat.be/index.php; https://www.balieantwerpen.be/nl/pro-deo/minderjarigen-advies. The Council of the Order of Flemish Bars prepares an annual list of lawyers to provide for the legal assistance and legal aid of minors. This list includes lawyers who have followed the training course for youth lawyers that is accredited by the Order of Flemish Bars (ORDER OF FLEMISH BARS, *Recommendation on the appointment of youth lawyers*, Document approved at the General Assembly of the Order of 7 December 2005, https://www.advocaat.be/documenten/ordeexpress/2006/1/aanbeveling%20jeugdadvocaten%20GG%2007%2012%202005.pdf.

[62] Article 1004/1, §5 Belgian Judicial Code.

[63] P. SENAEVE, *Het hoorrecht van minderjarigen sinds de wet op de familie- en jeugdrechtbank*, in *Tijdschrift voor Familierecht*, 2014, p. 190-191.

[64] Article 1253*ter*/6, section 2 Belgian Judicial Code.

[65] This is, however, not an exhaustive list. The court can order other investigations (I. BOONE, N. BOURGOIS, *Onderzoeksmaatregelen bevolen door de familierechtbank*, in P. SENAEVE (ed.), *Handboek Familieprocesrecht*, Mechelen, 2020, p. 425-427).

[66] Article 1253*ter*/6, section 3 Belgian Judicial Code.

[67] I. BOONE, N. BOURGOIS, *Onderzoeksmaatregelen bevolen door de familierechtbank*, cit., p. 407-432; https://departementwvg.be/justitiehuizen/maatschappelijk-onderzoek; https://www.scheidingskoffer.be/overzicht/ouders/wat-is-een-maatschappelijk-of-sociaal-onderzoek-door-een-justitie-assistent-1.

[68] https://departementwvg.be/justitiehuizen/maatschappelijk-onderzoek; https://www.scheidingskoffer.be/overzicht/ouders/wat-is-een-maatschappelijk-of-sociaal-onderzoek-door-een-justitie-assistent-1.

[69] I. BOONE, N. BOURGOIS, *Onderzoeksmaatregelen bevolen door de familierechtbank*, cit., p. 417; S. REISSE, M. BELLEFROID, *Het maatschappelijk onderzoek: opheldering ten behoeve van de familierechtbank*, in *Tijdschrift voor Familierecht*, 2014, p. 218-219.

thereport to the family court, the justice assistant has a feedback-meeting with the parents to discuss the report.[70] The child is not included in this feedback-meeting.[71] Besides ordering a social study, the court can also decide to subject the child to a medical-psychological examination if it considers that the report of the social study sent by the social service is insufficient.[72] This examination will be carried out by an expert (e.g. psychologist, psychiatrist, remedial educationalist).[73] The expert must act according to the principles of an adversarial procedure during the whole process of the examination. This means that every step of the process must be fully transparent for the parties (i.e. the parents), their lawyers, and the court. They will all receive a copy of the report of the examination.[74] Since the child is not a party to the proceedings, he/she will not be systematically informed about the results.

The last step in the proceedings is the decision of the family court. The minutes of the decision will be filed at the Registry.[75]

3.2. *International child abduction proceedings*

When a child is removed or retained in another State than the State of habitual residence in breach of the rights of custody, and those rights were actually exercised, this removal or retention is considered wrongful and thus an 'international child abduction'.[76] In most cases, the child is removed or retained by one parent (also called the taking parent) in breach of the custody rights of the other parent (also called the left-behind parent).

In such a situation, the left-behind parent can institute proceedings to ensure the return of the child to his/her State of habitual residence. These proceedings can be instituted in two manners. First, the left-behind parent can send a request to the Central Authority (CA) of the child's habitual residence or any CA designated by the Contracting States.[77] When the CA receives a request, it will first try

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[70] I. BOONE, N. BOURGOIS, *Onderzoeksmaatregelen bevolen door de familierechtbank*, cit., p. 418.

[71] This feedback-meeting is for 'the parties' (I. BOONE, N. BOURGOIS, *Onderzoeksmaatregelen bevolen door de familierechtbank*, cit., p. 418). Since the child is not a party to the proceedings, he/she will not be involved.

[72] Article 1253*ter*/6, section 3 Belgian Judicial Code.

[73] I. BOONE, N. BOURGOIS, *Onderzoeksmaatregelen bevolen door de familierechtbank*, cit., p. 419-421; https://www.deskundigenonderzoeken.be/informatie/informatie-aan-ouders/.

[74] I. BOONE, N. BOURGOIS, *Onderzoeksmaatregelen bevolen door de familierechtbank*, cit., p. 419-421; Article 973, §1 Belgian Judicial Code.

[75] Article 1041 Belgian Judicial Code.

[76] Article 3 Hague Convention.

[77] Article 8 Hague Convention. If the child is abducted from one EU Member State to another EU Member State, the Brussels II*bis* Regulation will be applicable and will complement the Hague Convention. With regard to the Central Authorities to which the left-behind parent can send a request, Article 57(1) of Brussels II*bis* is more restrictive than Article 8 Hague Convention. The Regulation provides that «*Any holder of parental responsibility may submit, to the central authority of the Member State of his or her habitual residence or to the central authority of the Member State where the child is habitually resident or present, […]*». Article 8 Hague Convention on the other hand states that «*Any person, institution or other*

to discover the whereabouts of the child.[78] If necessary, to prevent further harm to the child, they will ask for provisional measures to be taken.[79] Before starting a judicial procedure, the CA will try to achieve a voluntary return of the child.[80] If this fails, the CA prepares an application, which must be signed by the public prosecutor and submitted by the latter to the family court.[81]

Secondly, the left-behind parent can choose not to involve the CA and instead apply directly to the judicial authorities of the Contracting State to which the child was abducted.[82] If the child is present in Belgium, the left-behind parent shall lodge the application at the registry of the family court.[83] The remainder of the proceedings will be similar regardless of whether the CA was involved.

The parents are summoned by letter of the registry to appear at the first hearing, which will take place within eight days from the registration of the application on the general roll of the court.[84] If the case cannot be dealt with during this first hearing, the court will set deadlines for the exchange of written submissions[85] and for the plea hearing. However, the parties and judges will ensure that those deadlines are as short as possible since in abduction cases, the rights of the defence must be reconciled with the need for speed of the procedure.[86] Indeed, urgency is an aspect particular to international child abduction proceedings.[87]

Most parents will choose to be assisted by a lawyer during the return proceedings.[88] Based on Article 25 Hague Convention parents are entitled to receive legal aid and advice in any other contracting State on the same conditions as the natio-

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body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child».

[78] Article 7(a) Hague Convention.

[79] Article 7(b) Hague Convention. The legal basis for the relevant provisional measure that the family court can take is to be found in Article 1253*ter*/5, 1° of the Belgian Judicial Code. For a discussion on those provisional measures, see: P. SENAEVE, *De rechtspleging inzake voorlopige maatregelen tussen echtgenoten en tussen wettelijk samenwonenden en inzake spoedeisende procedures voor de familierechtbank*, in P. SENAEVE (ed.), *Handboek Familieprocesrecht*, Mechelen, 2020, p. 939-986. For this paper, we will not elaborate on the provisional measures and the particular procedure for this.

[80] Articles 7(c) and 10 Hague Convention.

[81] Article 1322*quinquies* Belgian Judicial Code.

[82] Article 29 Hague Convention.

[83] Article 1322*ter* Belgian Judicial Code.

[84] Article 1322*quater* Belgian Judicial Code.

[85] F. COLLIENNE, S. PFEIFF, *Les Enlèvements Internationaux d'Enfants Convention de La Haye et Règlement Bruxelles IIbis. Pratique et Questions de Procédure,* cit., p. 365.

[86] F. COLLIENNE, S. PFEIFF, *Les Enlèvements Internationaux d'Enfants Convention de La Haye et Règlement Bruxelles IIbis. Pratique et Questions de Procédure,* cit., p. 365.

[87] See Article 11(1) Hague Convention, which states that requires that the courts dealing with a request for return «*act expeditiously*».

[88] Article 728, §1 Belgian Judicial Code. In Belgium it is not mandatory for the parties to be represented by a lawyer (Article 758 Belgian Judicial Code).

nals of and habitually resident in that State. For the Belgian proceedings before the family court, this intention was translated in Article 1022 Belgian Judicial Code.[89]

Regarding the involvement of the child in return proceedings, Article 13(2) Hague Convention and Article 11(2) Brussels II*bis* Regulation should be mentioned. Article 13(2) Hague Convention entails an exception to the return of the child if «*the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views*». While this Article does not «*explicitly provide a right for the child to be heard or an obligation for the States to hear the child in (non)return proceedings*»,[90] it nevertheless implies a certain involvement of the child. The Brussels II-*bis* Regulation, which complements the Hague Convention in intra-EU child abduction cases,[91] does impose an obligation to hear the child when the court applies Articles 12 and 13 Hague Convention.

Belgian law does not include a specific provision for hearing the child during the return proceedings. The general provision in Article 1004/1 of the Belgian Judicial Code is applicable to «*matters in relation to the exercise of parental custody, the arrangements for his or her residence and the right to personal contact*». However, it can be assumed that international child abduction cases are included in this limited material scope. Indeed, international child abductions are mainly part of the broader and underlying conflict on parental custody.[92] Consequently, the hearing of the child in a child abduction case is subject to the same rules as in proceedings concerning custody (differentiation between children below and above 12 years old, hearing directly by the judge and without the presence of any other person). As in the custody proceedings, children involved in a child abduction case have the right to receive free legal advice and assistance from a youth lawyer.[93]

The last step of the return proceedings is the decision of the family court. The minutes of the decision will be filed at the Registry.[94]

From this brief discussion on the course of the legal proceedings in custody and international child abduction cases, three phases are inferred during which

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[89] B. LAMBERSY, C. VERGAUWEN, *De rechtspleging inzake internationale kinderontvoering door een ouder*, cit., p. 1050.

[90] T. VAN HOF, S. LEMBRECHTS, F. MAOLI, G. SCIACCALUGA, T. KRUGER, W. VANDENHOLE, L. CARPANETO, *To Hear or Not to Hear: Reasoning of Judges Regarding the Hearing of the Child in International Child Abduction Proceedings*, in *Family Law Quarterly*, 2020, p. 332.

[91] Articles 11 and 60(a) and Recitals 17–18 Brussels II*bis*.

[92] This can be inferred from Article 1(a) Hague Convention which states that one of the objects of the Convention is «*to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States*». Lambersy and Vergauwen also noted that «*a decision which merely orders the return of a child to his or her habitual residence within the meaning of the Hague Convention on Child Abduction must also be regarded as a decision on the custody of a child*» (B. LAMBERSY, C. VERGAUWEN, *De rechtspleging inzake internationale kinderontvoering door een ouder*, cit., p. 1037).

[93] Article 508/13/1, §4 Belgian Judicial Code; https://www.jeugdadvocaat.be/index.php; https://www.balieantwerpen.be/nl/pro-deo/minderjarigen-advies.

[94] Article 1041 Belgian Judicial Code.

children should be provided with information: before the first hearing of the family court, in between the first hearing of the family court and the court's decision, and after the court's decision.

The discussion also made clear which actors can be involved. In custody proceedings these are the parents, the family court, the parents' lawyers, the youth lawyer, the justice assistant, and the appointed expert. In international child abduction cases these are the parents, the Central Authorities, the family court, the parents' lawyers, and the youth lawyer.

In the next sections, focus will be on which information the child might need and should receive during each of the phases, as well as on the responsibilities of the different actors regarding the information provision to the child.

4. *The right to information during the proceedings and the role of the actors*

In one of the rather rare papers specifically focussed on the child's right to information, STALFORD, CAIRNS, and MARSHALL distinguished three layers of information needed for a genuinely participatory process.[95]

The first layer entails 'practical and procedural information'.[96] In general, this includes information on how the legal process works.[97] The second layer is defined as 'foundational rights-based information', which is mainly about informing the child about his/her rights.[98] The third layer is called 'agency asserting information'.[99] This third layer has less to do with the content of the information, but more with the way the information is passed on to the child. As STALFORD, CAIRNS, and MARSHALL write:

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[95] H. STALFORD, L. CAIRNS, J. MARSHALL, *Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information*, cit., 2017.

[96] H. STALFORD, L. CAIRNS, J. MARSHALL, *Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information*, cit., p. 211.

[97] More specifically, this layer entails information on when the proceedings will take place (including time of hearings and that of other relevant events), the likely duration of proceedings, the general progress of the proceedings, where the proceedings will take place (including location of hearings and that of other relevant events), the names, roles and responsibilities of the various actors appearing in court hearings, the existing support mechanisms for the child (COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, p. 20, para. 1; H. STALFORD, L. CAIRNS, J. MARSHALL, *Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information*, cit., p. 211).

[98] H. STALFORD, L. CAIRNS, J. MARSHALL, *Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information*, cit., p. 211-212. Children should receive guidance on the nature and scope of their rights in the context of justice proceedings (information of the full extent of their rights). They need to know for example that they have the right to be heard in such proceedings and that what they say should be given due weight (information on what the standing role of the child will be, how the questioning will be carried out, importance and impact of any given testimony).

[99] H. STALFORD, L. CAIRNS, J. MARSHALL, *Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information*, cit., p. 212-213.

«It is at this point that the right to information is understood not merely as conveying facts to the child, but as a process of contextualising that information, presenting genuine choices, defining what support is available to enable the child to exercise those choices, calibrating expectations in the light of other factors that influence decisions about the child, and presenting realistic and clear projections as to what outcomes might arise from different courses of action».[100]

Since the first and the second layer concern the content of the information, they will be referred to again in the following sections. The third layer, on the other hand, should be kept in mind at all times and by all actors when conveying information to the child. While this third layer is crucial for the child to be able to really benefit from the information he/she obtains, it will not be further discussed throughout the different phases of the proceedings.

4.1. *First phase: before the first hearing of the family court*

Course of first phase

In custody proceedings, this phase commences when one of the parent's initiates proceedings to ask for exclusive parental custody or for a change of the access or residence arrangement. After minimum two days (in case of a writ of summons to initiate the proceedings) and maximum fifteen days (in case of a contradictory or joint petition) the first hearing of the court will take place and this first phase comes to an end. During this short time, not a lot of actors will be involved yet; only the parents and, if they choose to be assisted, their lawyers.

In international child abduction cases, this phase evolves quite differently based on whether the left-behind parent sent a request to the CAs. If he/she does, the CA will locate the child, try to achieve a voluntary return and, if still necessary, prepare an application to submit to the family court. Thus, between localising the child and submitting an application, there is already a certain period. Then, there will be maximum eight days between the registration of the application and the first hearing of the family court. When the left-behind parent does not rely on the CA but directly applies to the family court, the first phase only covers the eight-day period between the registration of the application and the first hearing. The actors involved are thus the parents, potentially their lawyers, and potentially the CA.

Content of the information

Notwithstanding the short duration of this phase and the few actors involved, it is important for the child to already receive certain information. As the CoE's Guidelines on child-friendly justice make clear, the child should promptly receive

[100] H. Stalford, L. Cairns, J. Marshall, *Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information*, cit., p. 212.

all relevant and necessary information «*from the very first contact with the justice system*».[101]

During this first phase, it would be relevant for the child to already receive some 'practical and procedural information'.[102] The child should first be informed about the aim of the parent that initiated the proceedings. In a custody procedure, this will be either acquiring exclusive custody, or a specific access or residence arrangement. In international child abduction proceedings, this will be ensuring the return of the child to his/her habitual residence. The child should also be informed about the possible consequences of the proceedings on his/her life,[103] namely: which decisions can the court take, and what are their implications?

Further the child should already receive information on how the legal process works. In particular, he/she should receive information on when and where the first hearing will take place, those who will be present during this hearing, what the names, roles and responsibilities are of those present, and whether the child could or should be present.[104] Further, the child should be informed about the likely duration of the proceedings.[105] In an international child abduction case where the CA is involved, it is further important that the child is informed about the task of the CA to try to achieve a voluntary return and how the procedure will proceed if this fails.

Lastly, the child should be informed as soon as possible about the existing support mechanisms he/she can rely on.[106] In Belgium, this will mean that the child should be informed about the possibility to get free legal advice and assistance from a youth lawyer.[107]

Actors responsible for providing the information

Concerning who should convey all this information to the child, the Guidelines state that «*this is an important task of children's ombudspersons and children's*

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[101] COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, p. 20, para. 1 and p. 58, para. 50.

[102] H. STALFORD, L. CAIRNS, J. MARSHALL, *Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information*, cit., p. 211.

[103] The CoE's Guidelines express the need for this type of information when it concerns a cross-border civil law case or a family dispute (COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, p. 60, para. 56). The custody proceedings and international child abduction proceedings thus fall within this scope.

[104] COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, p. 20-21, para. 1, p. 58, para. 50 and p. 59, para. 54; H. STALFORD, L. CAIRNS, J. MARSHALL, *Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information*, cit., p. 211.

[105] COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, p. 20, para. 1(a).

[106] COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, p. 20, para. 1(c).

[107] On the youth lawyer: see further on pp. 16-19.

rights organisations».[108] However, no such actors are actively involved.[109] If we assess the involved actors at this point of the proceedings, it is apparent that none of them is suited to providing the child with the relevant and necessary information.

The first possible actors are the parents. If no conflict exists between them, they are often the first source of information for the child.[110] However, in a conflict situation, they might be too emotionally involved to provide the child with complete, relevant and objective information. This concern was also voiced in the Guidelines: «*parents may not always share all pertinent information, and what they give may be biased*».[111] In a conflict situation, children might also be less inclined to ask their parents for information.[112] Further, parents themselves may not be fully acquainted with how the legal process works and with the existing support mechanisms for the child. The only information of which parents are fully aware is what they want to achieve by initiating the specific proceedings (exclusive custody, access, residence, or return of the child). However, it seems rather inconceivable that all parents in conflict would be able to convey this information in a suitable manner. Moreover, in child abduction cases, contact between the child and

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[108] COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, p. 58, footnote 33.

[109] In Belgium there are children's rights organisations (e.g. https://www.tzitemzo.be/) and children's ombudspersons (https://www.kinderrechtencommissariaat.be/), which provide information to children. However, they do not actively reach out to children but mostly work through their websites. Further, they are not involved in a specific procedure to inform the child in that regard. A similar situation exists in the Netherlands, with a children's rights organisation (https://kjrw.eu) and a children's ombudsperson (https://www.dekinderombudsman.nl/contact). In cases of international child abduction, the Netherlands has a specific organisation, namely Centrum Internationale Kinderontvoering. This organisation will not contact the child on its own, but if a child contacts the organisation itself, it will inform the child of his/her rights and provide him/her with other general information on international child abduction. Specific information for that individual case shall however not be provided by the organisation (M.R. BRUNING, M.Q.M. MOSK, *Word ik gehoord? Participatiemogelijkheden van het kind in internationale kinderontvoeringsprocedures*, in *Tijdschrift Relatierecht en Praktijk*, 2020, p. 32).

[110] Some authors seem to imply that the provision of information is an obligation that parents have by virtue of their parental authority (see *inter alia* F. SWENNEN, *Het personen- en familierecht: een benadering in context*, Antwerpen, 2019, p. 401; L. DRESER, *Uitdagingen bij de toepassing van het hoorrecht bij minderjarige kinderen*, in I. BOONE, C. DECLERCK, U. CERULUS, L. DRESER, K. MATTHIJS, A.K. SODERMANS, S. VANASSCHE, A. VAN DEN BOSSCHE (ed.), *Actualia familierecht. Co-ouderschap vandaag en morgen*, Brugge, 2017, p. 51; I. BOONE, C. DECLERCK, E. VERTOMMEN, *Het WODC-rapport 'Kind in proces vanuit Belgisch perspectief'*, in *Tijdschrift voor Familie- en Jeugdrecht*, 2020, p. 2-3). However, this does not detract from the difficulties that we and also some of the authors identify regarding parents as information providers (L. DESER, *Uitdagingen bij de toepassing van het hoorrecht bij minderjarige kinderen*, cit., p. 46; I. BOONE, C. DECLERCK, E. VERTOMMEN, *Het WODC-rapport 'Kind in proces vanuit Belgisch perspectief'*, cit., footnote 25).

[111] COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, p. 58-59, para. 52.

[112] EWELL, *Bouncing Back – The Wellbeing of Children in international child abduction cases*, 2017, available at https://missingchildreneurope.eu/?wpdmdl=2345, 70.

the left-behind parent is often cut-off so that information will only come from the taking parent.[113]

During focus groups, young people not affected by an international child abduction underlined the key importance of open communication between parents and children.[114] Also children that experienced an abduction reported that they wanted to be informed by their parents, but that both taking and left-behind parents were often not well-placed to provide them with appropriate information.[115] Abducted children reported that they doubted parents' honesty, as parents had previously withheld information; «*I couldn't always tell if they were telling the truth. I just didn't know for sure*» (young person, EWELL, 2016).[116] Further, they mentioned that parents did not or not fully explain what was going on, did not show their real intentions or even lied to them;[117] «*I didn't know what was happening. It was only after a couple of months in [country x], that I realized what was going on, that I wouldn't see anyone from here anymore. (…) Children need to know what's happening before the departure. Parents can't just give a vague explanation. For us this is useless*» (young person, EWELL, 2016).[118]

A second possible actor are the parents' lawyers. However, also this actor is not best placed to inform the child. First, parents can represent themselves, so lawyers are not necessarily involved in all cases. Second, if lawyers are involved, they represent one of the parents as parties to the procedure and are thus not a neutral actor.[119] The lack of neutrality as a reason for not having contact with the child, was confirmed by BRUNING and MOSK. In their study on return proceedings, they argue that lawyers do not talk to children because they find it too stressful to have contact with the child and feel that their position as a lawyer for one of the parents prevents them from dealing responsibly with the child and his/her intere-

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[113] The EWELL study showed that a majority of children (64.0%) had no or only rare contact with the left-behind parent during their stay in the other country. Only a small number of children (14.7%) had frequent contact with the left-behind parent (EWELL, *Bouncing Back*, cit., 24-25).

[114] INCLUDE, *Country Report – Belgium*, cit.

[115] EWELL, *Bouncing Back*, cit., p. 71.

[116] EWELL, *Bouncing Back*, cit., p. 78.

[117] EWELL, *Bouncing Back*, cit., pp. 58-59.

[118] EWELL, *Bouncing Back*, cit., pp. 58-59.

[119] Parents and the child can have conflicting interests. In the Belgian deontological code for lawyers, it is provided that «*An attorney at law may not act for more than one client if there is a conflict of interest between those clients or a substantial threat of such a conflict*» (Section I.2.3, Article 5, para. 2). While just giving information to the child might not count as 'act for the child', it seems hard to ignore the difficulties that giving a lawyer the responsibility to inform the child might bring about.

sts.[120] In Belgium, it is no exception that parents take the child to consults with their lawyers. However, it is argued that this practice should end.[121]

The last possible involved actor is the CA. However, this is only possible in child abduction cases and only when the left-behind parent decided to send a request and initiate the proceedings indirectly with the help of the CA. The tasks of the CAs are summed up in Article 7 Hague Convention, but providing information to the child is not one of them. The website of the Belgian CA mentions their main tasks, but informing the child is not included.[122] It is thus unclear whether the Belgian Authority provides the child with information. Regarding the Dutch CA, Bruning and Mosk mention the following: «*In principle, the staff of the Central Authority have no contact with the abducted child. According to the Central Authority this is because it is not yet known whether the report of a child abduction will become a legal procedure. The Central Authority considers it too premature to involve children in this process […]*».[123]

It may be assumed that the attitude of the Belgian CA regarding the child is quite similar to that of the Dutch one.[124] While the CA thus does not seem to take on an active role in informing the child, there are some websites listed on the CA's website that can be useful for a child to find information (Child Focus, Children's Rights Commissioner, National Commission for the Rights of the Child).[125] However, the information that the child can find on those websites is not very specific and to find this information the child must actively look for it.

The discussion above shows that the child should already be informed about certain matters, but that none of the actors who could be involved currently has the responsibility to transmit this information, nor are they well placed to do so.

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[120] M.R. Bruning, M.Q.M. Mosk, *Word ik gehoord? Participatiemogelijkheden van het kind in internationale kinderontvoeringsprocedures*, cit., p. 32. The authors also refer to several instances in which Dutch lawyers were reprimanded by the Discipline Board of The Hague for having a conversation with children in the context of divorce cases. However, such a practice cannot be observed in the Belgian Disciplinary Board.

[121] E. Van der Mussele, *Advocaat voor minderjarigen: en wat vandaag?*, in Vlaamse Conferentie Balie Antwerpen (ed.), *Het gezin 2.0 – Huwelijk, nieuwe samenlevingsvormen en hun juridische implicaties*, Antwerpen, 2014, p. 245.

[122] https://justitie.belgium.be/nl/themas_en_dossiers/kinderen_en_jongeren/internationale_kinderontvoering.

[123] M.R. Bruning, M.Q.M. Mosk, *Word ik gehoord? Participatiemogelijkheden van het kind in internationale kinderontvoeringsprocedures*, cit., p. 32.

[124] Other Central Authorities do not seem to take up the task of informing the child either. On the website of the German CA, for instance, it is mentioned that «*Information and advice for both the abducting and the left-behind parent is also offered by the German Central Contact Point for Cross-border Family Conflicts*». This seems to imply that the child cannot rely on this Contact Point for information and advice (https://www.bundesjustizamt.de/EN/Topics/citizen_services/HKUE/Notes/Notes_node.html#doc3454458bodyText10).

[125] https://justitie.belgium.be/nl/themas_en_dossiers/kinderen_en_jongeren/internationale_kinderontvoering.

An actor that could be useful in this phase is the youth lawyer.[126] In Belgium, legal assistance by lawyers – and thus also by youth lawyers – is organised in a system of first- and second-line legal assistance. First-line legal assistance entails practical and legal information, a first legal opinion or the referral to a specialised body or organisation.[127] A child can contact a youth lawyer for first-line legal assistance at any time when problems arise, e.g. before or during a legal procedure, or whenever the child has questions. Youth lawyers can also be contacted confidentially by third parties who are concerned about the child.[128] This first-line legal assistance is always free of charge.[129] While every judicial district is obliged to organize a standby service,[130] the practical organisation can differ depending on the judicial district.[131]

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[126] It must be noted that there is no definition in Belgian law of a 'youth lawyer'; those lawyers are thus not a legally defined group of specialised lawyers (E. VAN DER MUSSELE, *Advocaat voor minderjarigen: en wat vandaag?*, cit., p. 214). However, the Council of the Order of Flemish Bars establishes an annual list of lawyers who wish to provide services as part of first- or second-line legal aid. In this context, lawyers have to indicate their preferred subject and provide proof of their expertise in this field or undertake to follow a training course organised by the Council (Article 508/5, §1, sections 2 and 3 for first-line legal aid and Article 508/7, sections 2 and 3 for second-line legal aid). Lawyers that indicate 'youth and children's rights' as preferred subject will have to follow the training course of 80 hours accredited by the Order of Flemish Bars (E. VAN DER MUSSELE, *Advocaat voor minderjarigen: en wat vandaag?*, cit., p. 212; N. DE WOLF, *Vrijwillige tussenkomst voor minderjarigen en het horen van minderjarigen voor de familierechtbank*, in E. VAN DER MUSSELE (ed.), *Jeugdadvocaat in Vlaanderen, België en Europa. Jeugd- en kinderrechten: 30 jaar jeugdadvocaten in Vlaanderen, België, Europa*, Gent, 2016, p. 108). This training course is organised every two years and includes a theoretical part which covers legal, criminological, socio-pedagogical, and psychological aspects. This is followed by practical exercises on communicating with children. Participants in the training must submit a favourable internship file and write a paper. Those who successfully complete the entire course receive the certificate 'special training in juvenile law' (ORDE VAN VLAAMSE BALIES, *Wegwijs aan de balie – Welkomstboek voor de advocaat-stagiair*, 2019, p. 17; N. DE WOLF, *Vrijwillige tussenkomst voor minderjarigen en het horen van minderjarigen voor de familierechtbank*, cit., p. 108; https://advocaat.be/DipladWebsite/media/DipladMediaLibrary/Documenten/Stage/Welkomstboek-OVB-2019-2020.pdf).

[127] Article 508/1, 1° Belgian Judicial Code.

[128] https://www.balieantwerpen.be/nl/pro-deo/minderjarigen-advies.

[129] Article 508/5, §2 Belgian Judicial Code.

[130] Article 508/7, section 2 Belgian Judicial Code; E. VAN DER MUSSELE, *Advocaat voor minderjarigen: en wat vandaag?*, cit., p. 236.

[131] In some districts, the lawyers are actually present and in others, they are on stand-by via mobile phone (E. VAN DER MUSSELEN, *De gewijzigde positie van de advocaat - Van sierstuk tot raadsman voor minderjarigen*, in J. PUT, M. ROM (eds.), *Het Nieuwe Jeugdrecht*, Gent, 2007, p. 274). For the judicial district of Antwerp, for example, two youth lawyers are present at the courthouse each working day from at least 9h until 13h. Children can walk in without an appointment or can call them during these hours. For requests outside these hours, children can call a phone number mentioned on the website of the Antwerp Bar (https://www.balieantwerpen.be/nl/pro-deo/minderjarigen-advies). The Youth Advocates Committee of the Order of Flemish Bars (consisting of a director-chairman and advocates for minors from the different Bars) strives however for legal assistance for minors in all judicial districts to be realised in the same qualitative way as much as possible (E. VAN DER MUSSELE, *Advocaat voor minderjarigen: en wat vandaag?*, cit., p. 225).

Second-line legal assistance is assistance provided in the form of detailed legal advice, assistance within or outside the scope of proceedings, or assistance in litigation.[132] Also this service is free of charge for children.[133] If children already made use of the first-line legal assistance, the same lawyer will be automatically appointed to assist the child in the context of second-line assistance, and possibly until the minor reaches the age of 18.[134] If not, the child can choose a lawyer from the list of youth lawyers.[135] A child can also turn directly to a particular lawyer. However, only lawyers who are on the list established by the Council of the Order of Flemish Bars and indicated a preference for youth and children's rights law may ask to be appointed for a child who has applied directly to that lawyer.[136] The youth lawyer will notify the child's parents and/or their lawyers as well as the family court of his/her appointment.[137]

The role of the youth lawyer is to act as the child's spokesperson and not to determine what is best for the child or to interpret the views of the child. As with an adult client, the will of the minor guides the lawyer's actions.[138] As VAN DER MUSSELE states: «*the aim is always to advise the minor in complete independence and with due respect for professional secrecy and to help him or her to formulate his or her own point of view*».[139] The youth lawyer will consult with the child outside the parental environment (e.g. in the school of the child) to ensure that the he/she is also seen by the child as independent.[140]

When a youth lawyer assists a child, this does not mean that the child becomes a party to the proceedings. The youth lawyer's capacities are limited to ask copies of documents and judgements from co-counsels and to take note of the contents of the files at the court.[141] The youth lawyer can also send (confidential)

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[132] Article 508/1, 2° Belgian Judicial Code.

[133] Article 508/13/1, §4 Belgian Judicial Code.

[134] https://www.balieantwerpen.be/nl/pro-deo/minderjarigen-advies; E. VAN DER MUSSELE, *Advocaat voor minderjarigen: en wat vandaag?*, cit., p. 214 and p. 223.

[135] Article 508/9, §1, section 2 Belgian Judicial Code.

[136] Article 508/9, § 1, section 3 Belgian Judicial Code; E. VAN DER MUSSELE, *Advocaat voor minderjarigen: en wat vandaag?*, cit., p. 241.

[137] N. DE WOLF, *Vrijwillige tussenkomst voor minderjarigen en het horen van minderjarigen voor de familierechtbank*, cit., p. 109.

[138] E. VAN DER MUSSELE, *Advocaat voor minderjarigen: en wat vandaag?*, cit., p. 214-215; A. VANDEKERCKHOVE, *Eerste stappen naar een meer kindvriendelijke justitie*, in *Tijdschrift Jeugd- en Kinderrechten*, 2011, p. 45; N. DE WOLF, *Vrijwillige tussenkomst voor minderjarigen en het horen van minderjarigen voor de familierechtbank*, cit., p. 108; KINDERRECHTENCOMMISSARIAAT, *Advies Spreekrecht Zelfstandige rechtsingang Jeugdadvocaten*, Document nr. 2005-2006/11, 2006, https://www.kinderrechtencommissariaat.be/sites/default/files/bestanden/2005_2006_11_advies_spreekrecht_zelfstandigerechtsingang_jeugdavocaten.pdf, p. 19.

[139] E. VAN DER MUSSELE, *Advocaat voor minderjarigen: en wat vandaag?*, cit., p. 215.

[140] E. VAN DER MUSSELE, *Advocaat voor minderjarigen: en wat vandaag?*, cit., p. 251.

[141] N. DE WOLF, *Vrijwillige tussenkomst voor minderjarigen en het horen van minderjarigen voor de familierechtbank*, cit., p. 109.

letters to the parents' lawyers, to the public prosecutor's office and to the court.[142] Whether the youth lawyer can apply for voluntary intervention by way of which the child becomes a party to the proceedings, is disputed. The most recent case law seems to indicate that it is not possible.[143] However, to fulfil the child's right to information, the limited capacities of the youth lawyer are deemed sufficient. The lawyer can access all the information either through the co-counsels or through the court and can therefore fully inform the child. Further, children indicated that for them crucial elements of appropriate information are first, to have the possibility to ask questions and receive a truthful answer and second, to have complex aspects of decision-making procedures explained to them.[144] The figure of the youth lawyer as it now is, seems apt to fulfil these elements.

However, one difficulty remains: before a child can contact a youth lawyer, they already need to be informed about the existence of this possibility. In other words, the child needs to be informed before being able to receive further information. As we have seen in the discussion above, the actors involved in the first phase will not necessarily inform the child about this. Therefore, it is very important that youth lawyers make preventive efforts to make themselves known by giving lectures about their role in schools, and in other institutions that might come in contact with abducted children or children of which the parents are divorcing (e.g. police stations, social organisations, …). Further, DE WOLF points out that social media, and the website of the Union of Youth Lawyers are channels through which children find and contact youth lawyers.[145]

Raising greater and constant awareness of the existence and the role of the youth lawyers is thus very important to improve the child's right to information in the first phase. A second possibility, which is admittedly more prudent and old-fashioned, is automatically sending a letter to the child when one of the parents initiates the proceedings. This letter should then include concise information on the course of the proceedings, a referral to websites at which the child can find more information,[146] and information on the possibility to contact a youth lawyer. Of

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[142] E. VAN DER MUSSELE, *Advocaat voor minderjarigen: en wat vandaag?*, cit., p. 240.

[143] Judgement of the Belgian Court of Cassation of 10 February 2020, A.C. v M.H. and J.C., Case C.15.0200.N, annotation by P. SENAEVE in *Tijdschrift voor Familierecht*, 2020, p. 198. On voluntary intervention, see further Articles 15 and 812-813 of the Belgian Judicial Code; N. DE WOLF, *Vrijwillige tussenkomst voor minderjarigen en het horen van minderjarigen voor de familierechtbank*, cit., p. 110-111; E. VAN DER MUSSELE, *Advocaat voor minderjarigen: en wat vandaag?*, cit., p. 240-241 and p. 247-248.

[144] INCLUDE, Country Report - Belgium, cit.; INCLUDE, Country Report - Hungary, 2021, available at https://missingchildreneurope.eu/?wpdmdl=2497; INCLUDE, Country Report - Cyprus, 2021, available at https://missingchildreneurope.eu/?wpdmdl=2498.

[145] N. DE WOLF, *Vrijwillige tussenkomst voor minderjarigen en het horen van minderjarigen voor de familierechtbank*, cit., p. 109. For more information on the Union of Youth Lawyers, see E. VAN DER MUSSELE, *Advocaat voor minderjarigen: en wat vandaag?*, cit., p. 213 and footnote 5. See also their website: https://www.jeugdadvocaat.be/.

[146] Examples of such websites in Belgium are: https://www.tzitemzo.be/kinderen/thema/scheiding-kinderen; https://www.caw.be/jac/zoek-antwoorden/vrienden-en-familie/; https://www.childfocus.be/nl/verdwijningen/ontvoeringen.

course, sending letters to children has its disadvantages (it is only useful for children who can read, and parents can withhold the letters) and difficulties (it should be in a language that children can understand, and in an appealing form). Nevertheless, such a letter could be seen as an extra effort to get information to the child and as an extra opportunity to make the existence of the youth lawyers known.

4.2. *Second phase: between the first hearing of the family court and the court's decision*

Course of the second phase

In both custody and international child abduction proceedings the second phase begins with the first hearing of the family court and ends when the court has taken its decision.

In custody proceedings there may be several hearings after the first hearing, such as hearings in which the questions to the children are discussed and plea hearings.[147] During the proceedings the court will hear the parents on their dispute and the court can also hear the child.[148] The court can further order investigations such as the social study and the medical-psychological examination.[149] It follows from the foregoing that a lot can happen during this second phase and several actors are necessarily involved (the parents and the family court) or can be involved (the parents' lawyers, the youth lawyer, the justice assistant and experts).

In international child abduction proceedings, it is possible that the case is immediately dealt with during the first hearing of the court. If this is not the case, additional hearings can be organised.[150] Also in these proceedings, the court will hear the parents and can hear the child.[151] In theory it is possible that the court orders investigations,[152] but in practice this is rarely the case given the summary nature of the return proceedings.[153] The actors involved in most child abduction proceedings will thus be the parents and the family court, and possibly also the parents' lawyers and the youth lawyer. The CA is less important in this second phase than in the first phase. According to Article 7(d-e) Hague Convention, the CA shall take appropriate measures to «*exchange, where desirable, information relating to the*

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[147] Implied in Article 1253*ter*/2, section 1 Belgian Judicial Code.

[148] Article 1253*ter*/3, §1, section 1 Belgian Judicial Code (hearing of parents); Article 1253*ter*/6, section 6 *juncto* Article 1004/1, §1 Belgian Judicial Code (hearing of children).

[149] Article 1253*ter*/6, section 2 and 3 Belgian Judicial Code.

[150] F. COLLIENNE, S. PFEIFF, *Les Enlèvements Internationaux d'Enfants Convention de La Haye et Règlement Bruxelles IIbis. Pratique et Questions de Procédure*, cit., p. 365.

[151] Article 1004/1, §1 Belgian Judicial Code; Article 13(2) Hague Convention: Article 11(2) Brussels II-*bis*.

[152] Article 1322*septies juncto* Article 1038 *juncto* Article 1253*ter*/6, section 2 and 3 Belgian Judicial Code.

[153] That the proceedings must be summary, follows from Article 2 Hague Convention, which states that Contracting States «*shall use the most expeditious procedures available*».

social background of the child» and to «*provide information of a general character as to the law of their State in connection with the application of the Convention*». The CA can thus be involved if the family court asks for information.

Content of the information and actors responsible for providing the information

During this second phase, as in the first phase, the child should receive 'practical and procedural information'.[154] The child should now be fully informed about how the legal process will proceed. In line with the CoE Guidelines, this includes information on when and where the hearings will take place, what the purpose of each of the hearings is, who will be involved in the hearings, and on the general progress of the proceedings.[155] The practical and procedural information also extents to information on the possible investigations the court can order. If the court has ordered an investigation, the child should be informed about what the investigation entails, when and where it will take place, who will be involved, and what will be the importance and impact.[156] The two investigations explicitly mentioned in the Belgian Judicial Code, namely the social study and the medical-psychological examination, will eventually lead to a written report. This report is discussed with[157] or communicated to the parties.[158] As the child is not a party to the proceedings, he/she will not automatically be informed about those reports.[159] Nevertheless, it is important that the child is informed about the content of the report and about the impact this report will have on the decision of the court.[160]

This practical and procedural information could be provided by the parents and their lawyers. However, they are not well suited to take on this role for the same reasons as mentioned in the first phase.[161] The family court might be an appropriate actor to inform the child about practical and procedural issues. However, in the current organisation of Belgian family courts, there is insufficient capacity

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[154] H. STALFORD, L. CAIRNS, J. MARSHALL, *Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information*, cit., p. 211.

[155] COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, p. 20, para. 1 and p. 59, para. 54.

[156] COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, p. 59, para. 54.

[157] I. BOONE, N. BOURGOIS, *Onderzoeksmaatregelen bevolen door de familierechtbank*, cit., p. 418. Article 1253*ter*/6, section 5 Belgian Judical Code.

[158] I. BOONE, N. BOURGOIS, *Onderzoeksmaatregelen bevolen door de familierechtbank*, cit., pp. 419-421; Articles 973, §1, 976 and 1253*ter*/6, section 5 Belgian Judicial Code.

[159] Specifically on the feedback-meeting in case of a social study, see: I. BOONE, N. BOURGOIS, *Onderzoeksmaatregelen bevolen door de familierechtbank*, cit., p. 418.

[160] On the consequences of the report of the social study and the medical-psychological examination, see: I. BOONE, N. BOURGOIS, *Onderzoeksmaatregelen bevolen door de familierechtbank*, cit., p. 418-419 and p. 425.

[161] See discussion on pp. 14-15.

for an increased workload.[162] Without the necessary structural changes in staff and resources, a plea for responsibility of the courts to inform the child is likely to be in vain.

Thirdly, if the court orders an investigation, there will be a justice assistant, or an expert involved in the proceedings. As mentioned before, the justice assistant will visit the child in the place(s) where he/she lives and will have, in principle, a conversation with children from the age of six.[163] The justice assistant will also provide information to the children with whom they have a conversation. More specifically, the justice assistant «*will explain his or her role and the framework for his or her actions and will weigh each word. He or she will also explain to the child that the content of the conversation will be written in a report intended for the court and that the child's parents will be informed about it and can also read it. In order to take the child's difficult position into account, the court justice assistant will tell the child how his or her words will be written down*».[164] The provision of information from the justice assistant to the child can therefore be said to be adequate for children who will be heard. Children who are not heard, are not informed either. Since justice assistants are trained in conversation techniques with children,[165] their responsibility to inform children could be extended to children below the age of six who will not be heard but merely observed. It is argued that the aim of providing the child with information before the conversation is «*to provide the child with all the information needed to understand the course of the of the social study*».[166] Also children who are not heard should be able to understand the course of the social study and should therefore be informed.

When the court orders a medical-psychological examination, the expert will provide information about the most appropriate residence and/or visiting arrangement for the children. *Inter alia* the way in which the children experience the current situation is examined.[167] Experts will assess the family relationships in the family of both parents and how the child functions in those. Individual conversa-

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[162] See for instance: Rechtbank Eerste Aanleg Antwerpen, *Werkingsverslag 2020*, approved by the general meeting of the Antwerp court of first instance on 2 April 202, https://www.rechtbanken-tribunaux.be/sites/default/files/rea_antwerpen/prov/files/WV_2020/2020_rea_antwerpen.pdf, p. 68-77.

[163] I. Boone, N. Bourgois, *Onderzoeksmaatregelen bevolen door de familierechtbank*, cit., p. 417; S. Reisse, M. Bellefroid, *Het maatschappelijk onderzoek: opheldering ten behoeve van de familierechtbank*, cit., pp. 218-219; https://departementwvg.be/justitiehuizen/maatschappelijk-onderzoek; https://www.scheidingskoffer.be/overzicht/ouders/wat-is-een-maatschappelijk-of-sociaal-onderzoek-door-een-justitie-assistent-1.

[164] S. Reisse, M. Bellefroid, *Het maatschappelijk onderzoek: opheldering ten behoeve van de familierechtbank*, cit., p. 218-219.

[165] S. Reisse, M. Bellefroid, *Het maatschappelijk onderzoek: opheldering ten behoeve van de familierechtbank*, cit., p. 219.

[166] S. Reisse, M. Bellefroid, *Het maatschappelijk onderzoek: opheldering ten behoeve van de familierechtbank*, cit., p. 219.

[167] https://www.deskundigenonderzoeken.be/informatie/informatie-aan-ouders/; https://www.de-piramide.be/aanbod/deskundig-onderzoek.

tions will be planned with both parents and children. Those can take place either in the practice of the expert or in the child's familiar environment.[168] Children can also be asked through questionnaires how they experience their upbringing with their parents, and what the differences and similarities are.[169] However, nothing is mentioned about whether the child is given information on the course of the examination. We recommend that the expert informs the child in a similar way as the justice assistant does. This entails providing information on the role of the expert, on the fact that there will be a written report of the examination which the parents can read, and on how the child's words will be documented in this report.

The last actor who can be involved in this second phase is the youth lawyer. Also in this phase, and for the same reasons as in the first phase,[170] the youth lawyer is the most suited actor to provide information to the child. From the moment the child is assisted by a youth lawyer, the latter will be the child's first point of contact throughout the procedure and will be able to automatically inform the child about everything. The advantage of the youth lawyer is first, that he/she will be able to maintain a helicopter view of the whole procedure. This contrary to, for example, the justice assistant and the expert, who are only included in a small part of the procedure. Further, it might be easier for a child to ask information from their youth lawyer than from, for example, the judge. The youth lawyer will be more accessible, so the threshold for the child is lower.

Next to practical and procedural information, the child should also receive information on his/her rights.[171] Most importantly in that regard and in this phase of the procedure is that the child is informed on his/her right to be heard.[172] As mentioned before, children should be informed that voicing their opinion is a right and not an obligation.[173] Further, in line with Article 12 UNCRC, they must be informed about the importance and impact of the given testimony,[174] in other words, what weight will be given to their views.[175] This information on the content of the

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[168] https://www.de-piramide.be/aanbod/deskundig-onderzoek.

[169] https://www.deskundigenonderzoeken.be/informatie/informatie-aan-ouders/; https://www.de-piramide.be/aanbod/deskundig-onderzoek.

[170] For a discussion on the figure of the youth lawyer in the first phase, see pp. 16-19.

[171] This refers to the second layer of information identified by H. STALFORD, L. CAIRNS, J. MARSHALL, *Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information*, cit., pp. 211-212.

[172] For a detailed discussion on how the right of the child to be heard is given form in Belgium, see *inter alia* P. SENAEVE, *Het hoorrecht van minderjarigen*, in P. SENAEVE (ed.), *Handboek Familieprocesrecht*, Mechelen, 2020, p. 469-517; P. SENAEVE, *Het hoorrecht van minderjarigen sinds de wet op de familie- en jeugdrechtbank*, cit., pp. 176-195.

[173] UN Committee on the Rights of the Child, General Comment No. 12, cit., para. 16.

[174] COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, p. 59, para. 54.

[175] G. LANSDOWN, *Every child's right to be heard: A resource guide on the UN committee on the rights of the child general comment No. 12*, cit., p. 24; UN Committee on the Rights of the Child, General Comment No. 12, cit., paras. 25, 34 and 45.

child's right must of course be accompanied by some practical information. In line with the CoE Guidelines, this entails information on who will hear the child, who will or can be present during the hearing, where the hearing will take place, how the child's views will be reported and who will be able to read this report.[176]

In the current Belgian practice, children from the age of 12 automatically receive an invitation for a hearing.[177] In 2014, a model information form was established with the intention of using it uniformly by all family courts.[178] However, deviations from this standard form are possible.[179] This information form indicates the child's right to be heard by the court, the manner in which the interview will take place, where the interview will take place, and what the child should do to accept or refuse the interview. It also states that the report of the interview will be added to the case file, that the child's parents may take note of it and that the content of this report may be used during the court proceedings. The form also specifies that the judge, when hearing the child, is not obliged to comply with the requests made by the child.[180] The information form is sent in name of the judge and also mentions that the child can contact the court in case he/she has questions.[181]

Where appropriate, the letter is sent to the addresses of both parents to ensure that the minor receives the information.[182] VAN DER MUSSELE argues that this is a rather naive assumption by the legislator since this «*is no guarantee at all, as both parents will often try to avoid children being heard outside their presence. After all, no one checks whether the letter arrived, was handed over and a reply was filled in and sent*».[183] Thus, even though the child is automatically informed by the judge, the figure of the youth lawyer remains useful. He/she will be able to monitor whether the child has actually received the information form or could provide the information themselves.

Next to sending the mandatory invitation letter, there are some courts that took additional initiatives to inform children on the practicalities and the aim of

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[176] COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, p. 59, para. 54; H. STALFORD, L. CAIRNS, J. MARSHALL, *Achieving Child Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information*, cit., p. 211; G. LANSDOWN, *Every child's right to be heard: A resource guide on the UN committee on the rights of the child general comment No. 12*, cit., p. 24.

[177] Articles 1004/1, §3 and 1004/2 Belgian Judicial Code.

[178] Belgian Royal Decree of 23 August 2014, *Vaststelling van het model van informatieformulier bedoeld in artikel 1004/2 van het Gerechtelijk Wetboek*, in *Belgisch Staatsblad*, 29 augustus 2014.

[179] P. SENAEVE, *Het hoorrecht van minderjarigen sinds de wet op de familie- en jeugdrechtbank*, cit., p. 179.

[180] The requirements for the content of the information form are mentioned in Article 1004/2 Belgian Judicial Code.

[181] Belgian Royal Decree of 23 August 2014, *Vaststelling van het model van informatieformulier bedoeld in artikel 1004/2 van het Gerechtelijk Wetboek*, in *Belgisch Staatsblad*, 29 augustus 2014.

[182] Article 1004/2, section 4 Belgian Judicial Code.

[183] E. VAN DER MUSSELE, *Advocaat voor minderjarigen: en wat vandaag?*, cit., p. 246.

the hearing. The courts of Antwerp, Mechelen, and Turnhout for example made an informative YouTube video in a form and language adapted to adolescents.[184]

Concerning children younger than 12 years, they also have the right to be heard by the judge,[185] but they do not automatically receive an invitation to be heard and are thus not informed on this right by the court.[186] These younger children will only be heard when they request this themselves, or at the request of the parents, the public prosecutor or, *ex officio*, the court. If the request comes from the child himself/herself, or from the public prosecutor, the court cannot refuse to hear the child.[187] It is thus very important that the child has all the information necessary to send a request if he/she wants to be heard.

The question is then who will inform the child about their right to be heard. This responsibility cannot be entrusted entirely to the parents. First, parents themselves may not be fully aware of the child's right to be heard, and second, they «*often want to avoid children telling the court what is really going on*».[188] In that case, they might withhold information from the child. Parents' lawyers are also not the best placed to provide information, this for the same reasons mentioned in the first phase. The best actor would again be the youth lawyer, who cannot only inform the child about the right to be heard but can also help the child with addressing the request to be heard to the court.[189]

Information can of course also be provided via other channels such as websites or brochures,[190] but then the child has to actively look for the information. In addition to information on the right to be heard, the website of the Belgian children's rights organisation *Tzitemzo* also offers children help in writing a letter to the judge asking to be heard.[191] However, the same argument remains: children will have to find their own way to this website.

Thus, to improve the provision of information to children below the age of 12 on their right to be heard, we argue that also regarding those children the family court should take on responsibility. The development of an information form specifically for younger children, inspired by the information form for older children, is recommended.

In the past, a legislative proposal that argued for an obligation for the courts to summon the child from the age of seven, and an obligation for the child to appear was rejected.[192] It was argued that «*[c]alling such young children to appear*

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[184] https://www.rechtbanken-tribunaux.be/nl/lokaal-nieuws/horen-kinderen-bij-de-familierechter.
[185] Article 1004/1, §1 Belgian Judicial Code.
[186] Article 1004/1, §2 Belgian Judicial Code.
[187] Article 1004/1, §2 Belgian Judicial Code.
[188] E. VAN DER MUSSELE, *Advocaat voor minderjarigen: en wat vandaag?*, cit., p. 246.
[189] E. VAN DER MUSSELE, *Advocaat voor minderjarigen: en wat vandaag?*, cit., p. 246.
[190] E.g.: https://www.tzitemzo.be/kinderen/thema/hoorrecht-kinderen.
[191] https://www.tzitemzo.be/kinderen/over-ons/wat-doen-we-kinderen2.
[192] Wetsvoorstel tot wijziging van verschillende bepalingen over het recht van minderjarigen om door

before a judge would have diminished their childhood, would have placed a responsibility on them that they could not handle, and would have turned them into mini-adults with the possibility of becoming actors in the struggle between their parents. Such a rule would also have entailed an unjustifiable huge increase in the workload of the family courts».[193] Eventually, it was decided to oblige the courts to explicitly inform and invite children from the age of 12.[194]

However, a difference must be made between informing children on their right to be heard and inviting them, or even obliging them, to be heard. In the context of this paper, we do not necessarily advocate to extent the automatic invitation to all children. Rather, we advocate that also children younger than 12 years should be automatically informed about their right to be heard and the possibility they have to send a request to the court if they want to be heard. By limiting the obligation to the provision of information and not providing an automatic invitation, we believe that the two arguments raised against the previous legislative proposal could not be rightfully raised again.

4.3. *Third phase: after the court's decision*

The third phase concerns the outcome of the procedure. Regarding the judgement and its enforcement, again the question can be asked: how and by whom will the child be informed? We will first set out how the child can currently be informed about the outcome of the proceedings. Next, we will discuss in which way the child should be informed. We will also examine the role of the different relevant actors. Lastly, we will discuss which information the child should receive in this phase.

Course of third phase

The third phase of a custody procedure involves the parents, the parents' lawyers, the youth lawyer and the judge(s). In addition to these actors, the CA is also involved in international child abduction proceedings. The central aspect of the third phase is the judgement. Belgian judgements are pronounced in public.[195] According to Article 792 Belgian Judicial Code, the registrar will send a transcript of the judgement to each of

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de rechter te worden gehoord, Parlementair Document 2010, nr. 5-115/1, https://www.senate.be/www/?MIval=publications/viewPub&COLL=S&PUID=83886246&TID=83886299&POS=1&LANG=nl; Wetsvoorstel tot wijziging van verschillende bepalingen over het recht van minderjarigen om door de rechter te worden gehoord, Parlementaire Stukken Senaat 2010-2011, nr. 5-115/4, Verslag namens de commissie voor de justitie, p. 50-51; P. SENAEVE, *Het hoorrecht van minderjarigen sinds de wet op de familie- en jeugdrechtbank*, cit., p. 179.

[193] P. SENAEVE, *Het hoorrecht van minderjarigen sinds de wet op de familie- en jeugdrechtbank*, cit., p. 179.

[194] Wetsvoorstel tot wijziging van verschillende bepalingen over het recht van minderjarigen om door de rechter te worden gehoord, cit., p. 62.

[195] Article 757 Belgian Judicial Code. In theory, it is possible for the child to attend the public hearing and to become aware of the judgement. This assumes that the child knows when and where the hearing will take place. In addition, the child must be able to travel to the court.

the parties or to the parties' lawyers within five days after the judgement.[196] Since the child is not a party to the proceedings, he/she will not receive a transcript of the judgement.[197] Consequently, a child will depend on his/her parents or the parents' lawyers to receive information about the content of the judgement. In practice, parents will often inform their child of the outcome of the proceedings because it has implications on their personal life.[198] However, as mentioned in the previous sections, the parents and the parents' lawyers will not be unbiased and therefore it is not desirable that they inform the child. Empirical research shows that children sometimes doubt whether the information they occasionally get from their parents is correct, and whether they can fully trust the parent in providing the right details.[199] When parents provide the information, objectivity can thus not be guaranteed. Furthermore, parents often lack the legal expertise to inform the child and answer their questions correctly.

The youth lawyer can request one of the parents or the parents' lawyers to receive a transcript of the judgement. The youth lawyer can also request a copy of the judgement at the court. It seems more appropriate that the youth lawyer, rather than the parents, informs the child. The youth lawyer with his/her legal expertise will understand the content of the judgement better.

The tasks of Central Authorities in international child abduction cases follow from Article 7 Hague Convention. According to this Article, Central Authorities shall provide administrative arrangements which are necessary and appropriate to secure the safe return of the child.[200] The Central Authorities assist thus in the enforcement of judgements. However, they are not obliged to inform the child about the outcome of the proceedings and the enforcement.

Currently the Belgian law does not oblige any actor to inform the child about the outcome of the proceedings. Children will depend on the parties, the court or the youth lawyer to receive information on the judgement. In the next section we will discuss how this can happen in a child-friendly manner.

By whom and how should the child be informed?

Since a judgement in custody or international child abduction proceedings will affect the child's personal life, it is important that the child knows what the

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[196] Article 792 Belgian Judicial Code.

[197] As mentioned in sections 3.1 and 4.1 a child cannot intervene as a party in a procedure. Even in cases where the child is heard, he/she will not be considered a party, see Article 1004/1 §6 Belgian Judicial Code.

[198] DRESER considers it to be a part of the parental responsibility to inform the child, see L. DRESER, *Uitdagingen bij de toepassing van het hoorrecht bij minderjarige kinderen*, cit., p. 51. Since there is no legal obligation for the judge to communicate the outcome of the proceedings to the child, BOONE ET AL. assume that this is the responsibility of the parents. I. BOONE, C. DECLERCK, E. VERTOMMEN, *Het WODC-rapport 'Kind in proces vanuit Belgisch perspectief'*, cit., p. 4.

[199] EWELL, *Bouncing Back*, cit., p. 78.

[200] Article 7 under h) Hague Convention.

content and the consequences of a judgement are. According to the Guidelines of the CoE, information to the child about the judgement should be given by the child's lawyer, guardian *ad litem* or legal representative.[201] In this section we discuss which actors and in which way they should inform the child. We distinguish four ways in which the child can be informed about the outcome of a procedure.[202]

Firstly, the judge can write the whole judgement in a child-friendly and understandable manner. This entails the use of short sentences, clear sentence structure, the avoidance of jargon, explanation of difficult words and the use of an understanding tone.[203] An example of such a child-friendly judgement is the judgement from Mr Justice Peter Jackson before the family court of England and Wales. This concerned a case in which a 14-year-old boy lived with his mother but wished to move with his father to a Scandinavian country. Mr Justice Peter Jackson communicated the judgement in the form of a letter addressed to the boy. The judgement entails short sentences and an understanding tone, for example: «*I believe that your feelings are that you love everyone in your family very much, just as they love you. The fact that your parents don't agree is naturally very stressful for you, and indeed for them. Gemma could see that when she met you, and so could I when you briefly gave evidence. Normally, even when parents are separated, they manage to agree on the best arrangements for their children. If they can't, the court is there as a last resort*».[204]

Instead of writing the whole judgement in a child-friendly manner, the judge can also choose to attach a section, letter or document to the normal judgement in which he/she explains the content of the judgement in a child-friendly manner.[205] An example hereof is the judgement from a Dutch court, which contains a section with an explanation for the child: «*[The minor 2] said in the conversation with an examining judge that he wants to understand the court's decision properly. Therefore, the court is writing a separate explanation for the children here. (...) The court understands that the children are very much looking forward to moving*

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[201] Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, cit., p. 31, para. 75.

[202] Inspiration for this subdivision follows from J. Lieber, *De rechter en de taal van het kind*, in *Tijdschrift voor Familie- en Jeugdrecht*, 2018, p. 6-7 and H. Stalford and K. Hollingsworth, *"This case is about you and your future": Towards Judgements for Children,* in *The Modern Law Review*, 2020, p. 1056.

[203] J. Lieber, *De rechter en de taal van het kind*, cit., pp. 6-7; S. Poot, *In de kinderschoenen. Onderzoek naar kindvriendelijke uitspraken in de Nederlandse civiele rechtspraktijk*, in *Tijdschrift voor Familie- en Jeugdrecht*, 2020, p. 2-3; H. Stalford and K. Hollingsworth, *"This case is about you and your future": Towards Judgements for Children*, cit., pp. 1056-1057. This is in line with the CoE Guidelines, Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, cit, p. 28, para. 49, p. 29, para. 56 and p. 31, para. 75.

[204] England and Wales family court 26 July 2017, case no. MA17P0016. An example of a Dutch judgement written in child-friendly language is the judgement from the court of Rotterdam of 3 February 2017, ECLI:NL:RBROT:2017:911. See also T. Liefaard, *Kindvriendelijke rechtspraak*, in *Tijdschrift voor Familie- en Jeugdrecht*, 2017, p. 1.

[205] J. Lieber, *De rechter en de taal van het kind*, cit., p. 7.

to Switzerland. It is important for children to like the place in which they live. However, it is not good for children to move to a foreign country when it is very uncertain whether this will be permanent (whether this is allowed by that country and whether it is financially possible), whether they can go to school there without getting too far behind (they still have to learn the language) and whether they can make friends (...)».[206]

For both these approaches, it is important that judges and clerks are trained in writing child-friendly judgements.[207] Exploratory research by POOT shows that children prefer the writing of the whole judgement in child-friendly language instead of a section or letter that explains in a child-friendly way the judgement.[208] However, writing the whole judgement in child-friendly language will be time-consuming for judges since the (standard) models cannot be used. New (standard) models need to be made. LIEBER, STALFORD and HOLLINGSWORTH point out several other possible disadvantages of such a child-friendly judgement. By writing in child-friendly language, the judge does not communicate in the most efficient way with a part of his/her audience, e.g. lawyers. Furthermore, child-friendly language is not the standard in legislation, case law and academic literature. The use of child-friendly language may make the judgement less precise and convincing from a legal point of view.[209]

A third method to inform a child about a judgement and its enforcement is by recording a child-friendly explanation of the judgement and share this with the child. This will be less time-consuming than writing a whole judgement in child-friendly language.[210]

A fourth option is to explain the judgement and its consequences in a personal conversation with the child.[211] This approach has a couple of advantages over the previously mentioned approaches. First, this allows the child to ask questions and to indicate that he/she does not understand the given information. Second, it can be assured that the information reaches the child. This is less the case when the judge writes a judgement in child-friendly language or when a judgement entails a child-friendly section. Whether the content of the judgement reaches the child

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[206] See section 5.9, called in Dutch "*Overweging met uitleg voor de kinderen*", court of appeal Arnhem-Leeuwarden 22 August 2017, ECLI:NL:GHARL:2017:7429; J. LIEBER, *De rechter en de taal van het kind*, cit., p. 7. An example of a judgement with a letter attached for the children is the note by Sheriff Aisha Anwar in Mr Patrick (a pseudonym) against Mrs Patrick (a pseudonym) of 20 March 2017, SC GLA 46.

[207] J. LIEBER, *De rechter en de taal van het kind*, cit., pp. 6-7.

[208] S. POOT, *In de kinderschoenen. Onderzoek naar kindvriendelijke uitspraken in de Nederlandse civiele rechtspraktijk*, cit., p. 9.

[209] J. LIEBERR, *De rechter en de taal van het kind*, cit., pp. 6-7; H. STALFORD and K. HOLLINGSWORTH, *"This case is about you and your future": Towards Judgements for Children*, cit., pp. 1040-1041.

[210] S. POOT, *In de kinderschoenen. Onderzoek naar kindvriendelijke uitspraken in de Nederlandse civiele rechtspraktijk*, cit., p. 11.

[211] J. LIEBER, *De rechter en de taal van het kind*, cit., p. 7.

depends on whether the lawyers or parents involved hand over the judgement or inform the child.[212] The judge can partially overcome this uncertainty by specifying in the judgement who should inform the child. This is sometimes done in Dutch judgements.[213]

When the child's parents or parents' lawyers inform the child about the content of the judgement, it is less guaranteed that this will be done in an impartial way. One way to meet this obstacle is to have an impartial actor, such as the judge himself/herself or the youth lawyer, explaining the judgement. The Netherlands knows the system of the guardian *ad litem*.[214] This guardian *ad litem* safeguards the best interest of the child. In international child abduction cases, the Dutch judge often instructs the guardian *ad litem* to inform the child of the judgement: «*The court considers it to be in the best interest of the (minor) that the guardian ad litem discusses the judgement of the court (and possibly the judgement of the court of appeal) with him/her*».[215]

It is noteworthy that the guardian *ad litem* may attach conditions to this. The judgement of 7 September 2017 states: «*At the hearing, the court of appeal requested the guardian ad litem to discuss the outcome of the case with the minor. The guardian ad litem indicated that he would do so under the condition that the parties will cooperate with the ruling, regardless of what the court's ruling will be. The parties agreed at the hearing to comply with the court's ruling. The court assumes that on this basis the guardian ad litem will discuss the outcome of the case with the minor*».[216]

Research on international child abduction judgements shows that such a clause is not included in Belgian judgements. The examined Belgian judgements mention that the judgement is pronounced in public and mention those who were present, i.e. the judges, the advocate-general and/or the registrar.[217] Children are not mentioned. Furthermore, the judge does not appoint an (independent) actor who needs to inform the child.

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[212] J. Lieber, *De rechter en de taal van het kind*, cit., p. 7.

[213] The Dutch standards for courts of appeal state that in proceedings where the child has been heard, the judge will discuss with the parents and other interested parties who will communicate the judgement to the child. https://www.rechtspraak.nl/SiteCollectionDocuments/professionele-standaard-kindgesprekken.pdf.

[214] See for discussion about the guardian *ad litem*: J. Ter Haar, *Burgerlijk Wetboek Boek 1. Titel 14. Afd. 1. Artikel 250*, in H. Krans, C. Stolker and W. Valk (eds), *Tekst en Commentaar. Burgerlijk Wetboek. Boeken 1 en 2,* Deventer, 2017, p. 444-450; E. Punselie, *Artikel 250. Bijzondere curator*, in S. Wortmann (ed), *Groene Serie Personen- en familierecht*, Deventer, 2021, p. 1-13; https://www.rechtspraak.nl/Onderwerpen/Bijzondere-curator.

[215] See e.g. Court of the Hague 16 May 2018, ECLI:NL:RBDHA:2018:6240; Court of the Hague 30 May 2018, ECLI:NL:RBDHA:2018:6474; Court of the Hague 11 July 2018, ECLI:NL:RBDHA:2018:8514 and court of the Hague 28 December 2018, ECLI:NL:RBDHA:2018:15836.

[216] Court of appeal of the Hague 7 September 2017, ECLI:NL:GHDHA:2017:2598.

[217] This is based on the case law which was collected for the VOICE project, in which the first and last author were involved as researchers. These cases were re-examined in light of the present paper.

In line with the reasoning of the Committee on the Rights of the Child, children need to have access to information in appropriate formats to their age and capacities.[218] In view of this, it is preferable to inform the child in a personal conversation with the judge or another impartial party. In that case, the form of communication can be adapted to the age and development of the child. This is more difficult when the judgement is communicated through a letter or when the judgement contains a child-friendly section. Since these are written forms of communication and not all children can read and understand this level of language, the written forms of communication are not suitable for all children. Furthermore, during a conversation, it can be verified whether the child understands the content of the information. Exploratory research from POOT in the Netherlands shows that children often indicate that they perceive the judgement as understandable, but they do not actually understand it.[219] This obstacle could thus be overcome by a personal conversation.

Based on the foregoing, a personal conversation with the child seems to be the best method for informing the child about the content of a judgement. Moreover, this should be done by the judge or the youth lawyer since they are impartial and often received training in communication with children. The Guidelines of the CoE stress the importance of training in communication of the actors who will inform the child. More precisely, training in using child-friendly language and developing knowledge on child psychology is necessary.[220] In Belgium, judges need to follow specialised training to become a judge in the family court. An example hereof is a training about the hearing of children.[221]

Content of the information

Principle IV.E.75 of the Guidelines of the Committee of Ministers of the CoE on child-friendly justice states that:

> *The child's lawyer, guardian ad litem or legal representative should communicate and explain the given decision or judgment to the child in a language adapted to the child's level of understanding and should give the necessary information on possible measures that could be taken, such as appeal or independent complaint mechanisms.*

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[218] UN Committee on the Rights of the Child, General Comment No. 12, cit., para. 82.

[219] S. POOT, *In de kinderschoenen. Onderzoek naar kindvriendelijke uitspraken in de Nederlandse civiele rechtspraktijk*, cit., p. 7-10.

[220] COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, cit, p. 23, para. 15, p. 27, para. 39 and p. 65.

[221] Article 259sexies, §1, under 1° Belgian Judicial Code and https://www.igo-ifj.be/nl/content/igo-online.

The child should thus first receive information about the judgement. Feedback about the legal reasoning after the decision is a crucial element of information, especially when children's views have not been followed in the final decision.[222] After the decision has been made, children must receive information about the outcome and how their views have influenced the decision so they know that their views were taken seriously.[223] When investigations are conducted, the child should also be informed about the influence of these investigations on the outcome of the proceedings. Provision of feedback and information are further important since children will be more likely to accept the outcome of the proceedings if they understand it.[224]

The Committee on the Rights of the Child states that «*[The] information [about the weight given to the views of the child] may prompt the child to insist, agree or make another proposal or, in the case of a judicial or administrative procedure, file an appeal or a complaint*».[225] The child should thus receive information about the possibilities of appeal, next to information on the outcome. In Belgium, a child cannot appeal against a judgement on custody or international child abduction. The child must thus be informed about the lack of possibilities of appeal. Contrary to the child, parents can in principle appeal. However, in Belgium, appeal is not possible against a decision in international child abduction cases. In those cases, the consequent case on the merits will either be held in Belgium (if the return is refused in an extra-EU case), or in the State of the habitual residence of the child (if the return is ordered). If the Belgian judge however refuses the return of the child in an intra-EU case, the courts in the State of former habitual residence of the child have a second chance to order the return. In that case, the child should be informed about the fact that the decision of the Belgian judge to refuse the return can be overturned by a court in his/her State of habitual residence and that, if that happens, he/she should nevertheless return.

Next to providing information about the possibilities of appeal, information about the enforcement is important. Enforcement is a significant aspect of international child abduction cases. Judgements ordering the return of the child often specify a time limit before which the child should have returned to the State of habitual residence. The judgements sometimes mention that the bailiff can take care of the enforcement of the return together with the assistance of the social po-

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[222] COUNCIL OF EUROPE, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, cit, p. 28, para. 49. According to BOONE ET AL., the judge should give this feedback, BOONE, C. DECLERCK, E. VERTOMMEN, *Het WODC-rapport 'Kind in proces vanuit Belgisch perspectief'*, cit., p. 7.

[223] UN Committee on the Rights of the Child, General Comment No. 12, cit., para. 45.

[224] S. LEMBRECHTS, M. PUTTERS, K. VAN HOORDE, *Kinderen en Rechters in Gesprek in Familiezaken van Internationale Kinderontvoering*, cit., pp. 288-290; H. STALFORD and K. HOLLINGSWORTH, *"This case is about you and your future": Towards Judgements for Children*, cit., pp. 1042-1046.

[225] UN Committee on the Rights of the Child, General Comment No. 12, cit., para. 45.

lice, social worker or psychologist.[226] It is remarkable that the enforcement itself is described in detail but no obligation to inform the child about it is included although these drastic measures affect the child seriously. Especially in child abduction cases, the information concerning the enforcement cannot be delayed too long: «*For instance, the amount of time between being informed about the decision and the actual coming into effect of this decision should not be unnecessarily long, but should leave children the time to adequately prepare themselves for what lies ahead*».[227]

5. *Conclusions*

The central question in this paper was how, when, about what and by whom a child should be informed in Belgian custody and international child abduction cases. Regarding the question *how* the child should be informed, we stressed the importance of the provision of adequate information, adapted to the needs and capacities of the child, and in a child-friendly manner. Regarding the question *when* the child should receive information, we distinguished three phases in Belgian legal procedures: before the first hearing of the family court, in between the first hearing of the family court and the court's decision, and after the court's decision. For each of these phases we discussed *which* information is and should be provided to children. More precisely, we focussed on the first and second layer of information, identified by STALFORD, CAIRNS and MARSHALL as necessary elements of a genuinely participatory process. The first layer refers to practical and procedural information. The second layer concerns foundational rights-based information.

Lastly, we also discussed *by whom* the child is and should be informed. We identified the different actors currently involved in the three phases: the parents, parents' lawyers, the youth lawyer, judges, justice assistants, experts and Central Authorities. Moreover, we examined which role these actors could have in each phase of the procedure. Our research shows that the youth lawyer is the most suitable actor to inform the child in the different phases. Since the youth lawyer can already be appointed at the beginning of the procedure and is involved in all the phases, he/she has an overall overview of the procedure and can act as a contact person for the child throughout. Although the child is not a party to the proceedings, his/her youth lawyer has access to the relevant documents through the court or the co-counsels. Consequently, the youth lawyer can provide complete information. Another advantage of the youth lawyer is that he/she is unbiased and can inform the child in an objective way. Currently, children – and younger children in

[226] See e.g. Court of appeal of Antwerp 31 May 2016 (unpublished) and court of Ghent 30 June 2020 (unpublished).

[227] INCLUDE Guide to Good Practice p. 14 https://missingchildreneurope.eu/?wpdmdl=2627.

particular – are often dependent on their parents to receive information. This in undesirable, since children's personal experiences have shown that information provided by parents in conflict has not always been reliable. Further, and contrary to the parents, the youth lawyer has the legal expertise to inform the child correctly.

To provide information, a youth lawyer needs to be appointed. This can only be done at the request of the child himself/herself. A child thus needs to be aware of the existence of the youth lawyer. In this paper we stressed the importance of raising greater and constant awareness of the existence and the role of the youth lawyer. Child-friendly information campaigns via the media or in schools about children's rights, divorce, child abduction and socio-legal support services could have an informing, awareness-raising and preventive effect to minimise harm and maximise benefits for affected children in the legal procedures following such events.[228] Cooperation with journalists, teachers and civil society can be beneficial, as are child-friendly news reports and materials produced by children themselves.[229]

The foregoing does not mean that the youth lawyer should be the only actor responsible for proving information towards the child. This paper showed that judges can also play an important role in the provision of information. In the first phase, we argue that the court should send children a letter with information regarding the procedure, the contact details of the youth lawyer and sources for further information. In the second phase, the judge currently informs children above the age of 12 through a letter about their right to be heard. We argue that this information should also be provided to younger children. In the third phase, the judge could also have a more active role. As discussed, the judge as an impartial person could inform the child about the outcome of a procedure. This can be done in different child-friendly ways of which we perceive a personal conversation with the child as the most suitable one.

To conclude, this paper showed the importance of the child's right to information. This right is often portrayed and discussed in function of the child's right to be heard and less attention is given to receiving information as an independent right of the child. This paper tried to show that the child's right to information and the child's right to be heard are connected but more focus on the right to information is necessary for children to be able to fully enjoy their right to participation in all phases of the procedure.

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[228] INCLUDE, Country report – Hungary, cit., p. 26.

[229] W. VANDENHOLE, G. ERDEM TÜRKELLI, S. LEMBRECHTS, cit., pp. 196-197.

Chapter 3

CHILDREN'S RIGHT TO INFORMATION IN CIVIL PROCEEDINGS IN BULGARIA

Boriana Musseva, Vasil Pandov

1. *The children's right to information as an essential component of the right to be heard and to participate*

The children's right to information in Bulgaria is closely linked to the right of the child to express his or her views during all proceedings concerning children's rights and interests. Both rights serve the protection of the best interests of the child and express the understanding that the children are to be treated like effective rights holders. These ideas stem from the supranational provisions as well as from the national law. The general rule in Bulgarian domestic law on the hearing of the child – Article 15, para. 1 of the Child Protection Act (hereinafter "CPA") - provides for that «*all cases of administrative or judicial proceedings affecting the rights and interests of a child should provide for a mandatory hearing of the child, provided he or she has reached the age of 10, unless this proves harmful to his or her interests*». The right to information is envisaged in the same Article 15, but in para.3 of the CPA stating that, before the child is given an opportunity to express his or her views, the court or the administrative authority shall «*provide the child with the necessary information, which would help him or her form his or her opinion and inform the child about the possible consequences of his or her desire, of the opinion supported by him or her, as well as about all the decisions made by the judicial or administrative body*». Thus, the obligation to hear the child and to acquaint him or her in advance with the needed information, gets through all civil law areas concerning children (parental responsibility, maintenance, child abduction, adoption, origin, placement and so on). The notion is rather neutral

as it can cover both domestic and cross border cases. It focuses on the contact between the child and the authority, entailing the idea to protect the best interests of the child. Nevertheless, the child's participation in proceedings can in some cases prove harmful, risky, and undesirable. Striking the right balance between the provision of information and the hearing on the one hand, and preserving the child unaffected by the parent's affairs on other hand, proved to be a very challenging practical issue.

The current analysis is predominantly focused on right to information as part of the right to be heard and to participate when exercised in judicial proceedings. It is based on the Bulgarian legal framework, case law and practical feedback provided by judges, attorneys and other legal practitioners including a representative of the Bulgarian Central Authority – the Ministry of Justice.

In Bulgaria, there are no special family or children courts. Only in Sofia, the Sofia Regional Court, the Sofia City Court, and the Sofia Appellate Court have structured some chambers dealing mostly with family matters. In all other regions in Bulgaria, the judges must combine the special family expertise with the general competence in civil and commercial matters and in some instances, even in criminal law. The administrative matters are decided by specialized administrative courts. When facing issues concerning children, these courts have also to apply the general rules on hearing of the child and on provision of information contained in Article 15 of the CPA. Only in the field of child abduction, Bulgaria has followed the recommendation to concentrate jurisdiction.[1] Thus, in child abduction cases, the first instance court is always the Sofia City Court and the second instance court the Sofia Appellate Court, where the access to the Supreme Court of Cassation is excluded (Article 22a, para. 1 and Article 22d, para. 1 CPA).

The right to information and to participation of children in Bulgaria was inspired by the supranational legislation (see infra, para. 3). The most important sources are the UN Convention on the Rights of the Child (Article 13, para.1 in connection with Article 12, para. 1) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 8).

Child participation in Family Law in Bulgaria changed significantly at legislative and judicial level during the years, especially after the end of the Cold War and the membership of Bulgaria to the EU (see *infra*, para. 4).

[1] See Practice Guide for the application of Brussels IIa Regulation, p. 50.

2. *The evolution of the right to be heard in the Bulgarian legal system: legislative provisions concerning the right to participation of the child and the right to receive information*

The right to participation of the child and the right to receive information in conjunction with the right to be heard are achievements of the last 30 years of the Bulgarian legislation.

Before the end of the Cold War, in Bulgaria the protection of children was not even mentioned in the Constitution of 1971.[2] The Family Code of 1968[3] provided for hearing of the child only in specifically listed hypothesis: conclusion of marriage by a person at the age of 16 to 18 (Article 8, para. 2), parental responsibility matters and maintenance (Article 29, para. 1 and Article 61, para. 1), adoption of a child between 10 to 14 years (Article 51, para. 3). A right to receive information was neither envisaged in the Family Code of 1968, nor in the Civil Procedural Code of 1952.[4] Not much changed with the entry into force of the Family Code of 1985.[5] A right to receive information was not introduced. The legislator stipulated hearing of a child in cases of conclusion of marriage by a person at the age of 16 to 18 (Article 12, para. 2), in parental responsibility matters and maintenance (106, para. 3, Article 71, para. 1 and Article 72, para. 2) and in adoption cases (Article 55, para. 1).

After the collapse of the communist regime in 1989, a new Constitution[6] was adopted. According to its Article 14, family, motherhood and children are under the protection of the state and the society. Without explicit mentioning, the right of the child to express his or her view could be detected in Article 39, para. 1, devoted to the freedom of expression. The right to information is enshrined in Article 41 stating that everyone has the right to seek, receive and disseminate information. The exercise of this right may not be directed against the rights and reputation of other citizens, nor against national security, public order, public health or moral. The hearing of the child can further be traced within the realm of the right to equal treatment and dignity (Article 6, para. 1). Finally, the Constitution provides for that the upbringing and education of the children until they reach the age of majority, is a right and obligation of their parents and shall be supported by the state (Article 47, para. 1). The cited provision of the Bulgarian Constitution considers the children predominantly as recipients of protection, rather than as full-fledged rights holders. This attitude is shared to some extend by the Bulgarian Constitutional Court (see para. 4).

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[2] Promulgated, State Gazette No. 39/18.05.1971.
[3] Promulgated, State Gazette No. 23/22.03.1968.
[4] Promulgated, State Gazette No. 12/08.02.1952.
[5] Promulgated, State Gazette No. 41/28.05.1985.
[6] Promulgated, State Gazette No. 56/13.07.1991.

The general rule on the hearing of the child and on the right to information was introduced in the CPA in 2000.[7] Firstly, this act enshrines the children's right to freedom of expression. According to Article 12 «*every child has a right to freely express his or her opinion on all issues affecting his or her interests. He or she may seek the assistance of the bodies and persons, to whom his or her protection pursuant to this Act has been assigned*». Secondly, it stipulates the children's right to be informed and consulted by the child protection body. This right is envisaged in Article 13 stating that «*every child has a right to be informed and consulted by the child protection body even without the knowledge thereof of his or her parents or of the persons who take care of his or her rearing and upbringing, should that be deemed necessary in view of protecting his or her interests in the best possible way and in case where informing the said persons might harm the child's interests*». Thirdly, the right to be heard is expressly established in Article 15, para. 1 stating that «*all cases of administrative or judicial proceedings affecting the rights and interests of a child should provide for a mandatory hearing of the child, provided he or she has reached the age of 10, unless this proves harmful to his or her interests*». If the child has not reached the age of 10, he or she may be given a hearing depending on the level of his or her development (Article 15, para. 2). In connection with the right to be heard, para. 3 of the same article expressly stipulates the right to information. Before the child is given a hearing, the court or the administrative body shall «*provide the child with the necessary information, which would help him or her form his or her opinion and inform the child about the possible consequences of his or her desire, of the opinion supported by him or her, as well as about all the decisions made by the judicial or administrative body*». The modalities of the hearing and the provision of information are described in para. 4 and 5 of Article 15. The judicial and administrative bodies shall ensure appropriate surroundings for hearing of the child in accordance with his/her age. The hearing and the consultation of a child shall mandatorily take place in the presence of a social worker from the Social Assistance Directorate at the current address of the child and, when necessary, in the presence of another appropriate specialist. The hearing may also take place in the presence of a parent, tutor, curator, other person who takes care of the child, or another close person known to the child, except where this does not correspond to the child's interests. The participation of the given person may be ordered by the court or the administrative body. Pursuant to Article 15, para. 7 and 8 CPA, the Social Assistance Directorate may represent the child in cases provided for by law and the child has a right to legal aid and appeal in all proceedings, affecting his or her rights or interests.

The aforementioned Article 15 of the CPA represents a rule piercing though all areas of law that can affect children's rights and interests.

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[7] Promulgated, State Gazette No. 48/13.07.2000, V. TODOROVA, 'The Bulgarian CPA: The Start of the Child Welfare Reform?', in: A. BAINHAM (ed.), International Survey of Family Law, Bristol: Jordans, 2002, p. 91.

The Family Code of 2009[8] contains also specific rules on the hearing of the child, while most of them refer to Article 15 of the CPA. However, there is no special rule in the Family Code of 2009 regarding the right to information. The hearing of the child as envisaged in Article 15 of the CPA is expressly provided for all matters taken into account in Chapter 9 "Relations between parents and children" (Article 138 of the Family Code of 2009). This chapter covers, for example, disputes concerning the exercise of parental rights and discharge of parental obligations (Article 123), rights and obligations of the child (Article 124), co-habitation (Article 126), dispute over parental rights (Article 127), dispute in case of disagreement between parents on the child travelling abroad (Article 127a), management and disposal of the child's property (Article 130), restriction and deprivation of parental rights (Article 131 and 132). The hearing of the child is further provided for in custody and guardianship instatement procedures (Article 155, para. 3) and in matters concerning parental rights after divorce (Article 59, para. 6). In Bulgaria, the child is not a party of the proceedings in matters of parental responsibility, including when determining his or her place of residence and the contact rights. The child is, however, a party to maintenance proceedings.

The standard for the hearing of the child in court proceedings of Article 15 CPA is further referred to in connection with child abduction cases and placement. Pursuant to Article 22a, para. 2 of the CPA, the court shall hear the child in accordance with Article 15 when an application for the return of a child or for the exercise of rights of access under the Hague Convention on the Civil Aspects of International Child Abduction is examined by the Sofia City Court. Article 28, para. 3 of the CPA includes the hearing of the child pursuant to the provision of Article 15 among the duties of the court seized with requests for placing a child with the family of relatives or friends, or with a foster family and in a social or integrated health and social service for residential care.

The last provision worth mentioning regarding the hearing of the child is Article 88 of the Social Services Act stating that all social services that implement child protection measures shall be provided in accordance with the procedure laid down in the CPA.

Unfortunately, the Code of Civil Procedure[9] and the Administrative Procedural Code[10] do not contain any rules on the factual provision of information to children. They are the main procedural instruments best known by the judges and the attorneys. Logically, the most appropriate solution would be to enshrine there all procedural aspects of the right to information of the child before, during and after the proceedings.

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[8] Promulgated, State Gazette No. 47/23.06.2009.
[9] Promulgated, State Gazette No. 59/20.07.2007.
[10] Promulgated, State Gazette No. 30/11.05.2006.

The enlisted legal sources do not constitute an exhaustive list of all hypothesis where the child is heard in civil proceedings in Bulgaria. Nevertheless, it is evident that the hearing of the child is the main core of the topic where the provision of information is attached to. The focus is put on the right to information within the procedure ending with the delivery of the decision. The exercise of that right after the decision is not expressly regulated. The general obligation to provision of information and consultancy is attributed, pursuant to Article 13 of the CPA, only to the child protection bodies, including Chairperson of the State Agency for Child Protection, the Social Assistance Directorates, the Minister of Labour and Social Policy, the Minister of the Interior, the Minister of Education and Science, the Minister of Justice, the Minister of Foreign Affairs, the Minister of Culture, the Minister of Health Care and the Mayors of municipalities. Parents and attorneys are not envisaged. Under the domestic law, the court is not obliged to inform the child about its decision save the cases when it is a party to the proceedings (for example in maintenance cases). Nevertheless, the general application of Article 39 and 41 of the Constitution and the supranational law still applies.

The abovementioned legal framework of the hearing of the child and of the right to information is further developed by the case law of the Bulgarian Supreme Court of Cassation and of the Bulgarian Supreme Administrative Court. Having in mind the case law of the supreme courts, a special attention will be paid to the main aspects of the hearing of the child, influencing inevitably the child's access to information.

Firstly, according to the quite old interpretative ruling of the Bulgarian Supreme Court of 12.11.1974 in civil case 3/74[11] the view of the child is not binding for the court, when deciding on the exercise of the parental responsibilities. The opinion, expressed by the child, is to be assessed together will all evidence and evaluated from the perspective of the best interests of the child.

Secondly, the hearing of the child is indicated as an obligation in Article 15, para. 1 CPA, when the child is above the age of 10 and no harm is suspected. According to the Supreme Court of Cassation this obligation binds not only the first instance court, but also the second instance court.[12] The omission to hear an eligible child in sense of Article 15, para. 1 CPA amounts to substantial procedural breach.[13] Nevertheless, in some cases, Bulgarian Supreme Courts consider that the hearing is not mandatory, for example, in civil procedure of partition of child's property,[14] in an administrative procedure for provision of funds for medical treat-

[11] Resolution of the Plemun of the Supreme Court № 1 of 12.11.74 in civil case № 3/74.

[12] Решение № 193 от 24.10.2019 г. по гр. д. № 4781/2018 г., Г. К., IV Г. О. на ВКС.

[13] Решение № 86 от 13.09.2016 г. по гр.д. № 4685/2015 г., Г. К., IV Г. О на ВКС. Решение № 9926 от 19.07.2018 г. по адм. д. № 13643/2017 г., III Отд. на ВАС.

[14] Определение № 602 от 26.10.2017 г. по гр.д. № 1158/2017 г., Г. К., I Г. О. на ВКС.

ment of a child abroad,[15] or in an administrative procedure for release of municipal property.[16] The lower instances tend to omit the hearing of the child when seized with an agreement on divorce and in matters of parental responsibility with the reasoning that there is no dispute anymore.[17]

Thirdly, pursuant to Article 15, para. 1 CPA the court may not fulfill the obligation to hear the child above the age of 10, only if this would prove harmful to his or her interests. The Supreme Court of Cassation interprets the latter as an exception to the general rule and, therefore, requires collection of convincing evidence. The court, intending to refuse hearing, is obliged to discuss all the facts and evidence in this regard. Its refusal to hear the child must be substantiated, so, in case of subsequent appeal of the decision, the next instance may be in the position to check its correctness. Otherwise, there is a non-fulfillment of a procedural norm, which is intended to ensure the correctness of the decision in the respective proceedings.[18] In practice, the refusal to hear the child is usually based on social report and on the evidence of the parents, where the court inclines to rely on emotional disorder,[19] difficult adaptation to the changing environment, emotional instability, introversion, rapid mood dynamics.[20]

Fourthly, as per the Supreme Court of Cassation[21] the hearing of the child, who at the time of the proceedings has not reached the age of 10, is optional and is assessed by the court in accordance with his or her maturity. In this case, the hearing may take place both at the request of one of the parties to the proceedings, or *ex officio*. The decision allowing hearing must, in any case, be substantiated.

Fifthly, children in Bulgaria are usually heard directly by the judge in the presence of social workers from the Social Assistance Directorate or in the presence of another appropriate specialist (Article 15, para. 4 CPA). The view of the children can also be found expressed in a forensic psychiatric examination, when requested. The parents are also allowed to attend the hearing (Article 15, para. 5 CPA), but, in practice, they are usually refrained to do so in matters of parental responsibility as not corresponding to the child's interests.

Sixthly, the hearing shall take place in a child-friendly environment in accordance with his/her age (Article 15, para. 4 CPA). Nevertheless, information from the practioners indicates that the children are heard in the court rooms, in judge's

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[15] Решение № 9669 от 19.07.2017 Г. По Адм. Д. № 4511/2017 г., VI Отд. на ВАС.

[16] Решение № 15490 от 22.11.2013 Г. По Адм. Д. № 9948/2013 г., III Отд. на ВАС.

[17] Определение № 793 от 06.06.2018 г. по гр. д. № 112/2018 Г. На Районен Съд – Търговище, Решение № от 16.11.2017 г. по гр. д. № 2430/2017 Г. на Районен Съд - Горна Оряховица, Решение № От 23.08.2017 г. по гр.д. № 1315/2017 Г. на Районен Съд - Горна Оряховица

[18] Решение № 86 от 13.09.2016 г. по гр.д. № 4685/2015 Г., Г. К., IV Г. О. на ВКС.

[19] Решение № 4512 от 06.11.2017 г. по гр. д. № 8118/2017 Г. на Районен съд – Варна.

[20] Решение № 134 от 13.04.2017 г. по в. гр. д. № 1007/2016 Г. на Окръжен съд-Велико Търново.

[21] Решение № 86 от 13.09.2016 г. по гр.д. № 4685/2015 Г., Г. К., IV Г. О. на ВКС.

offices and quite seldom in special "blue rooms", designated to serve a child-friendly justice.

Last but not least, before hearing, the child is to be provided with the necessary information, which would help him or her to form his or her view and to be notified about the possible consequences of his or her desire, of the opinion supported by him or her, as well as about all the decisions made by the judicial or administrative body (Article 15, para. 3 CPA). As stated above and confirmed by the practitioners' feedback in Bulgaria, the provision of information takes place after the initiation of the proceedings, most often as an introduction to the hearing of the child by the judge. The outcome of the proceedings in parental responsability matter is not brought to the attention of the children by the judge or the social worker and is left to the parents and their attorneys. The provided information varies but, most often, refers to the reasons for the hearing, the case itself, the possible consequences thereof and of the hearing, the rights of the child, the presence of other persons and the disclosure of the provided information.

3. *Relevant supranational provisions for the Bulgarian legal system*

3.1 *International Law*

Bulgaria is a contracting state to the United Nations Convention on the Rights of the Child since 1991.[22] According to Article 12 (CRC) Bulgaria undertook the duty «*to assure 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*». Bulgaria confirmed further the child's right to freedom of expression including «*the freedom to seek, receive and impart information*» pursuant to Article 13 (CRC). The right to be heard and the right to information contribute to the protection of the best interests of the child being of primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (Article 3 CRC). The General Comment Nr. 12 of 2009 elaborates in detail on the right of the child to be heard conditioned on his or her right to receive information. The provision of

[22] Promulgated, State Gazette No. 55/12.07.1991.

information is an essential part of the preparation of the child for the hearing[23] and of the feedback referring to the weight given to the views of the child.[24]

The right of the child to be heard and to be informed in Bulgaria stems also from the European Convention on the Protection of Human Rights (ECHR)[25] as interpreted by the European Court of Human Rights in conjunction with Article 8 – the right to respect for private and family live.[26]

The hearing of the child plays a significant role when applying the 1996 Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.[27] The omission to hear a child may amount to a ground for refusal of the recognition and enforcement of measures taken by the authorities of another Contracting State pursuant to Article 23, para. 2, b).[28]

The voice of the child may further motivate the judge applying the 1980 Hague Convention on the civil aspects of international child abduction[29] to refuse to order the return of the child «*if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views*» (Article 13, para. 2).

The list is not exhaustive but sufficiently shows the main international instruments that bind Bulgaria with respect to the hearing of the child.

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[23] General Comment No. 12 (2009) of the Committee on the Rights of the Child, point 41, a): *Those responsible for hearing the child have to ensure that the child is informed about her or his right to express her or his opinion in all matters affecting the child and, in particular, in any judicial and administrative decision-making process, and about the impact that his or her expressed views will have on the outcome. The child must, furthermore, receive information about the option of either communicating directly or through a representative. She or he must be aware of the possible consequences of this choice. The decision maker must adequately prepare the child before the hearing, providing explanations as to how, when and where the hearing will take place and who the participants will be, and has to take into account the views of the child in this regard.*

[24] General Comment No. 12 (2009) of the Committee on the Rights of the Child, point 45, d): *Since the child enjoys the right that her or his views are given due weight, the decision maker has to inform the child of the outcome of the process and explain how her or his views were considered. The feedback is a guarantee that the views of the child are not only heard as a formality, but are taken seriously. The information may prompt the child to insist, agree or make another proposal or, in the case of a judicial or administrative procedure, file an appeal or a complaint.*

[25] Promulgated, State Gazette No. 80/02.10.1992.

[26] See Guide on Article 8 of the European Convention on Human Rights - Right to respect for private and family life, home and correspondence, updated on August 31, 2020, https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf. See further Judgment of 16 December 1999, T. v. The UK, app. No. 24724/94 and Judgment of 24 September 2007, W.S. v. Poland, app. No. 21508/02.

[27] Promulgated, State Gazette No.15/16.02.2007.

[28] *b)* if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State;

[29] Promulgated, State Gazette No.82/16.09.2003.

In Bulgaria there is also an important free accessible source of reference elaborated by the International Social Service-Bulgaria, i.e., – a protocol for child-friendly justice, containing standards for children in civil law matters.[30]

3.2. *EU law*

At the level of the primary EU law Bulgaria is bound by Article 3(3) of the Treaty of the European Union putting forward the protection of the children's rights as an objective of the EU, as well as by Article 24 of the EU Charter of Fundamental Rights structuring the rights of the child among the fundamental rights.

Bulgaria is further bound as a participant in the judicial cooperation in civil matters by the secondary EU instruments in field of cross border family matters. The most important instruments include Regulation 2201/2003 of November 27, 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter Regulation Brussels II-*bis*) and Regulation 2019/1111 of June 25, 2019 on jurisdiction, recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (hereinafter Regulation Brussels II-*ter*). The hearing of the child plays an important role in the application of Regulation Brussels II bis as expressly stated in Recital 19 thereof and elaborated in detail in connection with the return of the child in the context of the Hague Convention on the Civil Aspects of International Child Abduction (Article 11 and Article 42).[31] The decision of another Member State may not be recognised and enforced if given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought (Article 23, letter "b"). Regulation Brussels II-*ter*, applicable since the 1st of August 2022, further straightens the right of the child to express his or her view. This right is reinforced with two special provisions – Article 21 in Chapter II "Jurisdiction" and Article 26 in Chapter III "International child abduction", both to be construed in compliance with a detailed Recital 39. Further elements of this right are to be found in Chapter IV "Recognition and enforcement" (Article 41, Article 68, Recital 57 and 71). The leading principles of the hearing of the child are enshrined in Article 21. According to it, any child who is capable of forming his or her own views shall be provided by the court exercising jurisdiction under Chapter II (and in return proceedings under the 1980 Hague Convention as per Article 26), in accordance with national law and procedure, with a genuine and effective opportunity to express his or her views. The court shall give due weight

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[30] https://www.iss-bg.org/pic/Child-friendly_justice_book.pdf

[31] See ECJ Judgment of December 22, 2010, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, Case C-491/10 PPU.

to the views of the child in accordance with his or her age and maturity (Article21 (2)), in particular when assessing the best interests of the child (Recital 39). The right of the child to express his or her view is shaped in accordance with Article 24(1) of the Charter of the Fundamental Rights of the EU and in the light of Article 12 of the UN Convention on the Rights of the Child. In this sense, Article 21 does neither provide for any minimum age, nor unify the method of hearing, leaving the questions of "who" (by a judge or by an expert), "how" (directly or through representative) and "where" (in the court room or in another place) to the national law. The same applies to the provision of information. In any case the hearing of the child is not an absolute obligation allowing the court to refrain from it due to considerations rooted in the best interests of the child, for example as it could be in cases of agreements (Recital 39).

4. *Relevant national case law*

The provision of information to children is not subject of particularly in-depth analysis in the Bulgarian case law. It is most often referred to in connection with the hearing of the child. In this sense the court decisions do not indicate anything, stating in general that the child has been provided with information[32] or go a little further clarifying the content of the provided information. In doing so, the decisions indicate, for example, that the information relates to the subject matter of the claim,[33] to the role and consequences of the expressed view,[34] or to the reason for the hearing.[35] In rare cases the decision describes the details of the provided information in the particular case.[36] In some instances, it is expressly described that the child confirmed that he or she understands the subject matter of the case.[37]

If the procedural obligation for provision of information is not fulfilled, the act of the administrative authority may be set annulled.[38] The same is true also

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[32] Определение № 531 от 27.08.2014 г. по ч. гр. д. № 674/2014 г. Районен съд - Девня.

[33] Определение № 109 от 15.01.2018 г. по ч. гр. д.№ 2329/2017 г. Районен съд - Ямбол, Решение № 127 от 17.06.2015 г. по ч. гр. д. № 340/2015 г. Районен съд - Севлиево, Определение № 2155 от 20.08.2018 г. по ч. гр. д.№ 1792/2018 г. Районен съд - Шумен.

[34] Определение № от 21.09.2018 г. по ч. гр. д. № 486/2018 г. Районен съд - Силистра, Определение № 531 от 27.08.2014 г. по ч. гр. д.№ 674/2014 г. Районен съд - Девня, Определение № 1173 от 02.06.2020 г. по ч. гр. д. № 107/2020 г. Районен съд - Сливница, Решение № 127 от 17.06.2015 г. по ч. гр. д. № 340/2015 г. Районен съд - Севлиево.

[35] Определение № от 20.11.2018 г. по адм. д. № 346/2018 г. на Административен съд – Стара Загора.

[36] Решение № 28 от 11.01.2017 Г. НА АДМС - БУРГАС по адм. д. № 1278/2016 Г. – in this decision it is expressly stated that the child has been aware of the facts and all related consequences and has expressed the desire to be placed under foster care in an institution, having in mind that his aunt does not want to take care of him.

[37] Определение № 142 от 19.02.2020 г. по ч. гр. д. № 146/2020 на Районен съд-Свищов.

[38] Решение № 190 от 11.01.2016 г. по адм. д. № 5015/2015 г. на Административен съд – София

for administrative decisions (the lack of provision of all relevant information to the child is considered as a substantial breach of the administrative procedure).[39] Unfortunately, there are decisions where the provision of information does not amount to substantial breach. The outcome is justified with the consideration that the child's view did not affect the content of the final decision and the result would be the same if the child was properly informed in advance.[40]

The Bulgarian case law concerning the hearing of the child was presented above in connection with the evolution of the right to be heard in the Bulgarian legal system: legislative provisions concerning the right to participation of the child and the right to receive information (see para. 2).

There is one new decision of the Bulgarian Constitutional Court rendered in connection to the Social Services Act. Unfortunately, in this decision, the Constitutional Court tends to construe the children's right to receive information from the perspective of the parents, the state, and the society rather than as an inherent any human right of the child. As to the substance in its decision Nr. 9 of 14 July 2020 in constitutional case Nr. 3 of 2020,[41] the Constitutional court declared Article 87 of the Social Services Act[42] unconstitutional. This article, applicable in cases where a child looks for support from a provider of social services, obliged the provider of the service to inform and consult the child in general or in connection to specific services (Article 87, para. 1 and 2). In addition, it envisaged that, if the child seeking support is under the age of 14, the service provider must immediately notify the Social Assistance Directorate (Article 87, para. 3). If the child is over the age of 14 years, the service provider must notify his or her parents only with the consent of the child (Article 87, para. 4). The Constitutional court held that, even in case where the child seeks support, when his or her parents have neglected their duties, the rights and responsibilities of the parents do not cease. If the parents do not take care or are even violent, it is necessary to provide for protection of the child in danger, including the right to contact the competent authorities directly or through social service providers. Nevertheless, the Constitutional court considers Article 87, para. 3 of Social Services Act unclear as to the guarantees that the rights of both the child and the parents will be respected. In his view the provision of Article 87, para. 4 creates a restriction for the information of the parents of children over 14 years of age, i.e., expanding the rights of the minor. The court concludes that, insofar as the Constitution does not provide exhaustively on the specific rights of

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[39] Решение № 4172 от 15.04.2015 г. по адм. д. № 12911/2014 г., VI ОТД. на ВАС, Решение № 9085 от 15.10.2002 Г. ПО АДМ. Д. № 4124/2002 Г., 5 с-в на ВАС, Решение № 80 ОТ 10.11.2009 г. по адм. д. № 448/2009 г. на Административен съд – София Град.

[40] Решение № 1045 от 29.05.2019 г. по адм. д. № 654/2019 г. на Административен съд - Варна.

[41] Promulgated, State Gazette No. 65/21.07.2020.

[42] Promulgated, State Gazette No. 24/22.03.2019.

minors, the introduction of a right of the child to seek social services without the knowledge of his or her parents would be within the competence of the legislator only if the nature of the cases is clearly specified. As the construed provision was formulated too generally and did not create clarity for the persons and institutions applying it, the Constitutional Court has the impression that minors are excluded from the regime of the constitutional rule. After this decision of the Constitutional Court Article 87 reads «*when a child has requested support from a social service provider, the provider is obliged to immediately notify the Social Assistance Directorate and the child's parents, guardian or custodian (para. 1). When the child does not provide the provider with information about his or her parents, guardian or custodian, they shall be notified by the Social Assistance Directorate (2)*». The outcome of this decision, on one hand, is that the right to receive information and consultancy is not visible when children are looking for support. Luckily, the general rule of Article 13 on information and consultation of the CPA still applies. On the other hand, the Social Services Act ignores the views of children over the age of 14, when it comes to informing the parents about the request for social services.

5. *The effectivity of the hearing as dependent on the right to receive adequate information: gaps and deficiency in the Bulgarian legal system*

The Bulgarian legal framework on the child's right to receive information as presented above proves to be satisfactory, but with room for impovement. The right to be heard and the right to information, as enshrinded in the Bulgarian Constitution and in the Child Protetion Act, are coveing all areas of law that can affect children. Nevertheless, there are some gaps and deficienecs that hinder the proper consideration of the child's view and in this sense his or her best interests.

Firstly, the provision of information to the child is provided for as an obligation for the child protection bodies (Article 13 CPA) and for the judicial and administrative authorities (Article 13 CPA). Attorneys and parents, for example, are not explicitly bound by such a duty. In addition, there is no clarity on the distribution of responsibilities between the different actors engaged with the provision of information to the child.

Secondly, from a practical point of view, it is important to regulate in detail the provision of information to the child before, during and after the judicial procedure in the main procedural codes of Bulgaria. The practiced last minute without escape provision of information, just before the hearing, has to be replaced with child-friendly involvement in advance. The respect for the child also implies the introduction of an obligation to inform him or her on the outcome of the case in a way appropriate to his or her age and maturity. A duty of the court to elaborate on the provision of information and on the hearing of the child in the decision can contribute to better protection of the interests of the child.

Thirdly, the CPA does not regulate the way for provision of information. Having in mind that in Bulgaria there are only few specialized family judges, and the fact that the judiciary system is extremely overloaded and under pressure to provide prompt justice, it is up to the abilities of the individual judge to decide how the child will be approached. It would be of help to provide for the use of child-friendly and calm language, appropriate materials, different approaches, depending on the age, maturity, and needs of the child. Regular specialized trainings for judges may also contribute to a better treatment of children when involved in judicial proceedings.

Fourthly, the child in Bulgaria is not a party to the proceedings in parental responsibility matters, including disputes concerning child abduction, determination of the child's place of residence or the contact rights. Parents, in Bulgaria, usually prefer to isolate the child from the court experience or, if he or she needs to be heard, quite often influence him. The protection of the interest of the child pursuant to the CPA is left to the social worker from the Social Assistance Directorate who, according to Article 15, para.4 of CPA, has mandatorily to attend the hearing. Nevertheless, the feedback from the practitioners shows that social workers are quite often passive leaving the child to cope alone. Additionally, the child's views may be considered by the social worker when executing the social report pursuant to Article 15, para.6 of CPA. Unfortunately, these reports quite often focus predominantly on the social living conditions and pay any or little attention to the views of the child. In this sense it is worth analyzing the establishment of the institute of the guardian *ad litem* or the use of special representatives of the child in all parental responsibility cases in Bulgaria in connection with Article 15, para.8 of CPA.

6. *Analysis of the current practices in Bulgaria*

Bulgarian legislation and case law address minor's right to information in cross-border proceedings. The general remark is that there is no special legislative rule in national Bulgarian sources to deal with the child right to information in proceedings *with cross-border* implications. The general rule is that Article 15, para.3 of CPA is operative to all cases irrespective of the cross-border nature of the law suit. The study carried out among judges and lawyers practicing in the area of child-related proceedings, shows that the general rule is applied in a similar way to cross-border proceedings as well as to purely internal ones. The general right for information is part of the right for participation of the child. The UN Committee on the Rights of the Child (UNCRC) has used the following terms to describe the right of child participation:

> *…processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.*
> *UN Committee on the Rights of the Child, (2009), General Comment no. 12 on the right to be heard.*

Under EU law, Article 24, para.1 of the EU Charter of Fundamental Rights provides that children may express their views freely, and that such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. This rule is a general one and has to be applied to all proceedings irrespective of the cross – border element. In the *Zarraga* case the CJEU interpreted the meaning of Article 24, para.1 of the EU Charter of Fundamental Rights by stating that hearing a child is not an absolute right. If a court decides it is necessary to hear the child, it must offer him or her a genuine and effective opportunity to express his or her views. It also held that the right of the child to be heard, as provided in the Charter and Brussels IIbis Regulation requires legal procedures and conditions which enable children to freely express their views and the court to obtain those views. The court also needs to take all appropriate measures to arrange such hearings, with regard to the children's best interests and the circumstances of each individual case.

In the case law of ECtHR, the right to respect for private and family life (Article 8 of the ECHR), although the right of the child to be heard in court is regarded as not being absolute, requires to be applied effectively. As a general rule, the national courts shall assess the need to hear a child in court in child-related proceedings. The need for hearing shall be assessed in light of the specific circumstances of each case, having due regard to the age and maturity of the child concerned. Irrespective whether the court finds it necessary to hear the child, as per the ECtHR, the authority shall ensure, under the procedural limb of Article 8 of ECHR, that all appropriate steps to accompany their decisions with the necessary safeguards have been taken. The procedural requirements implicit in Article 8 of ECHR could be violated by the contracting State Courts in case the decision for giving the child the opportunity to express his/her views is not based on reasoned opinion regarding the relevance and importance of child participation. In exercising their margin of appreciation the courts shall provide for the effective hearing of the child.[43]

One of the principles for hearing of the child is namely the need of/for the child to be duly informed in order to freely express his or her views. The qualitative requirement for the effective application of the right of participation is the consideration of what is in the best interests of the child. The best interest is the general test for all aspects concerning providing child with information. The conventional criterion for successfully guaranteeing the right of hearing is whether the courts' procedural approach was reasonable in the circumstances and provided sufficient material to reach a reasoned decision on the question of access in that particular case. If the answer is positive, the procedural requirements implicit in Article 8 of ECHR are complied with.

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[43] ECtHR *Gajtani v. Switzerland*, App. No. 43730/07, p.108 – 112; ECtHR, *Safin v Germany*, App. No. 30943/96, p.75 – 77; ECtHR *Sommerfeld v Germany*, App. No. 31871/96, p.72 – 74

In order to be able to participate meaningfully and genuinely, children and young people should be provided with all relevant information and offered adequate support for self advocacy appropriate to their age and circumstances. …Children and young people should always be fully informed of the scope of their participation, including the limitations on their involvement, the expected and actual outcomes of their participation and how their views were ultimately considered.[44]

Providing relevant information to the child is related to the characteristic of the right of participation being "freely" as per Article 12, para.1 of CRC. In order to be "freely" expressed, the right to be heard is subject to the necessary information provided to the child. The child shall have the opportunity to make a reasoned decision whether or not she or he wants to exercise her or his right to be heard. Providing the child with necessary information is important to avoid situations in which the child has been manipulated or instructed by parents or other involved parties – UN Committee on the Rights of the Child, (2009), General Comment no. 12 on the right to be heard, p. 10.

One of those steps is to provide child with necessary information about the right to participate in applying in an adequate way, tailored to the specific characteristics of the case:

- special treatment of the child taking into account the age and maturity as well as all behavioral and psychological aspects of child protection;
- information to be provided with adequate premises and by trained professionals;
- information to be provided in a non-discriminative way, regardless of race, ethnicity, colour, sex, language, religion, political or other opinion, national or social origin, property, disability, birth, sexual orientation or other status, social and/or economic background of the child and/or family;
- in case of judicial proceedings information provided to the child shall correspond to the requirements of the right of fair trial.

The right to be informed includes various elements in order to correspond to the criteria of Article 12 of CRC and Article 24 of the Charter:[45]

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[44] Evaluation of legislation, policy and practice on child participation in the European Union – Final report, 2015, Directorate-General for Directorate-General for Justice and Consumers (JUST), p.4.

[45] UN Committee on the Rights of the Child, (2009), General Comment no. 12 on the right to be heard, p.13: «*Those responsible for hearing the child have to ensure that the child is informed about her or his right to express her or his opinion in all matters affecting the child and, in particular, in any judicial and administrative decision-making processes, and about the impact that his or her expressed views will have on the outcome. The child must, furthermore, receive information about the option of either communicating directly or through a representative. She or he must be aware of the possible consequences of this choice. The decision maker must adequately prepare the child before the hearing, providing explanations as to how, when and where the hearing will take place and who the participants will be, and has to take account of the views of the child in this regard …. Since the child enjoys the right that her or his views are given due weight, the decision maker has to inform the child of the outcome of the process and explain how her or his views were considered*».

- requirements for the contents of the information (i.e., the right and not obligation to express the views); the type of proceedings in which the child could participate; the impact that his or her expressed views will have on the outcome; the venue, time and participants; the option for the child of either directly communicating or through a representative; the consequences of the possible refusal for participation by the child; the persons who shall help the child to express his or her position;
- requirements for the procedural and technical rules for the accomplishement of the right, including the environment in which the child feels respected and secure when freely expressing her or his opinions; the training and special qualification of the person who presents the information;
- requirements for adequacy from time-perspective provision of information (i.e., the information to be provided before, during and after the participation of the child);
- mechanisms for control by the state over the exercise of the right of information.

In the assessment of the current practices in Bulgaria regarding the right of the children to receive information in all proceedings, which concern the person or the property of the child, the present report founds its findings on two limbs: 1. the case law of Bulgarian courts and 2. the survey data collected from practicing lawyers in the field. As a general characteristic of the jurisprudence of courts, it could be outlined that the central issue in judges' reasoning is the more general topic of the right of child to be heard (whether it has been respected) and the value given to the views of the child. The right for information is only one of the procedural elements of the right to be heard as per Bulgarian legislation. It is part of the general provisions of Article 12 of CRC, of Article 24 of the Charter, of Article 21 of Regulation Brussels IIter of Article 11, para. 2 of Regulation Brussels IIbis. The legal framework in Bulgarian legislation of the right for information is the provision of Article 15, para. 3 of CPA. This rule is of general application, which is guaranteed by the legislator by other legal provisions referring to it.

First, the wording of Article 15 CPA is oriented to all cases of administrative or judicial proceedings affecting the rights and interests of a child. The rules for providing information to the child are mandatory and shall be respected by all administrative and judicial bodies. Next, the all-encompassing rule of Article 15 CPA is further referred to in many provisions dealing with specific court proceedings: Article 59, para. 6 of Family Code (claims for parental responsibility in the course of divorce proceedings); Article 138 of Family Code (all court proceedings on parental responsibility, the attribution, exercise, termination or restriction of parental responsibility, as well as all issues related to the right of custody and right of access); Article 155, para. 3 of Family Code (the designation and functions of guardians), Article 28, para. 3, p. 2 of CPA (the placement of the child in a foster family or in resident care); Article 22a, para.2 of CPA (court proceedings for return

of the child in cases of international abduction as per the Hague 1980 Abduction Convention). All special provisions use the same technique of referral to the general rule of Article 15 CPA, although its wording is applicable in all cases related to a child. This shows an overzealous effort by the legislator to stress the attention of competent administrative or judicial authorities to the mandatory and special nature of the right of child to express his/her views. Thus, in case of disrespect of the right of child to be heard, the failure to comply with law rules by the competent authority shall be out of any doubt.

However, the referral to the rule of Article 15 CPA is covering the need to respect the requirement for the mandatory hearing of the child. There is no additional provisions as to the procedural aspects of how it is to be effectuated, including the right of the child to receive information about the proceedings. The only specific rule as to providing the child with information remains Article 15, para. 3 of CPA, applicable to cross-border as well as to internal proceedings. This rule is not detailed and it satisfies the basic requirement for the right to information. There are no details in law as to how the information is to be provided: in or out of the court room; use of child-friendly materials; differentiation of the approach based on the age of the child or other features; additional requirements for providing information to children with special needs, etc. The law is clear that the person who bears the full responsibility for informing the child is the judge or administrative official in charge of the court or administrative proceedings. The role of social workers and/or psychologists in the process of providing information about the proceedings is not decisive. The hearing and the consultation of a child shall mandatorily take place in the presence of a social worker from the Social Assistance Directorate at the current address of the child and, when necessary, in the presence of another appropriate specialist. The research shows that the presence of social workers is not always used in most efficient way: the active role for informing the child is taken usually by the judge, the social worker being a witness of the process. On the other hand the absence of social worker is regarded as an obstacle to the hearing of the child.[46] Not always the court additionally appoints an expert psychologist to take part in the process of providing information to the child.[47] This is partly due to the procedural aspect since the expert psychologist or behavioral expert needs to be appointed in addition by the judge or by the administrative authority following the general rules for the appointment of expert witnesses of the Code of Civil Procedure or of the Code for Administrative Procedure. The social worker is provided by law to be present in all hearings of the child, unlike other specialists, whose presence depends on the discretion of the competent authority. In addition, as per Article 15, para. 5 of CPC the court or the administrative body

[46] Определение № 2155 от 20.08.2018 г. по ч. гр. д.№ 1792/2018 г. Районен съд - Шумен.
[47] Определение № от 21.09.2018 г. по ч. гр. д. № 486/2018 г. Районен съд - Силистра.

shall order that the hearing of the child is carried out in the presence of a parent, tutor, curator, other person who takes care of the child, or another close person known to the child, except where this does not correspond to the child's interest. In many instances, the courts use their discretion to conduct the hearing without the presence of parents due to the conflicting interests between child and parents and the negative influence that parents may exert on the free expression of child's views.[48] However, even if they are present on the hearing, parents, tutors, curators or other persons who take care of the child, are not subjects of the obligation to consult the child – the only responsible person remains the court or administrative official. The law doesn't expressly provide for the role of attorneys representing the child in the process of informing the child, including those appointed *ex officio* by the court. The study shows that the function of the child's lawyer is very important, since, many times, this is the only person who puts efforts to provide the child with the information needed to express his or her views and, especially, gives information about the events post hearing (i.e., the contents of the judicial or administrative act).

The contents of the information to be provided to the child is specified in very broad terms by law (the necessary information, which would help him or her to form his or her view and the possible consequences of the participation). This definition applied in the light of the best interests of the child creates a high threshold for the court in exercising its authority to inform the child. It covers a wide range of topics, which are related to the child forming his or her view: reason of the hearing, presence of other persons at the hearing and their role; extent of disclosure of the information provided; option of either communicating directly or through a representative; availability of procedural safeguards; behavioral rules during hearings; children's rights; background information on the case; possible outcomes of the hearing.

The efficiency of the hearing is a prerequisite for successful fulfillment of the right of child for participation, whereas the failure to meet this criterion would lead to a breach of international instruments, as mentioned above. In order the participation to be effective, information shall be provided *before*, *during* and *after* the hearing. Bulgarian legislation and jurisprudence show that, in the normal course of events, the child is consulted *only immediately* before giving him the opportunity to express his or her views. This is a deficiency of the legislation, which sometimes is cured by the efforts of the lawyers of the child. The child is not consulted until the elapse of specific period of time before the hearing, which seriously limits the utility of the overall consultation process. In practical terms, the jurisprudence shows that the judge arranges for the release of information on all topics immedia-

[48] Определение № 1173 от 02.06.2020 г. по ч. гр. д. № 107/2020 г. Районен съд - Сливница, Определение № 109 от 15.01.2018 г. по ч. гр. д.№ 2329/2017 г. Районен съд - Ямбол;

tely before the start of the court trial in the premises of the court. As a general trend the child is heard in the court room after parents and other parties leave for the participation of the child to be held.[49] In some occasions, as an exception, the child is provided with information in the cabinet of the judge,[50] in a more informal attitude and ambience. As a part of a governmental project,[51] in some courts the Ministry of justice has built so-called "blue rooms", which represent special premises, with design and furniture facilitating the contact with children. However, such special equipment designed especially for hearing children is available in limited number of courts and is not part of the general trend. Providing the child with information immediately before the start of the hearing, in many cases could not meet the level of diligence inherent for the best interest of the child who could not be able to realize and/or to deal with such complex information in just a few minutes. Practicing lawyers and judges confirm that there is a need for a change in legislation or in the practices established in this aspect by guaranteeing that in one or in several consecutive meetings the child is prepared for facing the judge or other authority.

Other general remark is the lack of consistent approach in building cooperation between the judicial or administrative authorities and the social worker/s engaged with the hearing. As per Article 15, para. 6 of CPC, the court or the administrative body shall notify the Social Assistance Agency at the current address of the child using the mechanism for service of notifications of the Code of Civil Procedure or the respective provisions of the Administrative Procedure Code. This is the general legal framework for service of documents by the courts, which is fulfilled by sending the request to the director of the social service authority to nominate a representative for the date and the hour of the hearing. In many instances, the social worker, who attends the proceedings is not known to the child, has no previous contacts with him and follows a routine. In one of the reply to the study, a practicing attorney described a case of disturbing lack of coordination between the judge and the social worker, which was resolved only due to the efforts of the lawyer to call over the phone the judge and to serve as a transmitter of the statements of the social worker. After the judge confirmed the need for the social worker's assistance, as described in the formal notification, the procedure continued. The Ministry of Justice and the Ministry of Labour, the latter being the supervising authority of Social Assistance Agency, could enact mutual protocol for coordination and communication between judges and social workers in the process of hearing the child. In the absence of new legislative framework, those soft law rules could overcome

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[49] Определение № 531 от 27.08.2014 г. по ч. гр. д.№ 674/2014 г. Районен съд - Девня, Определение № от 21.09.2018 г. по ч. гр. д. № 486/2018 г. Районен съд - Силистра

[50] Определение № от 20.11.2018 г. по адм. д. № 346/2018 г. на Административен съд – Стара Загора

[51] Bulgarian-Swiss Cooperation Program under the project *Strengthening the Legal and Institutional Capacity of the Judicial System in the Field of Justice for Children*.

the lack of requirement in the legislation for consulting the children by the social worker in one or more meetings before the day of the official hearing. The survey shows that there are no officially nationwide approved protocols for judges drafted by the Ministry of Justice with guidance as to the best behavioral practices for hearing the child, including advises on how to present the data and all necessary information in terms and language suitable for children. Some NGO are active in assisting courts and parties with providing best practices in the form of «*Protocol for child-friendly justice, containing standards for children in civil law matters*».[52]

It must be noted that, unlike many other Member States, in Bulgaria there are no specialized family or juvenile courts and children shall visit the common court houses for the hearings. Some major courts in the capital city and in some other district centers have specialized judges and/or specialized panels dealing only with family lawsuits, but they don't have separate premises or special rooms for attendance by children. Thus, when the child enters the court building and becomes part of the regular flaw of lawyers and parties on different cases, no beneficial conditions are created for the child to feel at ease to express his or her views. This is combined with the fact that necessary data has not previously being released to the child and the first time he or she receives information is by the judge, whose authority may intimidate the child.

As to consulting children in cross-border proceedings, no significant case law of Bulgarian courts was found, except for some cases on child abduction in the course of applying the 1980 Hague Convention. No instances of cross-border collection of evidence through distant hearing of the child using the tools of the Hague Evidence Convention have been found.

The questionnaires from lawyers and judges gave some interesting insights to the research, especially as concerns the current best practices that are ongoing]in Bulgarian civil proceedings and the perception that legal practitioners have on the existence, content and importance of children's right for information. The information provided in the present paragraph needs to be read together with the analysis conducted in para. 1-5 of the report.

SECTION 1 – BACKGROUND INFORMATION
This section of the questionnaire was devoted to the acquisition of certain background information of the respondents. The number of questionnaires collected is 24. The profile of respondents is the following:
Lawyers - 14
Judges - 8
Academics -1

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[52] See above note 30 – *Protocol for child-friendly justice, containing standards for children in civil law matters* – freely accessible online by the Bulgarian NGO called "International Social Service-Bulgaria".

Representative of Ministry of Justice responsible for cooperation as Central Authority under the Hague Conventions - 1
All the respondents were targeted for their specialized practice in child-related judicial proceedings. The majority of respondents has a professional experience exceeding 10 years.

SECTION 2 - GENERAL
This section contained general question on children's right to information. The scope was to have a general idea on the perception of judges and practicing lawyers on the contents and the ways of application of a general right of the child to receive adequate information in civil proceedings. Additional emphasis is added on the functioning of the right for information in cross-border cases, especially when EU instruments and international conventions were concerned.

1. In your country, is there a general obligation to provide written/oral information to children, when the dispute involves a child or is capable to affect the child's life and future? Does it depend on the age of the child? What is the main content of this information?
There is a well-established national rule in Bulgarian legislation, namely Article 15 of CPA, which requires all courts and/or administrative authorities to hear the child in the course of proceedings affecting the rights and interests of a child, in case he or she has reached the age of 10, unless this proves harmful to his or her interests. In cases where the child has not reached the age of 10, he or she may be heard depending on the level of his or her development. The decision to hear the child shall be reasoned. All respondents, judges and lawyers, are well acquainted with the obligation to hear the child. As a part of the obligation to provide for the hearing of the child, the law states that the child shall be provided with the necessary information, which would help him or her form his or her view and to inform the child about the possible consequences of his or her desire, of the shared view, as well as about all the decisions made by the judicial or administrative body.
Practice on the application of Article 15, para. 3 of CPA shows that although the mandatory requirement to hear the child is obeyed by courts, the provision of information to the child is not so effectively applied. There are no specific rules on the form in which the information is to be provided, which leaves the judges with the opportunity to make it orally. There are no or small quantities of special materials drafted and disseminated by the state in helping judges and social workers to accomplish their task to inform the child.
Since the right to provide child with information is part of the obligation to hear the child, it is applied only in cases of ongoing judicial or administrative proceedings. It is further preconditioned by the age and level of development of the child. The case law of Bulgarian courts has not established a clear set of criteria for assessing the proper level of development of the child, which qualifies for the right to be heard. The courts have a case-by-case flexible approach in assessing the right of the child to information if he or

she is below the age of 10. If the child is not qualified to be heard according to the rule of Article 15, para. 1 of CPA, no information is provided to him or her.
The jurisprudence of the courts is not firm on the right of children for information. In some instances the court makes a distinction whether the child is heard as a witness or to reveal his or hers opinion on some facts from the past or if the child is heard in order the court to rule on a matter that will determine the future of the child's being. In the first option the court can proceed without providing information to the child. However, as per Article 13 of CPA, all children are entitled to information and consultation by the child protection authorities. The study shows no cases of practical application of this general rule, not related to specific proceedings. All reported instances of informing the child were in the course of formal proceedings, whereas the general rule of Article 13 of CPA remains more as a legal guarantee not often applied in specific context.
The general assessment is that the law expressly provides for the right of child for information in the course of court proceedings, but its application is far from being settled or qualified to the best interest of the child threshold in all instances.

2. Are children informed before the start of the proceeding?
The law expressly provides that the process of informing the child is held before the hearing, not before the start of the proceedings. In many instances, children are not informed about the proceedings until they are summoned to appear before the judicial or administrative authority or until the start of the hearing. There are no established standards or rules on how to prepare the child for the hearing, including to keep him or her informed from the start of the proceedings. The general right for information and consultation by State child protection authorities could come into play (Article 13 CPA), but there are no proofs for its application. Small number of answers points toward the fact that child is always informed before the start of the proceedings. In 50% of cases the study is showing that child is not informed before the start of the hearing.

3. How long before children are informed before the start of the proceeding?
The clear majority of respondents (19 out of 24) are on the position that there is no fixed rule in law how long in advance the children to be informed. This is a reflection of the provisions of CPA, which have a lacuna on the definition of the time prior to the hearing the information is/has be provided. 15% of the answers refer to the lack of data on it.

4. Are children informed during the proceeding?
For the majority of respondents, the child is "always" (4), "often" (9) or "sometimes" (9) provided information during the proceeding. Only three respondents stated that the child is "barely" or "never" provided with information. This result is to be explained by the provision of Article 15, para. 3 of CPA, which obliges the court or administrative authority to inform the child before the start of the hearing. There is a clear difference between preliminary and ongoing, during the hearing provision of information.

5. Are children provided information after the proceeding?
The general trend is clearly leading to the conclusion that children are not at all or not adequately informed about the outcome of the proceedings, the "barely" and "never" answers being 13. Only 4 answers have opted for "often". Judges have no contact with child after the end of the hearing and, respectively, the general duty by law for providing information doesn't cover the outcome of the proceedings. The only participants in proceedings, who provide information to the child about the result are the lawyers of the parties.

6. In general, in your legal system, is there a professional that has the duty to help the child in expressing his/her opinion?
The study shows that judges and lawyers perceive the figure of the social worker as the person who has the duty to help the child expressing its views in the process. This result is directly attributable to the text of Article 15, para. 4 of CPA, according to which the hearing and the consultation of a child shall mandatorily take place in the presence of a social worker from the Social Assistance Directorate at the current address of the child and, when necessary, in the presence of another appropriate specialist. The law does not expressly provide that the social worker is entitled to assist the child, but this comes from the general obligation of child protection authorities under Article 13 of CPA.
The assessment of the utility of the presence of the social worker on the hearing are not very positive: some respondents point out that the social worker usually hasn't met with the child before the court hearing and the law provides only for the formal presence of this type of officials. Others express doubts from their experience on the qualification of the social workers.
In many cases the court, who is the addressee of the obligation to inform the child, is referred as also the professional who is entitled to inform the child. Also, the court has the power to appoint, in addition to the mandatory presence of the social worker, a court expert – child psychologist, but the study is decisive that in most cases the social worker is the only person to help the child.

If yes, is this professional neutral from the parties of the dispute and from the court institution?
The majority of respondents (9) answered positively underlining that the social worker is independent from the parties and from the court, since he or she is an official of the "Social Assistance" Municipal Directorate to the Social Assistance Agency (an Agency under the auspices of the Ministry of Labour and Social Policy). In some cases, however, there is a gap in legislation, which rebuts the presumption for impartiality of the social worker. Those are the cases where the social worker is party on the proceedings, in proceedings for relocation of the child out of the family as per Article 25 of CPA. In the latter case the social workers make the request to the court for relocation of the child out of his or her family and, at the same time, are present on the hearing of the child who in many cases, opposes to be put under resident case or under other form of care.

In cases of an expert psychologist being appointed, CPC requires the expert to declare its independence from the parties and the case (Article 196 of Code of Civil Procedure).

7. In general, and even when there is no obligation for the judge to hear the child under domestic law, does your legal system provide for an obligation to inform the child about the proceeding?
Majority of respondents answered positively to this question citing the general provision of Article 15, para.3 of CPA according to which the authority provides children with information before the start of the hearing. Some of the respondents refer to the more general provisions of the Code of Civil Procedure regarding the procedural capacity of children as parties in court cases depending of their age (Article 28, para. 4 of CPC). Thus, there is a confusion between the information provided before the specific hearing and the more general obligation for giving information to the child that some kind of proceedings have been initiated.

8. Are parents prepared or advised by courts or other public service on how to explain to children the situation and how to communicate them the outcome of the proceeding?
The majority of the answers were negative affirming that Bulgarian legislation doesn't effectively guarantee that parents are prepared by the judge or by other public institution on how to assist their children and how to explain them the situation or the outcome of the proceedings. As per Article 8, para. 2 of CPA, Directorate Social Assistance shall cooperate and help parents and all persons responsible for the child with information and guidance for all measures of protection of the child. This obligation of Directorate Social Assistance is not applied and, as a result, it is the role of parents to inform the child for the outcome of the proceedings.

9. In civil proceedings, are children provided with child-friendly material on their right to information and to be heard?
If yes, which of these materials?
If yes, are there different materials on the basis of different age categories?
There are no legal rules, nor standards or good practices enacted for giving children information materials for the right to participate in proceedings tailored to their age and development. However, more than 50% of answers are positive. In most cases, the judicial or administrative authority provides drawings and/or other leaflets. Major part of the respondents points out that social workers and judges provide all relevant information orally without any specially drafted materials.
10. If the child does not understand the local language, are there translation services or materials available in order to guarantee that the child receives proper information?
The survey shows that the right for information is backed up with translation services in case the child does not understand Bulgarian language. The guarantees for it are twofold – 1. There is a general requirement, as per Article 4, para. 2 of CPC, for the court to appoint an interpreter if the party on the proceedings is not in command of Bul-

garian language; 2. In Article 15, para. 4 of CPA a special rule is enacted for the court to appoint appropriate specialist to take part in the hearing of the child (this specialist could be an interpreter). The result of the study shows that there are no deficiencies in assuring translation services to guarantee that the child receives proper information.

11. Is information adequately provided also to children with special needs? How?
Special rules for access to justice are enacted for children with special needs in Article 65 to 67 of the Bulgarian Law on People with Special Needs. People with special needs have access to consultations regarding the ongoing proceedings, as well as to personal assistant helping them to take part in the court hearings. The judicial authority may appoint so-called assisting person in order to facilitate the access to justice. Majority of respondents are on the position that the law and practice are in line with the requirements of children with special needs.

SECTION 3: PROCEEDINGS ON PARENTAL RESPONSIBILITY
This section is dedicated to proceedings on matters of parental responsibility that, therefore, fall into the scope of application of Regulation (EC) No. 2201/2003 (as well as the Regulation (EC) 2019/111 that will enter into force in 2022). This section is of direct interest for the application of EU instruments in the field of judicial cooperation in civil matters.

12. In parental responsibility proceedings, is the child heard before issuing a decision on the merits (either directly, or through a representative or an appropriate body)?
In parental responsibility proceedings, the general rule of Article 15, para.1 of CPA regarding the requirement for hearing the child is additionally emphasised through the special rules of Article 59, para. 6 (divorce proceedings), Article 138 (parental responsibility proceedings), Article 155, para. 3 (proceedings for appointment of guardian or curator), all of them referring to Article 15 of CPA. Bulgarian legislator is cautious in guaranteeing the child involved in parental responsibility proceedings the right to express his or her views. The study is unambiguous that the right of participation of children in this kind of proceedings is fully implemented.

13. Who hears the child? If the child is heard by the judge, is the judge assisted by a psychologist or an expert?
As per Article 15, para.1 of CPA the hearing of the child is mandatory in case the child has reached the age of 10. The court has the discretion to refuse to hear the child if this could be in his or her detriment. In cases where the child has not reached the age of 10, he or she may be heard depending on the level of his or her development. The decision to hear the child shall be reasoned.
As per Article 15 of CPA the judge is the person hearing the child in the mandatory presence of a social worker from the Social Assistance Directorate at the current address of the child and, when necessary, in the presence of another appropriate specialist. On many cases, judges appoint psychologists paid by the state budget to take part

in the hearing and to preliminary meet the child (in the presence of parents or alone with the child) in order to establish a psychological assessment of the child. The court determines the tasks of the expert to be addressed. Thus, on the hearing controlled by the judge, a social worker as well as a psychologist could be present to help the child express his or her views. The audition is always directed by the judge.

Does one of the parents (or both parents) attend the hearing?
Majority of respondents point out that, as a principle, the presence of parents on the hearing is required and they are summoned by the judge unless it is contrary to the interests of the child. In some instances, Article 15, para.5 of CPA provides that the presence of parents could prevent the child to freely express his or her view and the court could decide to lead the hearing only in the presence of the social worker and/or psychologist. The parents could stay close to the child in adjacent room. The court or the administrative body shall order that the hearing of the child takes place in the presence of a parent, tutor, curator, other person who takes care of the child, or another close person known to the child, except where this does not correspond to the child's interest.

14. Is the hearing usually preceded by a phase in which the child is provided information?
How is the information provided?
When is the information provided?
The information is normally provided by the judge immediately before the start of the hearing in the premises of the court (in the court room or in a specially suited ambience called "blue room"). The law doesn't specify a period before the hearing when the information shall be released, and the practice of courts is not to summon the child on a separate meeting before the hearing. Thus, the effectiveness of the information given to the child could be impaired, since it is not realistic that the possibility to assess the data and possible options by the child could be fulfilled in a period of few minutes. In some cases, the social worker prepares the child for the hearing giving him information for it. Social workers have a general obligation to inform children for their rights as per Article 29, para.1 of the Rules on Application of CPA.

What is the content of the information?
This question was given multiple answers, whereas they cover all aspects of the information provided like: reason of the hearing, presence of other persons at the hearing, professionals' functions, extent of disclosure of the information provided, availability of procedural safeguards, behavioural rules during hearings, children's rights, background information on the case, possible outcomes of the hearing, as well as all other type of information that the authority could consider relevant (for example, about the right to have the absence from school of the child excused, etc.). In most cases, the judge gives the child information on the reasons for the hearing, the possible outcome of the hearing and a general description of the case at hand. The content of the information is not predetermined by law. Considering the above-mentioned answers, according to which it is usually the judge to give information

to the child, it is possible to infer that the content of the information is determined by the judge on a case-by-case basis.

Are children informed at the beginning of the audience that their opinion is important but they won't be responsible of the final outcome of the proceedings?
The result of the survey is that, definitely, the child, as a principle, is informed before the start of audience, that his or her opinion is important and that the final decisions is to be made by the court. There is no data as to what is the depth and complexity of the accomplishment of this task by the authority.

15. Is the hearing usually followed by a phase in which the child is provided feedbacks and information about the following steps?
Bulgarian courts have no special procedure to inform the child about the outcome of the proceedings. After the end of the procedure, judicial authorities only send a notice to the representative of the child (parents, guardians, lawyers) about the act that has been pronounced following the general rules of civil procedure. There is no rule of law about the mechanisms of cooperation between the courts and social workers in informing the child about the outcome of the proceedings. Some social workers take the necessary steps to keep the child updated following the general requirement to consult the child as per Article 13 of CPA. However, the study demonstrates that, habitually, it is up to the parents/guardian or lawyers to inform the child about the outcome. In four cases, respondents stated that the child is "never" provided with this kind of information. Three times the answer was "sometimes", and nine times the answer was "barely".

16. Do you usually provide information to children together with a person they trust? Who is this person?
As per Article 15, para.5 of CPA, the court or the administrative body shall order that the hearing of the child shall take place also in the presence of a parent, tutor, curator, other person who takes care of the child, or another close person known to the child, except where this does not correspond to the child's interest. In most cases, the court organises the hearing in the presence of parents except when this could be contrary to the interests of the child. The share of opinions on the survey that no person of trust to the child is present is significant (half of the answers). As per the case law, in many occasions the court decides that the hearing shall take place only in the presence of a social worker and a psychologist since the parents' interests could be conflicting or contrary to those of the child.
17. After the judge has issued a decision on the merits, who informs the child about the outcome of the proceeding (i.e., the decision and its consequences)?
How is this information provided?
Normally, it is the lawyers of the parties, or the parents, who have the role to inform the child about the decision on the merits (majority of responses on the survey). The reported answers show that there is no fixed rule about the modalities under which this kind of information may be provided. The general rules of civil procedu-

re require that every party is informed about the final decision on the merits of the proceedings. If the child is under the age of 14, he or she is represented by law by the parents or by guardians in the proceedings and all notices for the outcome of the case are addressed and sent to the representatives and not to the child (Article 28, para.4 of CPC). It is a settled practice for the judge to point out in the court decision that the child is entitled to legal aid or counselling about the appeal.

Section 4: International child abduction
This section makes reference to international child abduction proceedings and to return proceedings. The section comprehends proceedings for the return of the child under the 1980 Hague Convention, and also return applications following a decision of non-return, according to Article 11 of the Regulation (EC) No 2201/2003. The hearing of the child – as well as the necessary procedural guarantees – may be difficult in the context of child abduction proceedings, where the court has to act expeditiously and shall take a decision on return or non-return within six weeks. Providing assistance and proper information to the child, could in general constitute an even greater challenge for courts and practitioners, since the collaboration of the parent that is taking care of the child is not always guaranteed. Also, the high degree of urgency of those proceedings may constitute another important obstacle.

18. In international child abduction cases, is the child heard before the decision of (non)return in international child abduction cases under the 1980 Hague Convention on the Civil aspects of International Child Abduction (and, when applicable, the EC Regulation No 2201/2003 – from August 2022, Regulation EU 2019/1111)? The national legal frame supplementing the rules of the 1980 Hague Convention on the Civil Aspects of International Child Abduction is contained in the Children Protection Act (Article 22a to Article 22g). There is a special rule of Article 22a, para. 3 of CPA, which refers to the general rule for hearing the child (Article15 of CPA). The requirement to hear the child is observed (there is a positive unanimous answer by all respondents). Some of the participants in the study cite the rules of Article 11, para.2 of Regulation No 2201/2003 as well as those of Article 13, para.2 of 1980 Hague Abduction Convention. The courts are on the view that in abduction cases it is crucial to understand the view of the child, which is a potential ground as per Article 13, para.2 of 1980 Hague Abduction Convention to refuse the return of the child.

19. Who hears the child?
If the child is heard by the judge, is the judge assisted by a psychologist or an expert?
Does one of the parents (or both parents) attend the hearing?
As per Article 22a of CPA there is one nationwide competent court for all cases of child abduction claims as per the 1980 Hague Abduction Convention (i.e., the Sofia City Court). The judges are well specialised in hearing the child and the general requirements for the mandatory presence of social workers, as per Article 15, para.4 of CPA, is observed. If needed, the courts appoint an expert psychologist.

The presence of a state prosecutor is also provided for by law: he has the function to control and safeguard the procedure regarding the protection of the best interests of the child.
The study shows that, in most cases, the legal requirement of a parent or guardian of the child to be present on the hearing is applied unless the court deems that the abducting parent or the claimant could influence and impair the child's free expression of view.

20. Is the hearing usually preceded by a phase in which the child is provided information?
Who provides the information to the child? How is the information provided? When is the information provided?
The clear majority of answers to the study is that the judge arranges for providing the child with information, following the rule of Article 15, para.1 of CPA, before the start of the hearing. The information is given orally, without special procedure, by the judicial authority assisted by the social worker and, on occasions, by a psychologist. There is a routine to hear the child in the cabinet of the judge, outside the court room and without the presence of abducting parent and the claimant.
This question allowed for multiple answers, whereas they cover all aspects of the information provided like: reason of the hearing, presence of other persons at the hearing, professionals' functions, extent of disclosure of the information provided, availability of procedural safeguards, behavioural rules during hearings, children's rights, background information on the case, hearing's possible outcomes as well as all other type of information that the authority could consider relevant (for example about the right to have the absence from school of the child excused, etc.). In most cases the judge gives the child information on the reasons for the hearing, the possible outcome of the hearing and a general description of the case at hand.
The content of the information is not predetermined by law. Considering the answers above-mentioned, according to which it is usually the judge to give information to the child, it is possible to infer that the content of the information is decided by the judge on a case-by-case basis.

Are the children informed at the beginning of the audience that their opinion is important, but they won't be responsible of the final outcome of the proceedings?
The prevalent opinion is that the child is informed about the value of sharing its view with the deciding authority. However, in five cases the answer is "sometimes". There is no special attention to the detail that the child won't be responsible for the final outcome.

21. If a decision of return is issued, is the child informed about the decision? If the answer is YES, how is the child informed? By whom? ('Decision of return': decision adopted under article 11 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, ordering the immediate return of the child in the State of habitual residence)

There is no special rule of Bulgarian legislation for informing the child for the return pronounced by the court. As per Article 528, para. 4 of CPC, in proceedings for enforcement of return order, the bailiff could ask the Social Assistance Directorate to issue measures for assistance as per Article 23 of CPA in arranging for the voluntary return of the child. Possible measures are the consultation and provision of information by the social worker to the child.
Also, in most occasions, it is the lawyer of parties who has the role to inform the child about the outcome of the return order.

22. If a decision of return is issued, is the child prepared and informed about the enforcement of a return order? If the answer is YES, how is the child informed? By whom?
The result of the survey is negative: 11 out of 15 answers point out that the child is not prepared for the enforcement of the return order. The above-mentioned procedure of Article 528 CPC is sometimes applied. Habitually, it is the social worker who enters into contact with the child and prepare him or her for the execution of the return order. Rarely, a psychologist intervenes at the enforcement stage.

Section 5: Maintenance proceedings
The general obligation to hear the child as per Article 15 of CPA is relevant in maintenance disputes. The law is clear that the judge shall assure for the participation of the child in all proceedings that affect his or her rights and interests, irrespective whether the maintenance case is a separate one or the court is seized simultaneously with divorce or parental responsibility claims. The fact that the child is a party on the lawsuit being the claimant of maintenance, shall not prejudice its right to participation. However, since the law presumes for the need of the child to have maintenance offered, most judges don't find it necessary to hear the child in order to pronounce the decision on the merits.

23. When proceedings on maintenance or child support are celebrated outside a divorce/separation/marriage annulment proceeding, is the judge under an obligation to hear the child?
Yes. The respondents in the survey are definitely on the opinion that the general requirement of Article 15, para.1 of CPA is applicable and, if the child has reached the age of 10, a hearing shall take place. If the child has reached the age of 14 years, as per the general rules of civil procedure (Article 28, para.4 of CPC), he or she is entitled to act before the court with the approval of the parent or guardian.

24. Is the hearing usually preceded by a phase in which the child is provided information? Who provides the information to the child? How is the information provided? When is the information provided? What is the content of the information?
The clear majority of answers to the study is that the judge arranges for providing the child with information following the rule of Article 15, para.1 of CPA before the start of the hearing. The information is given orally without special procedure by the judi-

cial authority assisted by the social worker. The social worker, who is in charge for presenting a report on the needs of the child, conducts one or more meetings with the child before the court hearing. During those meetings, the social worker informs the child about the upcoming hearing and describes him or her the details about the participation. This question allowed for multiple answers, whereas they cover all aspects of the information provided, like: reason of the hearing, presence of other persons at the hearing, professionals' functions, extent of disclosure of the information provided, availability of procedural safeguards, behavioural rules during hearings, children's rights, background information on the case, hearing's possible outcomes as well as all other type of information that the authority could consider relevant (for example about the right to have the absence from school of the child excused, etc.).
The content of the information is not predetermined by law. Considering the above-mentioned answers, according to which it is usually the judge to give information to the child, it is possible to infer that the content of the information is decided by the judge on a case-by-case basis and it is mainly related to the need of the child for financial support.

Are the children informed at the beginning of the audience that their opinion is important but they won't be responsible of the final outcome of the proceedings?
There is no firm opinion on whether the child is informed about the value of sharing its view with the deciding authority. The positive and negative answers are almost even. There is no special attention to the details that the child won't be responsible for the final outcome.

SECTION 6: SPECIAL REPRESENTATIVE OR SPECIAL CURATOR OF THE CHILD
The study shows high certainty in respondents about the right of children to have appointed special person to represent them in court proceedings being guaranteed by the Civil Procedure Code, that is, an attorney registered with the National Bureau for Legal Aid on the expenses of the court. As per Article 15, para.8 of CPA, the child has a right to legal aid and right to file an appeal in all proceedings affecting his or her rights or interests. The entitlement to legal aid through representation by a lawyer is depending on whether the child is a party on the proceedings. Examples of the child being a party on the proceedings are: maintenance cases, establishment of parenthood, the contestation of the parent-child relationship, placement of the child under foster care or under institutional protection, and issuance of protection orders related to domestic violence. Where the child is only appearing to express its view and he or she is not a party on the proceedings (divorce proceedings, parental responsibility cases), he or she is not entitled to have appointed a special representative. There is additional rule for instances of conflict between the interests of the child and the parent/guardian/curator, when the latter is the representative of the child for the specific procedure (as per the general rule of Article 28, para.4 of CPC, children under 14 are represented before the court by their parents/guardians/curators). As per Article 29, para.4 of CPC, in case of conflict between the interests of the representative and the party, the court assigns the task to defend the child to

a special representative, i.e., a registered attorney, providing legal aid. Also Article 129, para.2 of Family Code provides for appointment of a special representative in all deals and legal relations, when interests of the parent and those of the child are conflicting.

25. In your country, has the child the right to be separately represented in civil proceedings?
If the answer is YES, please list the proceedings, as well as the relevant legal provisions, in which the child has the right of separate representation.
In general, the child has the right of separate representation before the court in civil proceedings (through a special representative, i.e., an attorney) when there is a situation of conflict of interests between the child and its representative/s by law (parents, guardians, curators). The answers collected make difference as to whether the child is a party on the proceedings and there are conflicting interests with the parents/guardians/curators or the child is not a party and there is no conflict of interests. In the first situation the study clearly comes to the conclusion that the child has the right to access to a special representative on expenses of the court budget.

In these cases, does this representation include the specific duty to provide the child with adequate information about the object, the scope and the possible outcomes of the proceeding?
The majority of respondents affirm that there is no special duty for the attorney appointed by the court to provide children with information (13 out of 20 answers). Five practitioners referred to the general obligation of Article 15, para.3 of CPA. However, the cited legal provision expressly obliges with the duty to inform only the judge or the administrative officer and not the special representative.

If the child is heard during the proceeding, has the representative the duty to prepare the child for the hearing?
The special representative appointed for the judicial proceedings has to perform his professional tasks as a lawyer in the proceedings with due care, but he or she has no separate or express obligation to prepare the child for a hearing.

26. In your country, is there the possibility to appoint a special curator or a guardian ad litem of the child in civil proceedings involving him/her?
If the answer is YES, please list the proceedings, as well as the relevant legal provisions, in which the appointment of the special curator or the guardian ad litem is foreseen:
In those cases, what are the main duties and responsibilities of the special curator or of the guardian ad litem?
The respondents didn't recognise the legal figure of a special curator or that of a guardian ad litem, since there are no such figures in Bulgarian legislation. All answers refer to the special representative in civil proceedings, that is, an attorney, appointed for the respective case to protect the interests of the child. As per Article

29, para.4 of CPC, in case of conflict between the interests of the representative by law and the party, the court assigns the task to defend the child to a special representative (a registered attorney, providing legal aid). Also Article 129, para.2 of Family Code provides for appointment of a special representative in all deals and legal relations, when the parent has conflicting interests with the child. Some participants in the study make reference to the general rules for determination of guardian of the child, who doesn't qualify for special guardian ad litem.

SECTION 7: FINAL CONSIDERATIONS

27. Have you ever had a specific training for professionals on children's rights and/or how to protect and fulfil the best interests of the child in civil proceedings?
Majority of respondents have taken part in educational initiatives and trainings to practitioners about children's' rights in proceedings and about the protection of the best interests of the child. Those professional trainings are more general in context and scope with no special focus on the children's right for information in cross-border civil proceedings.

28. Have you ever had a training on child-friendly language for informing children?
29. Have you ever had a training on how to explain parents how to inform their children about proceedings?
30. Have you ever had a training on child-friendly behaviour to relate to children involved in proceedings?
With very few exceptions, almost no practitioners took part in specialised trainings on the way to inform children how to exercise their right to participation in civil proceedings, including the requirements for the language and communicational skills used or for the proper ambience.

31. What do you think can be done in order for children to receive complete and adequate information about the proceeding that concerns them in your country?
This question was addressed by majority of respondents, and a number of proposals for specific measures were put forward:
- To fill the legislative gaps about the specific procedure and requirements on the way to provide information to children. This could be done via changes in the Children Protection Act as well as by drafting a set of practices to be endorsed by the Supreme Judicial Council and by the Children Protection Agency. Detailed law provisions should be drafted to specify the mandatory scope of the information to be given to children and the time limits for it, including the roles and responsibilities for presenting the outcome of the proceedings.
- Reform aiming at the establishment of specialised juvenile courts and/or specialised juvenile chambers in the structure of existing courts.
- Legislative changes towards the institution of lists of specially trained and qualified attorneys, who could be appointed as special representatives of children and/or provide legal aid to children.

- *The State Child Protection Agency to draft, edit and distribute to courts and to social workers special materials helping the provision of information to children in the form of internet sites, comics, books, tables, movies.*
- *Improvement of the ambience in which the child is heard by creating more special facilities in court houses in order to diminish the cases in which the child is summoned to the court room.*
- *Mandatory special training of judges and of social workers regarding the proceedings of providing information to children.*
- *Introducing requirement for mandatory presence of psychologists during hearing of children.*
- *Improvement of coordination between different stakeholders judiciary, social workers, attorneys, representing the child in the form of new specially enacted rules). Current Child Commissions as per Article 20a of CPA could be a starting point for this development.*
- *To enact codes of conduct for social workers and judges for the accomplishment of the task of preparing the child for the hearing time enough before the actual proceedings.*
- *To strengthen the case law regarding mandatory reversal of judgements pronounced in breach of the rules for informing the children in the process of expressing his or her views.*

32. Is there any other aspect that has been omitted in this survey and that you think is relevant for the purpose of this research?
The preponderant number of respondents are on the position that the study covers all relevant aspects and possible flaws in the process of informing minors in exercising their right to participation in cross-border civil cases.
Several practical inputs were raised in order to amplify the scope of the survey, which, after analysis, could be qualified as suggestions for enactment of new measures. The first one is to record on video the hearing of the child in order to help the judge and parties and to eliminate possible second hearing on topics covered by the child in the first one. The second proposal is to expressly define by law a maximum number of hearings of the child in the course of single proceedings, especially is cases of domestic violence order cases.
Some of the respondents put forward the possible amplification of the study towards the activities of social workers before the hearing in informing, consulting, and preparing the child to express his or her views.

7. *Conclusions*

The children's right to information in Bulgaria is known and well applied in the practice institute. It is closely linked to the right of the child to express his or her view during all proceedings concerning children's rights and interests. Bulgaria is legally bound by the supranational standards stemming from the UN Con-

vention on the Rights of the Child, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the primary and secondary instruments of the EU law. The right to information about all proceedings affecting the child is guaranteed by an express provision of Bulgarian legislation, which requires all judicial and/or administrative authorities to provide details to the child for the hearing. Judges are assisted by the mandatory presence of social workers during the child participation. Although some differences in the routine of courts in various regions of the country, in general, social workers are required to meet the child before the hearing and to assist the judge in the proceedings to follow. In many instances, courts don't hesitate to additionally appoint an expert psychologist to be present on the hearing.

Nevertheless, Bulgaria faces some difficulties in the proper application of the hearing of the child and in the provision of information in all judicial proceedings affecting his or her rights and interests. The provision of information to the child is not an explicit obligation for parents and attorneys: it is only incumbent to the authority but it is not regulated in detail in respective procedural laws. There are no rules setting the way of provision of information. The child is most often informed shortly before the hearing about the subject matter of the case, the reason for the hearing and the role of the shared view. The provision of information to the child about the final outcome is not well settled in law and this task is most often fulfilled by the lawyers of the parties. The hearing of the child outside the court tends to lack substance. Under the Bulgarian law the child is quite seldom a party to the proceedings and the protection of his or her interests at the end of the day is usually left indirectly to the parents and to the child itself.

Despite some gaps and shortcomings, the development in Bulgaria in the last 30 years shows a tendency to increase the standards of child protection. The outcome of MiRI project can be used to maintain this trend.

CHAPTER 4

CHILDREN'S RIGHT TO INFORMATION IN CIVIL PROCEEDINGS IN FRANCE

Samuel Fulli-Lemaire

The present report aims to present the results of the research carried out in France for the purposes of the *MiRI – Minor's right to information in EU civil actions* (JUST-JCOO-AG-2018) project.

The study focused on both the relevant rules and judicial practice, as far as it can be ascertained. The various statutory rules and related case law have been gathered, translated as appropriate, and presented in a systematic manner. Information on judicial practice has been sought in two directions. First, a translation into French of a questionnaire drafted by the project coordinators has been disseminated among practitioners. The information derived from the exploitation of the replies has been supplemented by references to the results of recent empirical studies conducted in France.

The report comprises an overview of the children's right to information in civil proceedings in France (1), followed by a description first of the relevant framework (2) and then of judicial practice (3). On this basis, a critical assessment will be presented (4).

1. *Overview: the children's right to information in civil proceedings in (the French) context*

1.1. *The involvement of children in civil proceedings and its implications*

In French legal writing, the specific challenges that arise when children are involved in civil proceedings are usually divided into two main categories, depending on whether the child is a party to the proceedings or merely has an interest in the proceedings.[1]

When the child is – or rather would be if he/she were an adult – a party to the proceedings, the focus is very much on the implications of his/her lack of capacity. In principle, the child is represented by his/her legal guardians, who normally are the child's parents, but the court can appoint another person in their place if it deems it to be in the child's interest, for instance if the parents die or lose parental authority. An *ad hoc* guardian can also be appointed when the interests of the minor seem to conflict with those of his/her legal guardians, either for the duration of a specific proceeding[2] or for a more sustained period of time.[3] Whichever configuration is involved, the guardian acts on behalf of the child, who will consequently not appear directly in the proceeding.[4] This makes the issue of the child's access to information vanish somewhat artificially, or rather it is to be assumed, absent a legal rule to that effect, that it falls on the guardian to provide the child with all necessary information. The issue of information thus only comes up, and obliquely at that, in relation to the rare instances where the law gives legal standing to the child himself/herself. This happens, for instance, when the child is in danger, is a parent himself/herself, or in some situations if he/she is over 16 years of age.[5] A child who finds himself/herself in one of these admittedly circumscribed situations is entitled to – or sometimes must have – a lawyer of his/her own[6] and it is assumed that this lawyer will provide the child with the information that is relevant to the proceedings at hand.[7] Naturally, adult litigants should also be able to rely on their lawyers for such information, but representing children is a uniquely challenging task, particularly when it comes to communication, and the legal profession has

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[1] See A. GOUTTENOIRE, *Répertoire de procédure civile*, V° *Mineur*; *Les modes de participation de l'enfant aux procédures judiciaires*, in *Droit de la famille* (hereafter *Dr. fam.*), 2006, étude 29.

[2] A form of guardianship *ad litem* provided for by art. 388-2 of the French Civil Code (hereafter CC).

[3] See art. 383 CC.

[4] A. GOUTTENOIRE, V° *Mineur*, cit., n° 166.

[5] For an overview, see A. GOUTTENOIRE, V° *Mineur*, cit., n^{os} 211-247.

[6] The expenses will be covered by legal aid under Law n° 91-647 of July 10, 1991 (*Loi n° 91-647 du 10 juillet 1991 relative à l'aide juridique*).

[7] A. GOUTTENOIRE, V° *Mineur*, cit., n° 260. Again, no legal provision addresses this issue and it does not seem to have come up in case law.

undertaken various efforts to ensure that at least some of its members are specially trained. As these efforts are relevant to the legal representation of children generally, that is to say whether or not the child is party to the proceeding at hand[8], they will be addressed later on.

The report will otherwise focus on the situation where the child, while not party to a judicial proceeding, nonetheless has an interest in it. In this context, the child is entitled to be heard and to representation by a lawyer, and for this dual purpose the child is entitled to some information.

1.2. *Historical development of the French framework*

The development of the French framework, such as it is, has been driven by the increasing protection of children's rights at supranational level.[9] With respect to the right to information, a preliminary step has been the implementation of the right to be heard in judicial proceedings. Formerly, the law only provided for this in scattered provisions, for instance in adoption proceedings or when the child's parents divorced.[10]

The ratification of the 1989 United Nations Convention on the Rights of the Child (or New York Convention) was then a turning point, as its article 12.2 provides that, for the purpose of the child's right to express his/her own views freely in all matters affecting him/her, when he/she is capable of forming such views, "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". The entry into force of the Convention, in 1990, thus made a reform of the French rules of civil procedure necessary, and it was enacted by a 1993 law[11] which created a general framework for the hearing of children in all proceedings relating to them in article 388-1 of the Civil Code.

A few years down the line, the shortcomings of this original framework were thrown into sharp relief by subsequent international instruments, this time at European level. The first is the 1996 European Convention on the Exercise of Children's Rights (or Strasbourg Convention),[12] which lists and enshrines various ri-

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[8] For an overview, see M. Picot, *L'avocat de l'enfant*, in *Dr. fam.*, 2006, étude 37.

[9] P. Bonfils, A. Gouttenoire, *Droit des mineurs*, Paris, 2nd ed., 2014, n° 1137 et seq.

[10] B. Mallevaey (ed), *Audition et discernement de l'enfant devant le juge aux affaires familiales – 55 recommandations pour améliorer la participation de l'enfant aux décisions judiciaires le concernant au sein de sa famille*, 2018, p. 14 (report available at http://www.gip-recherche-justice.fr/wp-content/uploads/2019/02/16.32.Rapport-final-ADEJAF.pdf, last accessed on January 25, 2021).

[11] *Loi n° 93-22 du 8 janvier 1993 modifiant le Code civil relative à l'état civil, à la famille et aux droits de l'enfant et instituant le juge aux affaires familiale.*

[12] The Convention was signed by France that same year, but it would not come into force until January 1, 2008, see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/160/signatures?p_auth=8MAqd9Z8 (last accessed on January 25, 2021).

ghts derived from the child's right to be heard during proceedings affecting him/her and conducted before a judicial authority. These, crucially, include the rights "to receive all relevant information" (art. 3, a) and "be informed of the possible consequences of compliance with these views and the possible consequences of any decision" (art. 3, c), thus linking the two rights.[13] The other instrument which played a major role in shaping the French rules on the hearing of children in civil proceedings is the Brussels IIA Regulation of 2003,[14] which refers to such a possibility in four provisions (art. 11, 23, 41, 42).[15] The Regulation, however, does not refer directly to the right to information. Another reform thus appeared indispensable if the national rules were to be brought in line with the country's international commitments, and it was carried out by the combination of a 2007 law[16] which modified article 388-1 CC and a 2009 ministerial decree[17] which introduced several additional provisions (art. 338-1 et seq.) in the Code of Civil Procedure (hereafter CCP).[18] These, which have barely been amended since then, remain the only relevant statutory and regulatory provisions in the French legal order.

1.3. *Essential features of the French framework*

It should be emphasized at this point that the child's right to information in civil proceedings in general, let alone in cross-border cases specifically,[19] regrettably

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[13] See also article 6, b) of the Strasbourg Convention.

[14] Council Regulation (EC) No 2201/2003 of November 27, 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

[15] Interestingly, the Brussels II Regulation (Council Regulation (EC) No 1347/2000 of May 29, 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses) already included, among the grounds of non-recognition, the fact that the foreign judgment "was given, except in case of urgency, without the child having been given an opportunity to be heard […]" (art. 15, 2), (b)), but this provision does not seem to have received much attention. The same could be said of the reference to the child's objection "to being returned" in article 13, § 2, of the 1980 Hague Convention on the Civil Aspects of International Child Abduction.

[16] *Loi n° 2007-293 du 5 mars 2007 réformant la protection de l'enfance*.

[17] *Décret n° 2009-572 du 20 mai 2009 relatif à l'audition de l'enfant en justice*.

[18] For an overview, see L. FRANCOZ TERMINAL, *Le nouveau régime de l'audition en justice de l'enfant concerné par une procédure judiciaire*, in *Droit. fam.*, 2009, étude 30.

[19] Nothing relevant appears, for instance, in the *Répertoire de droit international*'s entry on the rights of the child (F. MONÉGER, V° *Droits de l'enfant*), even in the section dedicated to the rights of the child to be heard and represented in the context of judicial proceedings (nos 99-104). For their part, publications dealing with the hearing of children within the framework of international instruments tend to focus on the role played by the wishes of the child, and in particular on the weight which should be attached to them by the judge when reaching his/her decision, see U. MAGNUS, P. MANKOWSKI (eds), *European Commentaries on Private International Law (ECPIL), Vol. IV – Brussels IIbis Regulation*, Köln, 2017, V° *Article 11*, n° 16 et seq., V° *Article 23*, n° 23, V° *Article 41*, n° 27, and V° *Article 42*, n° 19; A. GOUTTENOIRE, *L'audition de l'enfant dans le règlement « Bruxelles II bis »*, in H. FULCHIRON, C. NOURISSAT (eds), *Le nouveau droit communautaire du divorce et de la responsabilité parentale*, Paris, 2005, p. 201; P. Klötgen, *La portée juridique donnée à la parole de l'enfant*, p. 337, and A. GOUTTENOIRE, *La parole de l'enfant enlevé*, p. 349, in H. FULCHIRON (ed), *Les enlèvements d'enfants à travers les frontières*, Bruxelles, 2004.

does not appear to be a major concern in France. This is hardly surprising however, given that, as already explained, the child's right to be heard in judicial proceedings, of which the right to information is both a key component and an indispensable prerequisite,[20] has itself only come to the fore fairly recently. In this respect, it appears significant that neither right is constitutionally protected in France.[21]

The general or default rules implementing the child's right to be heard in judicial proceedings affecting him/her are to be found first in article 388-1 CC, the first paragraph of which provides that "in any proceeding that concerns him/her, a minor capable of discernment may, without prejudice to the provisions providing for his/her intervention or consent, be heard by the court or, if his/her interest so requires, by the person appointed by the court for this purpose".[22] The general regime, then, must be combined with the rules specific to various particular procedures.[23] These include proceedings with regard to *assistance éducative*,[24] proceedings pursuant to the 1980 Hague Convention or the Brussels IIA Regulation, proceedings involving a legal guardian appointed instead of the parents,[25] and adoption proceedings.[26] As these special rules do not deal directly with information provided to the child, but typically make it compulsory rather than possible that the child be heard, they will not be discussed further, with one important exception.[27] It should, however, be kept in mind that as a result the general regime applies at first instance before both family law courts (*juges aux affaires familiales* or *JAFs*), which have general jurisdiction over family law matters, and specialised children's courts (*juges des enfants*), who deal with *assistance éducative*.

Within the general rules, the issue of information is addressed by article 388-1 CC, § 4, which provides that "the court shall verify that the minor has been informed of his/her right to be heard and assisted by a lawyer". This should be read in connection with the further rules contained in the Code of Civil Procedure,[28] which make clear that while the burden of providing the minor with this information rests with his/her parents or legal guardian (art. 338-1 CCP, § 1), it will also be mentio-

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[20] See part 2.1 below.

[21] P. Bonfils, A. Gouttenoire, *Droit des mineurs*, cit., n° 1151.

[22] The translations of French statutory or regulatory provisions contained in this report are provided by the author.

[23] For an overview, see A. Gouttenoire, V° *Mineur*, cit., n° 116 et seq.

[24] This protective regime for at-risk children involves the monitoring and support of children who are left in the care of their families, see art. 375 CC. et seq.

[25] See art. 1234 CCP et seq.

[26] See. art. 345 and 360 CC.

[27] It regards the recently introduced out-of-court divorce, see part 2.2. below. Another minor exception is art. 1192 CCP, which provides that when an appeal is lodged against a first-instance judgment in matters of *assistance éducative*, the child must be informed together with the other parties if he/she is over 16 years of age.

[28] See part 2.2 below.

ned in the various summons which will be issued and sent to the child (art. 338-1 CCP, § 2-3; 338-6 CCP, § 2, as applicable).

It should also be noted that the judge may entrust an independent third party, with past or current relevant professional experience, with the task of hearing the child (art. 338-9 CCP). This possibility, like the emphasis on providing children who so desire with the assistance of their own lawyers, could be construed as inspired, at least in part, by a determination to ensure in this context the effectivity of the children's right to information. Even if this proposition is accurate, however, it remains unacknowledged by the legislator, the courts and academics alike.[29]

This very basic body of rules, furthermore, has not been supplemented by case law, as very few cases have centered on the information provided to a child, or lack thereof. This only serves to emphasize the relevance of incorporating input relative to judicial practice. Indeed, there is some evidence to suggest that, in practice, the system operates in a way that is more respectful of the child's right to information in civil proceedings than could otherwise be feared.

2. *The French framework regarding the children's right to information in civil proceedings*

2.1. *Supranational rules and guidelines*

As already mentioned, the most directly relevant provisions at supranational level are articles 3 and 6 lit. b) of the European Convention on the Exercise of Children's Rights, in that they are the only texts which explicitly refer to a right to information in judicial proceedings:[30]

> *[A]rticle 3 – Right to be informed and to express his or her views in proceedings*
> *A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights:*
> *a) to receive all relevant information;*
> *b) to be consulted and express his or her views;*
> *c) to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.*

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[29] The Ministerial Circular of 3 July 2009, which is a non-binding text, is an exception, see part. 2.3 below. See also, regarding the assistance of a specially trained lawyer, B. MALLEVAEY (ed), *Audition et discernement de l'enfant devant le juge aux affaires familiales – 55 recommandations pour améliorer la participation de l'enfant aux décisions judiciaires le concernant au sein de sa famille*, cit., pp. 112-113.

[30] Or, rather, the only provisions that are *binding* on France. Otherwise, article 6 of the 2003 Council of Europe Convention on Contact Concerning Children, in particular, would have to be included.

And

[A]rticle 6 – Decision-making process
In proceedings affecting a child, the judicial authority, before taking a decision, shall: […]
b) in a case where the child is considered by internal law as having sufficient understanding:
– ensure that the child has received all relevant information;
– consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child;
– allow the child to express his or her views; […]

These two texts link the right of the child to information and his/her right to be involved, and more specifically heard, during civil proceedings. Provisions which enshrine only the latter are consequently also relevant, albeit in an indirect way. The most significant of these is, naturally, article 12 of the New York Convention, which provides that:

[A]rticle 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.

The second paragraph, which according to the *Cour de cassation* has direct effect,[31] in turns connects the right of the child to be heard with the rights of the child to express his/her views freely, and to have those views taken into account. In an even more roundabout way, then, article 24, § 1, of the Charter of Fundamental Rights of the European Union could also be brought into play:[32]

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[31] *Cass. civ. 1re*, 18.05.2005, n° 02-20.613. The court, reversing previous rulings, stated for the first time that a provision of the New York Convention had direct effect, see A. GOUTTENOIRE, V° *Mineur*, cit., n° 13.

[32] It famously was brought into play by the Court of Justice of the European Union when interpreting article 42 of the Brussels IIA Regulation, see CJEU, Case C491/10 PPU, 22.12.2010, *Aguirre Zarraga*. That case, however, does not directly touch upon the issue of the information that should be provided to the child.

> *[C]hildren shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*

The rights enshrined in the European Convention on Human Rights (ECHR), for their part, have not featured significantly in French debates. Still, in the light of the previous discussions, the right to a fair trial protected under article 6 could be brought into the debate, as well as possibly the rights to respect for private and family life and to freedom of expression, which are protected under articles 8 and 10 respectively.[33]

Turning to soft law instruments, the Committee on the Rights of the Child has stated, in its General Comment No 12 (2009) on the right of the child to be heard (§ 48), that:

> *[T]he child's right to be heard imposes the obligation on States parties to review or amend their legislation in order to introduce mechanisms providing children with access to appropriate information, adequate support, if necessary, feedback on the weight given to their views, and procedures for complaints, remedies or redress.*

The same year, the Parliamentary Assembly of the Council of Europe expressed, in its Recommendation 1864 titled "Promoting the participation by children in decisions affecting them" (§ 7), the view that:

> *[C]hildren must therefore be listened to and allowed to participate in decisions in all fields, especially […] access to justice and the administration of justice. Additional efforts are needed to ensure that children are allowed to express their opinions freely during judicial and administrative proceedings in a climate of respect, trust and mutual understanding. When promoting a meaningful participation by children, […] children should have access to child-friendly information, appropriate to their age and to their situation.*

The subsequent Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2011) tackle the issue of information fairly extensively and detail the kind of information that should be provided to children "before, during and after judicial proceedings". Information on the substantive rights of children as well as, broadly speaking, "the system and procedures involved" should be "provided to children in a manner adapted to their age and maturity, in a language which they can understand and which is gender and culture sensitive".

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[33] For a discussion of the European Court of Human Rights cases which could be relevant to the issue at stake, see the Italian National Report. The cases that come closest to touching upon the issue of the information which should be made available to children, however, concern criminal proceedings.

2.2. *Statutory provisions and ministerial decrees*

The statutory rules and those enacted by ministerial decree are to be found in the French Civil Code and Code of Civil Procedure. As explained above, two articles of the Civil Code may be relevant if the child is a party to the proceedings, with the latter providing for the appointment of a guardian *ad litem*:

> *[A]rticle 383 CC, § 1*
> *When the interests of the legal guardian or, as the case may be, of the two legal guardians, conflict with those of the minor, the former shall request that the guardianship court[34] appoint an ad hoc guardian. If there is a lack of diligence on the part of the legal guardians, the court may proceed with the appointment upon the request of the public prosecutor, of the minor himself or herself, or ex officio[35]*

> *[A]rticle 388-2 CC, § 1[36]*
> *When, during a proceeding, the interests of a minor appear to conflict with those of his legal representatives, the guardianship court, as provided for under article 383 or, failing that, the court hearing the case, shall appoint an ad hoc guardian tasked with representing the minor.[37]*

When the child merely has an interest in the proceeding, the relevant provision in the Civil Code, which includes some of the general rules relating to the hearing of the child, is:

> *[A]rticle 388-1 CC*
> *In any proceeding that concerns him or her, a minor capable of discernment[38] may, without prejudice to the provisions providing for his or her intervention or consent, be heard by the court or, if his or her interest so requires, by the person appointed by the court for this purpose.*
> *The minor is entitled to be heard. If he or she refuses to be heard, the court may assess the merits of this refusal. The minor may be heard alone, or with the assistance*

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[34] When children are involved as opposed to vulnerable adults, the competence of the guardianship court is entrusted to the general family law courts (*JAF*).

[35] *Lorsque les intérêts de l'administrateur légal unique ou, selon le cas, des deux administrateurs légaux sont en opposition avec ceux du mineur, ces derniers demandent la nomination d'un administrateur ad hoc par le juge des tutelles. A défaut de diligence des administrateurs légaux, le juge peut procéder à cette nomination à la demande du ministère public, du mineur lui-même ou d'office.*

[36] The *Cour de cassation* has ruled that, in principle, a guardian *ad litem* should be appointed when the proceeding aims at contesting a parent-child relationship, see *Cass. civ. 1re*, November 6, 2013, n° 12-19.269.

[37] *Lorsque, dans une procédure, les intérêts d'un mineur apparaissent en opposition avec ceux de ses représentants légaux, le juge des tutelles dans les conditions prévues à l'article 383 ou, à défaut, le juge saisi de l'instance lui désigne un administrateur ad hoc chargé de le représenter.*

[38] On this criterion, see part. 4.1 below.

of a lawyer or of a person of his or her choice. If this choice does not appear to be in the minor's interest, the court may appoint another person.
The hearing does not make the minor become party to the proceeding.
The court shall verify that the minor has been informed of his or her right to be heard and assisted by a lawyer.[39]

The other relevant provisions are found in the Code of Civil Procedure:

[A]rticle 338-1 CCP
The minor capable of discernment shall be informed, by his or her legal guardian or guardians or, as the case may be, by the person or body he or she has been entrusted to, of his or her right to be heard and assisted by a lawyer in all proceedings that concern him or her.
When proceedings are instituted by means of an application, the summons to attend the hearing shall be accompanied by a notice containing the text of article 388-1 of the Civil Code and of the first paragraph of the present article.
When proceedings are instituted by means of a submission served by writ by a court officer, the notice mentioned in the previous paragraph shall be enclosed with the submission.[40]

[A]rticle 338-4 CCP
When the request [to be heard] is made by the minor, a refusal can only be based on the minor's lack of discernment or the fact that the proceeding does not concern him or her.
When the request [for the minor to be heard] is made by the parties, the court may also refuse if it deems it unnecessary to hold a hearing in order to decide the case or if it deems it contrary to the interest of the minor.

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[39] *Dans toute procédure le concernant, le mineur capable de discernement peut, sans préjudice des dispositions prévoyant son intervention ou son consentement, être entendu par le juge ou, lorsque son intérêt le commande, par la personne désignée par le juge à cet effet.*
Cette audition est de droit lorsque le mineur en fait la demande. Lorsque le mineur refuse d'être entendu, le juge apprécie le bien-fondé de ce refus. Il peut être entendu seul, avec un avocat ou une personne de son choix. Si ce choix n'apparaît pas conforme à l'intérêt du mineur, le juge peut procéder à la désignation d'une autre personne.
L'audition du mineur ne lui confère pas la qualité de partie à la procédure.
Le juge s'assure que le mineur a été informé de son droit à être entendu et à être assisté par un avocat.

[40] *Le mineur capable de discernement est informé par le ou les titulaires de l'exercice de l'autorité parentale, le tuteur ou, le cas échéant, par la personne ou le service à qui il a été confié de son droit à être entendu et à être assisté d'un avocat dans toutes les procédures le concernant.*
Lorsque la procédure est introduite par requête, la convocation à l'audience est accompagnée d'un avis rappelant les dispositions de l'article 388-1 du code civil et celles du premier alinéa du présent article.
Lorsque la procédure est introduite par acte d'huissier, l'avis mentionné à l'alinéa précédent est joint à celui-ci.

The minor and the parties may be informed of the denial by any means. In all cases, the reasons for the denial shall be mentioned in the decision on the merits.[41]

[A]rticle 338-6 CCP
The court registry or, as the case may be, the person appointed by the court to hear the minor shall issue him or her, by simple letter, with a summons to attend the hearing.
The summons shall inform him or her of his or her right to be heard alone, or with the assistance of a lawyer, or of a person of his or her choice.
On the same day, the parties' lawyers and, failing that, the parties themselves, shall be informed of the forms in which the hearing will take place.[42]

[A]rticle 338-7 CCP
If the minor requests the assistance of a lawyer yet does not select one himself or herself, the court will require, by any means, that a lawyer be appointed by the chairperson of the bar.[43]

[A]rticle 338-9 CCP, § 1 and 2
If the court considers that the interest of the child requires it, it shall appoint to conduct the hearing a person who must not have any ties with either the minor or the parties.
That person must have past or current experience in the social, psychological or medical-psychological fields.[44]

Besides the general regime, the rules in matter of divorce must be included. In 2016, the legislator chose to break with the long-standing conception of divorce as a court order exclusively, by taking consensual divorces out of court as a matter

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[41] *Lorsque la demande est formée par le mineur, le refus d'audition ne peut être fondé que sur son absence de discernement ou sur le fait que la procédure ne le concerne pas.*
Lorsque la demande est formée par les parties, l'audition peut également être refusée si le juge ne l'estime pas nécessaire à la solution du litige ou si elle lui paraît contraire à l'intérêt de l'enfant mineur.
Le mineur et les parties sont avisés du refus par tout moyen. Dans tous les cas, les motifs du refus sont mentionnés dans la décision au fond.

[42] *Le greffe ou, le cas échéant, la personne désignée par le juge pour entendre le mineur adresse à celui-ci, par lettre simple, une convocation en vue de son audition.*
La convocation l'informe de son droit à être entendu seul, avec un avocat ou une personne de son choix.
Le même jour, les défenseurs des parties et, à défaut, les parties elles-mêmes sont avisés des modalités de l'audition.

[43] *Si le mineur demande à être entendu avec un avocat et s'il ne choisit pas lui-même celui-ci, le juge requiert, par tout moyen, la désignation d'un avocat par le bâtonnier.*

[44] *Lorsque le juge estime que l'intérêt de l'enfant le commande, il désigne pour procéder à son audition une personne qui ne doit entretenir de liens ni avec le mineur ni avec une partie.*
Cette personne doit exercer ou avoir exercé une activité dans le domaine social, psychologique ou médico-psychologique.

of principle.[45] This, however, is subject *inter alia* to the absence of opposition from the spouses' minor children:

> *[A]rticle 229-2 CC*
> *The spouses may not mutually consent to the divorce in a private deed countersigned by their lawyers if:*
> *1° The minor, informed by his or her parents of his or her right to be heard by the judge under the conditions of article 388-1, requests a hearing; […]*[46]

This provision is supplemented by two articles in the Code of Civil Procedure:

> *[A]rticle 1144 CCP*
> *The information provided for under article 229-2 of the Civil Code, 1°, is achieved by means of a form addressed to each of the couple's minor children, which mentions the child's right to be heard by the judge under the conditions of article 388-1 as well as the consequences of this choice on the remainder of the proceedings.*

The template form will be specified by a ministerial order of the Minister for Justice.[47]

> *[A]rticle 1144-2 CCP*
> *The divorce settlement agreement, if applicable, mentions that the information provided for under article 229-2 of the Civil Code has not been delivered for lack of discernment on the part of the minor child involved.*[48]

The relevant ministerial order[49] contains the following template form:

> *My name is [first name and surname]*
> *I was born on [date of birth]*

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[45] See art. 229-1 CC et seq.

[46] *Les époux ne peuvent consentir mutuellement à leur divorce par acte sous signature privée contresigné par avocats lorsque:*
1° Le mineur, informé par ses parents de son droit à être entendu par le juge dans les conditions prévues à l'article 388-1, demande son audition par le juge: […]

[47] *L'information prévue au 1° de l'article 229-2 du code civil prend la forme d'un formulaire destiné à chacun des enfants mineurs, qui mentionne son droit de demander à être entendu dans les conditions de l'article 388-1 du même code ainsi que les conséquences de son choix sur les suites de la procédure.*
Le modèle de formulaire est fixé par arrêté du garde des sceaux, ministre de la justice.

[48] *La convention de divorce mentionne, le cas échéant, que l'information prévue au 1° de l'article 229-2 du code civil n'a pas été donnée en l'absence de discernement de l'enfant mineur concerné.*

[49] *Arrêté du 28 décembre 2016 fixant le modèle de l'information délivrée aux enfants mineurs capables de discernement dans le cadre d'une procédure de divorce par consentement mutuel par acte sous signature privée contresigné par avocats, déposé au rang des minutes d'un notaire*, NOR: JUSC1633188A.

I have been informed that I have a right to be heard, either by the court or by a person appointed by the court, so that my feelings may be taken into account for the purpose of organizing my relationships with my parents who wish to divorce.
I have been informed that I have a right to be assisted by a lawyer.
I have been informed that I can be heard alone, or with the assistance of a lawyer or of a person of my choice, and that an account of the hearing will be provided to my parents.
I have understood that, as a result of my request, the divorce of my parents will be brought before a court.
I request to be heard:
YES NO
Date
Signature of the child[50]

2.3. *Ministerial circulars*

In the aftermath of the reform enacted by the 2007 law and 2009 decree,[51] the Minister for Justice released a Ministerial Circular[52] which aimed at providing further explanations regarding the framework that had just been set up. Even though this is a non-binding text, the guidelines it contains can be regarded as influential, particularly over judges who are its intended audience. Besides, the text offers insight into the thinking behind the reform. The Circular is particularly interesting in two respects.

First, it provides an explicitly non-exhaustive list of the civil proceedings to which the general rules implementing the child's right to be heard apply. These includes proceedings in matters of parental responsibility, whether they involve only the parents or third parties as well, and whether or not they are conducted in the

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[50] *Je m'appelle [prénoms et nom]*
Je suis né(e) le [date de naissance]
Je suis informé(e) que j'ai le droit d'être entendu(e), par le juge ou par une personne désignée par lui, pour que mes sentiments soient pris en compte pour l'organisation de mes relations avec mes parents qui souhaitent divorcer.
Je suis informé(e) que j'ai le droit d'être assisté(e) d'un avocat.
Je suis informé(e) que je peux être entendu(e) seul(e), avec un avocat ou une personne de mon choix et qu'il sera rendu compte de cette audition à mes parents.
J'ai compris que, suite à ma demande, un juge sera saisi du divorce de mes parents.
Je souhaite être entendu(e):
OUI NON
Date
Signature de l'enfant.

[51] See part 1.2. above.

[52] *Circ. DACS n° CIV/10/09, 211-7 C1/2-2-7/MLM du 3 juillet 2009*, *Journal du droit des jeunes*, n° 295, 2010/5, pp. 46-48 (available for instance at: https://www.cairn.info/revue-journal-du-droit-des-jeunes-2010-5-page-46.htm, last accessed on January 26, 2021).

context of a divorce; applications made by the parents to change their matrimonial property regime;[53] proceedings in matters of filiation;[54] and tort claims where the child has suffered damage.[55] The omission of maintenance proceedings from the list has been noted, and is broadly supported as a matter of principle because of their purely financial character, and because the minors are not directly creditors.[56] It remains possible, however, that a court might exceptionally deem it appropriate or necessary to hold a hearing.[57] On the whole, this part of the Circular only reinforces the impression that family law courts are the main (civil) actors when it comes to child hearings.

Then, and more importantly for the present purpose, the Circular addresses the issue of the information which must be provided to children. In this second respect, several points made in the text are enlightening. For instance, the Circular explains the rationale of entrusting the child's legal guardians with the delivery of information, as provided for under article 338-1 CCP, § 1: "these persons, who are tasked with attending to the child on a day-to-day basis, seem best equipped to communicate with him or her using language which is attuned to his or her level of understanding".[58] Likewise, the requirement under various provisions of the Code of Civil Procedure that communication between the court and the parties include a notice containing the text of article 388-1 CC and of the first paragraph of article 338-1 CCP, is framed as an attempt to help the legal guardians discharge their obligation satisfactorily. The Circular also reminds judges that they must verify that the required information has indeed been delivered to the child. This, or so the text continues, can be effected either by the legal guardians submitting a signed statement to the effect that the child has received the information and elected not to request a hearing, or – in the case of oral proceedings – by the judge asking them direct questions. Finally, the Circular endeavours to remind judges of the emphasis placed by the Brussels IIA Regulation on giving the child an opportunity to be heard, and the correlative importance of evoking this issue in the rulings. A model

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[53] The dominant view is critical of the inclusion of these proceedings in the scope of the art. 388-1 CC framework. Even though a change to the parents' matrimonial property regime might indeed, in time, affect the child's financial situation, the causal relationship appears too weak, see P. Bonfils, A. Gouttenoire, *Droit des mineurs*, cit., n° 1178.

[54] The Circular also refers to the child's application to change his or her first name, but this matter has now been diverted out of court, see article 60 CC.

[55] In such a case, the child would be party to the proceeding were it not for his/her lack of capacity, which entails that the claim will be brought by his/her legal guardian on his/her behalf. There is however little doubt that he/she has "an interest" in the proceeding.

[56] CA Aix en Provence, Septembre 25, 2014, RG n° 13/22303.

[57] For a discussion of this issue, see B. MALLEVAEY (ed), *Audition et discernement de l'enfant devant le juge aux affaires familiales – 55 recommandations pour améliorer la participation de l'enfant aux décisions judiciaires le concernant au sein de sa famille*, cit., pp. 33-39.

[58] *Ayant la charge quotidienne de l'enfant, ces personnes apparaissent les plus aptes à lui parler dans un langage adapté à son degré de compréhension*.

draft for the dedicated part of the judgments has even been made available, or so the Circular says, on the department of judicial services'[59] intranet.

This preoccupation with compliance with EU requirements is also perceptible in another, earlier Ministerial Circular, dealing specifically with the hearing of children within the scope of the Brussels IIA Regulation.[60] In that text, which was adopted and circulated in 2007, the Minister for Justice encouraged judges to specify in their judgments, whenever children "capable of discernment" had not been heard, that they had been informed of their right to be heard and had declined to exercise it. The Circular reminded judges only afterwards that they should verify that the children involved had indeed received the information they were entitled to under French law, to which the EU instrument refers back.[61]

2.4. *Soft law documents at national and local levels*

Yet one step lower on the normativity scale, various soft law documents must be briefly described. One is the *Charte nationale de l'avocat d'enfant*, subsequently renamed the *Charte nationale de défense des mineurs*, which is a country-wide Charter adopted in 2008 by the Conference of the Bar Chairpersons (*la Conférence des bâtonnier*) and which aims to emphasize the specificities of the legal representation of children and set out guidelines.[62] Even though the Charter is firmly focused on criminal proceedings, the hearing of children and article 388-1 CC are mentioned, as is the necessity of providing the child with information relating both to the general framework of the lawyer's intervention and to the case at hand.[63] Together with the creation of a "children's law" (*droit des enfants*) specialisation, which is recognized by the profession, and with the rise of dedicated professional

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[59] The *Direction des services judiciaires* or *DSJ*.

[60] *Circ. DACS n° 2007-06 du 16 mars 2007 relative à l'audition de l'enfant pour l'application du règlement « Bruxelles II bis » concernant les décisions sur la responsabilité parentale* (available at: http://www.textes.justice.gouv.fr/art_pix/boj_DACS_16%2003%2007.pdf, last accessed on January 26, 2021).

[61] *Dans l'hypothèse où l'audition n'a pas été souhaitée par les parents ni demandée par l'enfant luimême, le visa des dispositions de l'article 3881 pourrait donc s'accompagner d'une formule ainsi rédigée: « Cependant, les parties n'ont pas souhaité faire usage de cette possibilité eu égard à l'absence de conflit sur les dispositions concernant le mineur. Par ailleurs, ce dernier, informé de son droit à être entendu, n'a pas fait de demande en ce sens ». Il paraît à cet égard nécessaire que les débats devant le juge aux affaires familiales permettent de vérifier que même en cas d'accord entre les parents sur les modalités d'exercice de l'autorité parentale, les enfants ont été avisés de leur droit d'être entendus.*

[62] A virtually definitive version was published in the *Journal du droit des jeunes*, n° 275, 2008/5, pp. 42-46, available at: https://www.cairn.info/revue-journal-du-droit-des-jeunes-2008-5-page-42.htm (last accessed on 26.01.2021).

[63] *L'avocat explique son rôle au mineur, en fonction du cadre juridique de son intervention et les limites de celles-ci. […] L'avocat informe le mineur du contenu de son dossier, des procès verbaux, des rapports...*

training,[64] this suggests that lawyers are determined to share the burden of implementing the children's right to information.[65]

The other relevant soft law instruments, which build on the 2008 Charter among other sources, are agreements concluded locally between judges sitting in first-instance family law courts and lawyers specialising in the legal representation of children. These agreements, sometimes referred to as protocols, contain guidelines on best practices relating to the hearing of children. The impetus for their adoption seems to have been provided by the 2007 / 2009 reform, since the framework that was set up on that occasion was not devoid of gaps or ambiguities, few of which have been remedied since then.[66] It is difficult to know or estimate how many such agreements exist, but a research group funded by the *Mission de recherche Droit et Justice*,[67] and which released in 2018 a major report on the hearing of children before family law courts, has gained access to 18 of them.[68] An earlier survey,[69] conducted by two Paris-based lawyers and which consisted of a questionnaire which was answered by 24 *JAFs*, had gained access to one and become aware of a further 9.[70]

When it comes to the children's right to information, it seems that the agreements broadly reflect the statutory framework, with the addition of guidelines regarding the drafting of submissions (see art. 338-1 CCP above) aimed at lawyers. Another recurring feature is a pre-filled template which the parents are invited to use when attesting that they have provided their children with the information they are entitled to. The agreement concluded in Montpellier, furthermore, also provides for additional information to be communicated to the parents, more specifically to the effect that the possibility to hear the child exists in the interest of the child and in order to enforce his/her rights. As a result, the parents are reminded that the decision of whether or not to conduct a hearing belongs primarily to the child, together with the judge.[71] Several agreements also provide that, if a hearing

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[64] See A. GOUTTENOIRE, V° *Mineur*, cit., nos 248-251.

[65] See also D. ATTIAS, *L'avocat d'enfants et l'audition de l'enfant devant le juge aux affaires familiales*, in *AJ Famille* (hereafter *AJ Fam.*), 2009, p. 330.

[66] See part 1.2 above.

[67] The *Mission de recherche Droit et Justice* (http://www.gip-recherche-justice.fr/) is an entity co-founded by the French Ministry of Justice and the National Centre for Scientific Research (CNRS) with the aim to fund and support research on topics related to the law and to the justice system.

[68] B. MALLEVAEY (ed), *Audition et discernement de l'enfant devant le juge aux affaires familiales – 55 recommandations pour améliorer la participation de l'enfant aux décisions judiciaires le concernant au sein de sa famille*, cit., pp. 24-25.

[69] A. KARILA-DANZIGER, I. COPÉ-BESSIS, *Quelles pratiques juridictionnelles du JAF en matière d'audition des mineurs ?*, in *AJ Fam.*, 2014, p. 15.

[70] The agreement concluded in Paris was published in *AJ Fam.*, 2014, pp. 18-20, alongside the links to various other agreements.

[71] B. MALLEVAEY (ed), *Audition et discernement de l'enfant devant le juge aux affaires familiales – 55 recommandations pour améliorer la participation de l'enfant aux décisions judiciaires le concernant au sein de sa famille*, cit., pp. 69-70.

takes place, the child should be informed that what he/she tells the judge will be shared, in some form, with the parties to the proceeding, which will often comprise his/her parents.[72]

2.5. *Case law*

Case law concerning the children's right to information is surprisingly scarce, and what little can be found does not support the view that this particular right is robustly enforced in France.

In one notable judgment,[73] the *Cour de cassation* ruled that the general regime structured around art. 388-1 CC applied only to hearings before the court, to the exclusion of expert appraisals. The implication, naturally, is that when the judge commissions an appraisal by an expert, the child need not be informed about his/her right to be heard and assisted by a lawyer. Compelling though this distinction between court hearings and expert appraisals may be in the abstract, it becomes blurred when the court delegates the conduct of the hearing to a third party, as it is entitled to do under articles 388-1 CC, § 1, and 338-9 CCP.[74] Only the legal basis for the appointment can, thus, distinguish an expert appraisal from a hearing delegated to a third party under art. 388-1 CC.[75]

The guarantees afforded to children under the general hearing regime have also been undermined in other ways. First, the *Cour de cassation* has stated that while the failure on the lower court's part to check that the child has indeed received the information he/she is entitled to does constitute a "violation" of article 388-1 CC, this did not provide an adequate basis to challenge an interlocutory judgment ordering that a biological test be performed, as the lower court had not exceeded its powers.[76] Then, the *Cour de cassation* has, on occasions, shown itself to be somewhat easily satisfied that the requirements of article 388-1 CC had been met.[77] The Court has, lastly, proved reluctant to accept that the child's parents could invoke an infringement to the child's right to information, given that the burden of providing that information rests in the first place on them.[78] Again, this

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[72] In order to comply with the principle that both sides must be heard (*audi alterem partem* principle), see *Ibid*., pp. 137-138.

[73] *Cass. civ. 1re*, March 23, 2011, n° 10-10.547.

[74] For the translation of these provisions, see part 2.2 above.

[75] P. Bonfils, A. Gouttenoire, *Droit des mineurs*, cit., n° 1171.

[76] *Cass. civ. 1re*, October 6, 2010, n° 09-16.335.

[77] *Cass. civ. 1re*, October 26, 2011, n° 10-19.674, in which the Court inferred from the facts that the child knew about the proceeding, and had written to the court in order to present his position, without however requesting to be heard, that he had been informed of his right to be heard and to be assisted by a lawyer.

[78] *Cass. civ. 1re*, September 11, 2013, n° 12-18.543; *Cass. civ. 1re*, September 28, 2011, n° 10-23.502. The Court also rules at regular intervals that the argument drawn from the minor's lack of information cannot be raised for the first time before it; in other words, this argument is inadmissible if it has not previously been raised before the lower courts. See, among many others, *Cass. civ. 1re*, June 26, 2019, n° 18-19.017; *Cass. civ. 1re*, June 26, 2013, n° 12-17.275.

reasoning is logical up to a point, but it also means that very few consequences, if any, are attached to an infringement of the child's right to information.

3. *The children's right to information in judicial practice*

3.1. *Summary of the replies to the questionnaire*

A translation into French of the questionnaire drafted by the MiRI project coordinators has been disseminated among practitioners in various ways (posts on social media and several specialised blogs, targeted email campaigns, direct communication to the French Ministry of Justice…). Despite these efforts over a sustained period of time, only four completed questionnaires were received back, with quite concise, if not brief, answers. More positively, the profiles of the respondents are fairly varied: one judge with over 10 years of experience, and three lawyers, two of whom with an experience of between 1 and 5 years, and the third of between 5 and 10 years. The answers, nonetheless, are broadly consistent, which should not necessarily be taken to mean that they reflect well on the reality of the French system. Unfortunately, three of the completed questionnaires include input on Belgian law as well as on French law, while the compatibility with French law of other answers appears doubtful.

Taken together, these observations suggest that the task of exploiting the replies should be approached with caution, and that they lend themselves to a presentation in synthetic rather than systematic form. Broadly speaking, then, the answers submitted confirm the central role played, in all the areas of the law surveyed,[79] by the general rules branching out from article 388-1 CC. As a result, courts enjoy a significant degree of discretion, even though the best interest of the child looms large. The possible appointment of an *ad hoc* guardian and the possibility for the child to be assisted by his or her own lawyer in some circumstances[80] seem well known, but are not always sufficiently distinguished, particularly when it comes to their respective legal bases.

But what makes the answers provided to the questionnaire striking is how often they consist of "I don't know" or "there are no fixed rules". Children only "sometimes" receive information before the proceedings and "rarely" afterwards, even when a return order is given! Similarly, there seems to be no clarity regarding the timeline according to which information is delivered, or even regarding the person who delivers it. These sore points are balanced, to a limited extent, by the

[79] The answers do reflect the ambiguous situation of maintenance proceedings in this respect, see part 2.3 above.

[80] As already explained, this is in principle excluded when the child is party to the proceeding as a result of his/her lack of capacity, see part 1.1 above.

fact that, when information is communicated before or during the proceeding, it seems to be fairly comprehensive. In the same vein, cases involving children with special needs or who do not speak French seem to be handled reasonably well.

The last section of the questionnaire also elicited some answers which are of interest. While half of the respondents report having followed a training course on children's rights, none have been trained in communication techniques specific to children or parents. Perhaps unsurprisingly at this point, the answers to the last but one question express dissatisfaction with the *status quo*. This takes the form of calls for clearer guidelines or legislative reform.

3.2. *Other input*

This ambivalent image is, by and large, corroborated by the 2018 report supported by the *Mission de recherche droit et justice* and the 2014 survey.[81] Three points, among many, stand out from the interviews conducted by the authors with family law court judges.

Firstly, the judges who answered the 2014 survey reported that the parents who were summoned to court were systematically reminded of their obligation to provide their children with information, and that this reminder virtually always took the form of a mention of the content of art. 388-1 CC. But while the majority of these judges also stated that they paid attention to whether the applications and other procedural documents lodged by parents contained a reference to the information received by the children, the absence of such a reference seems to be devoid of consequences save in a minority of cases, and even then, it seems to result only in a stay of proceedings aimed at having the parents remedy their omission.[82]

Secondly, several judges mentioned the pre-filled template which, in accordance with the agreements applicable before their respective courts, the parents were invited to use when attesting that they had provided their children with the information they were entitled to under art. 388-1 CC.[83] All the judges interviewed by the authors of the 2018 report, strikingly, admitted to taking these written state-

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[81] See part 2.4 above.

[82] A. Karila-Danziger, I. Copé-Bessis, *Quelles pratiques juridictionnelles du JAF en matière d'audition des mineurs?*, cit., p. 15. This is corroborated by that survey's twin study, i.e. a review of 256 judgments, mostly unpublished, rendered by 22 courts of appeal between July 1, 2012 and June 30, 2013 in matters of terms and conditions for exercising parental authority when the parents are separated. Few of these judgments mention how the information the children are entitled to under art. 388-1 CC had been provided to them, see L. Briand, *L'audition du mineur devant le JAF: examen des arrêts d'appel*, in *AJ Fam*., 2014, p. 22.

[83] A. Karila-Danziger, I. Copé-Bessis, *Quelles pratiques juridictionnelles du JAF en matière d'audition des mineurs?*, cit., p. 15; B. Mallevaey (ed), *Audition et discernement de l'enfant devant le juge aux affaires familiales – 55 recommandations pour améliorer la participation de l'enfant aux décisions judiciaires le concernant au sein de sa famille*, cit., p. 71.

ments at face value, without taking any additional steps to check that they reflected actual communications of information.[84]

Thirdly, the interviews support the view that, when a hearing does take place, a significant amount of information is passed on by the judges. According to the report,[85] most of them divide the hearings they conduct into several phases, the first of which, tellingly referred to as the "explanation phase", is entirely dedicated to the communication of information to the child. This information concerns the way the proceeding in general, and the hearing in particular, will unfold; as well as the use to which the child's statements will be put. Most judges, or so it would seem, encourage the child to express his/her own views, while trying to impress upon him/her that these views will not bind the judge. The aim, naturally, is to downplay the significance of the hearing, in order to relieve the pressure which the child might be feeling. If the child is heard alone, some judges will check that he/she has been informed of his/her right to be assisted by a lawyer. Some of these points will frequently be taken up again during the last phase of the hearing. The record of the hearing, which has to be shared with the parties to the proceeding,[86] is also discussed, and sometimes read to the child. In order to facilitate communication, the judges seem prepared to use a child-friendly language.

4. *Critical assessment*

4.1. *The shortcomings of the current approach*

Even though significant progress has been achieved over the course of the last three decades or so, the French approach to safeguarding the children's right to information in civil proceedings is currently the focus of criticism. Some of the shortcomings are merely the consequence of broader inadequacies, notably a relative lack of attention paid to the specificities of judicial proceedings involving children as well as to the adjustments which would be necessary as a result. Others are specific to the issue of information, and only these will be discussed here.

First, the incomplete nature of the current legislative and regulatory framework leads to considerable uncertainty, and to divergences between the practices followed by different courts.[87] Whether or not a child does receive adequate

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[84] B. MALLEVAEY (ed), *Audition et discernement de l'enfant devant le juge aux affaires familiales – 55 recommandations pour améliorer la participation de l'enfant aux décisions judiciaires le concernant au sein de sa famille*, cit., pp. 71-72.

[85] *Ibid*., pp. 139-143.

[86] See part 2.4 above.

[87] B. MALLEVAEY (ed), *Audition et discernement de l'enfant devant le juge aux affaires familiales – 55 recommandations pour améliorer la participation de l'enfant aux décisions judiciaires le concernant au sein de sa famille*, cit., pp. 174-175.

information depends too much on the commitment, training and sensitivity to the issue of the lawyer who assists him/her (if there is one) and of the judge who is in charge of the proceeding. Situations where the child is not heard are, as a result, particularly concerning.[88] This should not, however, divert attention from the observation that a significant proportion of what seems to function in France can be attributed primarily not to the legislative framework, but to the horizontal, spontaneous, and often multilateral initiatives set up by practitioners.

Further criticism is directed at particular aspects of the rules and practices. The fact that the right to information only benefits children "capable of discernment", according to article 388-1 CC, is a frequent target. This criterion, derived from the French version of article 12 of the United Nations Convention on the Rights of the Child, is described as less evocative and precise than the phrase "capable of forming his or her own views" which is used in the English version.[89] While the *Cour de cassation* consistently refuses to accept that lack of discernment may be established merely by reference to the age of the child,[90] this factor seems to play an understandably pivotal role in the judges' appreciation,[91] which makes a clarification desirable, for instance by setting up a system of presumptions.[92] The over-reliance of the overall system on the legal guardians, often the parents, and the correlative disengagement of judges,[93] is another point of criticism. To put it strongly, the focus sometimes seems to be the communication of information to the guardians rather than to the child himself/herself.[94] That is all the more problematic given that the parents often have a personal interest in the proceeding, and so may not evaluate their child's discernment objectively nor relay information to him/her in an objective manner.[95] In its current form, then, providing information to the child might best be described as a parental prerogative as opposed to a legal obligation.[96] Lastly, the limited scope of the child's right to information is also criticised, particularly inasmuch as it does not include the clarification that the

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[88] Which explains the calls for the hearing of the child to be explicitly made the principle, and the absence of a hearing the exception, see *Ibid*., p. 107.

[89] *Ibid*., p. 42.

[90] *Cass. civ. 1re*, March 18, 2015, n° 14-11.392.

[91] This is confirmed by the 2014 survey of 256 court of appeal judgments, see L. Briand, *L'audition du mineur devant le JAF: examen des arrêts d'appel*, cit., pp. 22-23. No child until the age of 4 was deemed to be capable of discernment and every one over the age of 14 was, with the proportion steadily climbing between the ages of 5 and 13.

[92] B. Mallevaey (ed), *Audition et discernement de l'enfant devant le juge aux affaires familiales – 55 recommandations pour améliorer la participation de l'enfant aux décisions judiciaires le concernant au sein de sa famille*, cit., pp. 49, 59

[93] See part 3.2 above.

[94] B. Mallevaey (ed), *Audition et discernement de l'enfant devant le juge aux affaires familiales – 55 recommandations pour améliorer la participation de l'enfant aux décisions judiciaires le concernant au sein de sa famille*, cit., p. 68.

[95] *Ibid*., pp. 65-66.

[96] G. Barbier, *La pratique bordelaise de l'audition de l'enfant*, in *AJ Fam*., 2012, p. 498.

costs of legal representation, should the child choose to bring in a lawyer, will be covered by legal aid.[97]

4.2. *A nascent push for reform*

In light of the above, that the next round of reforms might be on the horizon will undoubtedly be welcomed. It has, in particular, been argued that such a step is indispensable if French law is to be made compliant with the rules that will become applicable when the Recast of the Brussels IIA Regulation[98] comes into force in 2022,[99] since the new instrument has been hailed as furthering the protection of the rights of children involved in cross-border family disputes.[100]

It should be noted that the current shortcomings, which affect the translation into practice of the right of the child to be heard in the context of judicial proceedings, feature heavily in the 2020 annual report on children's rights of the Human Rights Defender (*Défenseur des droits*)[101] titled "Taking into account the voice of the child: a right for the child, a duty for the adults" ("*Prendre en compte la parole de l'enfant: un droit pour l'enfant, un devoir pour l'adulte*").[102] Among the recommendations which are formulated, several are directly inspired by the 2018 *Mission de recherche droit et justice* report.[103]

Furthermore, the rules adopted in 2016 regarding out-of-courts divorces, while not perfect, undoubtedly express a different, and much more tailored, approach to the children's right to information in civil proceedings.[104] Although these rules reflect in part the specificities of the French out-of-court divorce, and more specifically the significant – and controversial – pressure it places upon minor children, they may also signal a broader shift in this matter.

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[97] B. MALLEVAEY (ed), *Audition et discernement de l'enfant devant le juge aux affaires familiales – 55 recommandations pour améliorer la participation de l'enfant aux décisions judiciaires le concernant au sein de sa famille*, cit., p. 74. See also part. 1.1 above.

[98] Council Regulation (EU) 2019/1111 of 25 June, 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction.

[99] B. MALLEVAEY, quoted in V. AVENA-ROBARDET, *Parole de l'enfant: la fin du discernement?*, in *AJ Fam.*, 2020, p. 613.

[100] S. CORNELOUP, T. KRUGER, *Le règlement 2019/1111, Bruxelles II: la protection des enfants gagne du terrain*, in *Revue critique de droit international privé*, 2020, p. 215.

[101] Available at https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd_rae_rapport.pdf (last accessed on January 27, 2021).

[102] See also the 2013 Report, titled "L'enfant et sa parole en justice" (available at https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=11170, last accessed on January 27, 2021).

[103] See, in particular, Recommendation n° 3.

[104] See part 2.2 above.

Chapter 5

CHILDREN'S RIGHT TO INFORMATION IN CIVIL PROCEEDINGS IN ITALY

Francesco Pesce, Francesca Maoli, Roberta Bendinelli

1. *Introduction*

The present National Report is intended to present the results of the national research carried out within the project MiRI – *Minor's right to information in EU civil actions* (JUST-JCOO-AG-2018), concerning children's right to information in civil proceedings in Italy.

The research comprises the collection of the relevant Italian provisions of law and case law concerning the aforementioned topic, in order to examine to what extent the right to information is foreseen and respected by the legal system. Moreover, through a questionnaire distributed to judges and lawyers, the research focused on the practice existing in civil proceedings in Italy. The answers to the questionnaires have been examined and rationalized in the present report in order to offer a state-of-the-art assessment of the current situation. This will enable a further development of the research, together with other partners of the project and other countries involved in the investigation: the scope is to explore whether it is

possible to develop more efficient best practices on children's right to information in civil cases, so as to create a set of guidelines of common best practices that might or should be applied in all EU Member States.

All the national case law cited in the present Report is available in the project's database.[1]

2. *The children's right to information as an essential component of the right to be heard and to participate*

As stated above, the present report focuses on children's right to be informed in civil proceedings in Italy.

When speaking of child participation, children must be informed – in a child-friendly language – about the nature of the judicial proceeding and the implications of being heard in this context, otherwise they would not be in the position to consciously express themselves. Those are the considerations expressed, *inter alia*, by the European Fundamental Rights Agency in 2017, within its report on child-friendly justice.[2]

As it will emerge in the following paragraphs, the analysis of Italian law shows that only a few provisions are specifically dedicated to the enjoyment of this right. As for the rest, it is only mentioned in the context of the child's right to be heard during the proceeding. Thus, it seems that the Italian legal system considers the right to information to be especially important in case the judge hears the child. Indeed, the hearing of the child represents a very delicate phase and a crucial aspect of child's participation in proceedings: given the need to establish direct contact between the child and the judicial authority, it is particularly important that the child is prepared for the hearing in order to pursue his or her best interests.[3]

In the light of the above, there is an opportunity to analyse the right to receive adequate information and the right to be heard together, for the purposes of providing a clear assessment of the situation in the Italian legal system.

When it comes to the protection of the child, the context of the Italian justice has to be appreciated in its characteristics. The structure is characterized by a certain degree of fragmentation: generally speaking, competences are allocated

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[1] Available at http://dispo.unige.it/node/1159.

[2] FRA, *Child-friendly Justice: Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States*, 2017, available at https://fra.europa.eu/en/publi-cation/2017/child-friendly-justice-perspectives-and-experiences-children-involved-judicial (last accessed December 9, 2020).

[3] On this topic see the findings reached within the project "VOICE" (reference number: JUST/2016/JCOO/AG/CIVI/764206), presented in T. VAN HOF, S. LEMBRECHTS, F. MAOLI, G. SCIACCALUGA, T. KRUGER, W. VANDENHOLE, L. CARPANETO, *To Hear or not to Hear: Reasoning of Judges Regarding the Hearing of the Child in International Child Abduction Proceedings*, in *Family Law Quarterly*, 2020, p. 327.

between ordinary and juvenile courts (according to Article 38 of the preliminary provisions to the Italian Civil Code, as modified in 2013).[4] This fragmentation shares similarities with child participation. In judicial proceedings, it results in the strengthening of the child's right to be heard: read together, such evolutions contribute to achieving the goal of considering children not as mere recipients of protection, but as effective rights holders.[5]

In general, ordinary courts (*tribunali ordinari*) deal with parental responsibility issues, mainly in the framework of separation and divorce proceedings (custody, placement, maintenance), while juvenile courts (*tribunali per i minorenni*) deal with requests for limitation and loss of parental responsibility (so-called *de potestate* proceedings).

Juvenile courts are specialised courts in each district court of appeal (29 in total).[6] Each juvenile court is a collegiate body made up of four judges: two professional judges (the president and a side judge) and two "honorary magistrates" (a man and a woman), who are professionals with jurisdictional functions (honorary judges are appointed among psychologists, attorneys, pedagogues, anthropologists). Each juvenile court has its own public prosecutor, who has a leading controlling function in civil proceedings.

In 2016, a draft law[7] envisaged the abolition of juvenile courts and the creation, instead, of specialized sections within ordinary courts. The bill provoked the strong reaction of the civil society[8] and from the Italian Authority for Children and Adolescents.[9] In May 2017, the Commissioner for Human Rights of the Council of Europe sent a letter to the President of the Italian Senate underlining that the draft law under consideration had the potential to weaken the «*well-established system*

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[4] Modifications made by Article 96, par. 1, let. c) of Legislative Decree No 154 of December 28, 2013, which also added Article 38 *bis*.

[5] On the Italian juvenile system in the field of civil justice as a "child-friendly" one, see E. D'Alessandro, *Verso una giustizia "a misura di minore" nella giustizia civile: garanzie e giusto processo*, in Autorità garante per l'infanzia e l'adolescenza (ed.), *La Convenzione delle Nazioni Unite sui diritti dell'infanzia e dell'adolescenza. Conquiste e prospettive a trent'anni dall'adozione* (2019) 334, available (with English abstracts) at: https://www.garanteinfanzia.org/pubblicazioni.

[6] Royal Law-Decree No 1404 of July 20, 1934, converted into Law No. 835 of May 27, 1935. The list of Italian juvenile courts is available here: http://www.tribmin.milano.giustizia.it/it/Content/Index/28721. Ordinary courts are currently 145: after 2022, according to Legislative Decree No 162/2019, they will reach the number of 135.

[7] Draft Law No 2284 of March 10, 2016.

[8] Among others, see Associazione italiana dei magistrati per i minorenni e per la famiglia (A.I.M.M.F.), *Sulla soppressione dei Tribunali e delle Procure per i minorenni e l'introduzione di sezioni specializzate presso i Tribunali ordinari*, February 20, 2016: https://www.minoriefamiglia.org/index.php/documenti/progetti-di-riforma/641-sulla-soppressione-dei-tribunali-e-delle-procure-per-i-minorenni-e-l-introduzione-di-sezioni-specializzate-presso-i-tribunali-ordinari-20-2-16 (last accessed May 3, 2021).

[9] *Autorità garante per l'infanzia e l'adolescenza*. It is the national body aimed at safeguarding the effective implementation of the Convention of the Rights of the Child of 1989 in Italy. All information about the Authority is available at: https://www.garanteinfanzia.org.

for the protection of children's rights in Italy, and thus, undermine Italy's ability to comply fully with its international commitments in this field»[10].

Child participation in Family Law in Italy is experiencing considerable developments at a legislative and judicial level (see *infra*, para. 4). In judicial proceedings, such evolutions contribute to achieving the goal of considering children not as mere recipients of protection, but as effective rights holders. The need to give children information is mentioned in one of the judgments marking this change: it affirms that children should receive, in order to be heard, "relevant and appropriate information" («*informazioni pertinenti e appropriate*»). The decision at issue is judgment 27 July 2007, No. 16753 of the Italian Corte di Cassazione.

In a more recent decision, the Corte di Cassazione claimed that hearing minors is the best way to inform them about the proceeding in question, which is their fundamental right.[11]

In the Italian legal system, the link between the child's right to be heard and his/her right to be informed results in a general provision included in Article 336-bis of the Civil Code, according to which the judge gives the child all information regarding the nature of the proceeding and the consequences of the hearing. This should be read in light of supranational provisions (see infra, para. 3).

3. *The evolution of the right to be heard in the Italian legal system: legislative provisions concerning the right to participation of the child and the right to receive information*

3.1. *The child's right to be informed and heard in the Italian legal system: the Italian Constitution and the Italian Civil Code*

In the Italian legal system, the right of the child to be heard and to participate in civil proceedings is protected on multiple levels: the Constitution, the Civil Code, the Code of Civil Procedure, Law No. 898 of December 1, 1970, Law No. 184 of May 4, 1983, Decree-Law No. 132 of September 12, 2014 (which was converted into Law No. 162/2014), Legislative Decree No. 142 of August 18, 2015.[12]

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[10] The letter of Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, of 9 May 2017, is available at https://rm.coe.int/letter-from-the-council-of-europe-commissioner-for-human-rights-nils-m/16807122cb (last accessed July 1, 2021).

[11] Corte di Cassazione, judgment May 7, 2019, No. 12018: informing the child *«costituisce una modalità, tra le più rilevanti, di riconoscimento del suo diritto fondamentale ad essere informato e ad esprimere le proprie opinioni nei procedimenti che lo riguardano, […]»* (*«represents a modality, among the most relevant ones, of implementation of his or her fundamental rights to express an opinion in proceedings concerning him or her»).*

[12] Legislative Decree No. 142/2015 specifically concerns children seeking asylum in Italy.

Although the legal sources referred to do not constitute an exhaustive list of every possible case where the child is heard by a civil judge in Italy, we consider them the most significant ones. They provide a clear indication of how children's right to be heard is enshrined in Italian law. They also indicate that the Italian legislator doesn't seem to have focused enough on the child's right to receive relevant and adequate information prior to being heard and after the conclusion of the proceeding.

The child's right to be heard falls within the scope of Article 31 of the Italian Constitution, according to which the Republic protects «*children and the young by adopting necessary provisions*».[13] Moreover, the right at hand seems to fall within the scope of Article 2 (regarding the inviolable rights of the person), Article 21 (freedom of expression) and Article 32 (right to health) of the Constitution itself.

The Italian Civil Code (1942) has been deeply reformed over the years, especially in the provisions on Family Law. Two legislative acts have been of paramount importance as regards the child's right to be heard: Law No. 219 of December 10, 2012 and Legislative Decree No. 154 December 28, 2013. They added – among others – the following provisions to the Civil Code: Article 315-*bis* and Article 336-*bis*.

Before moving on to them, it is important to note that the Civil Code had formerly been amended by Law No. 54 of February 8, 2006, which led to Article 155-*sexies* (then repealed by Legislative Decree No. 154/2013). It introduced explicit reference to children's right to be heard. This came as no surprise, since Law No. 54/2006 was meant to put children's protection first.

The aforementioned Law also introduced the exercise of joint parental responsibility as a general rule.[14] As affirmed by the Corte di Cassazione in judgment June 18, 2008 No. 16593, Law No. 54/2006 was intended to lay down children's right to keep a healthy and harmonious relationship with both parents, to ultimately pursue their best interest.

Both Articles 315-*bis* and 336-*bis* of the Civil Code are considered to be of general application: it means that they should apply in any civil proceeding whose direct or indirect effects affect a minor.[15] That said, Article 336-*bis* is of special

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[13] See the English version of the Italian Constitution published on the website of the Senate of the Italian Republic.

[14] See the version of Article 155 of the Civil Code resulting from Law No. 54/2006.

[15] Among those authors stating that Articles 315-bis and 336-bis of the Civil Code are of general application, see: G. Ballarani, *Contenuto e limiti del diritto all'ascolto nel nuovo art. 336-bis c.c.: il legislatore riconosce il diritto del minore a non essere ascoltato*, in *Dir. fam. pers.*, 2014, p. 841; A.G. Cianci et al., *Nuovo titolo IX del Libro I rubricato* "Della responsabilità genitoriale e dei diritti e doveri del figlio", in M. Bianca (ed), *Filiazione, Commento al decreto attuativo. Le novità introdotte dal d.lgs. 28 dicembre 2013, n. 154*, Milan, 2014, p. 128, 134; F. Danovi, *L'ascolto del minore nel processo civile*, in *Dir. fam. pers.*, 2014, p. 1592; F. Galgano, *Diritto privato*, Padua, 2019, p. 892; L.Galanti, *Il minore come parte: finalmente il riconoscimento della Cassazione*, in *Riv. trim. dir. proc. civ.*, 2017, p. 349; R. Lombardi, *L'ascolto del minore nei procedimenti di separazione e divorzio su accordo delle parti tra fonti sovranazionali*

importance since it sets out some fundamental rules about how to hear the child. In Italy, these rules have led to some protocols applied locally.[16]

Article 315-*bis*, para. 3, lays down that children have the right to be heard in all the matters and proceedings concerning them when they are at least 12 years old, or even younger if capable of judgment.

Moving on to Article 336-*bis*, its para. 1 affirms that children are heard about all the matters and proceedings concerning them when they are at least 12 years old, or even younger if capable of judgment. Children are heard by the President of the Court or by the delegated judge, except when this clashes with their best interest or is manifestly unnecessary. In those cases, the judge needs to explain his/her position.[17]

According to para. 2 of the same provision, it is the judge who hears the child, possibly with the assistance of experts (like psychologists, social assistants or other professionals). The child's parents, their lawyers, the child's special curator – when appointed – and the public prosecutor can take part in the hearing as long as the judge allows them. The goal of this provision is to make sure that children won't feel pressured when expressing their views.

Para. 2 of Article 336-*bis* must be combined with Article 38 of the Implementing provisions for the application of the Civil Code: if the child is heard in a protected space, the parties' representatives, the child's special curator and the public prosecutor (but not the parents) won't need the above-mentioned authorisation.

As stated earlier, according to para. 3 of Article 336-*bis*, the judge gives the child all information regarding the nature of the proceeding and the consequences of being heard, before this happens. Minutes – or a video recording of the act – must be produced.

When analysing Article 336-*bis* under the guidance of legal theory, some aspects seem worthy of particular attention.

Firstly, the age limit to inform and then to hear the child shouldn't be strictly interpreted. What makes the hearing necessary is not the child's age in itself, but his/her capacity of judgment.[18]

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e diritto interno, cit.; M.A. LUPOI, *Il procedimento della crisi tra genitori non coniugati avanti al tribunale ordinario*, in *Riv. trim. dir. proc. civ.*, 2013, p. 1289; V. MALFA, *L'ascolto del minore alla luce della legge n.219/2012*, in *Iura & Legal Systems*, 2015, p. 15.

[16] See further in this paragraph. These protocols have been mentioned by a number of authors, as: A. SILIBERTI, *Ascolto del minore in sede di separazione: il giudice deve motivare la decisione di non disporre l'ascolto diretto*, cit.; M.A. IANNICELLI, *La crisi della coppia genitoriale e il "diritto" del figlio minore di essere ascoltato*, in *Familia*, 2016, p. 87; F. MICELA, *Interesse del minore e principio del contraddittorio*, in *Minori giust.*, 2011, p. 145.

[17] *«[…] Se l'ascolto è in contrasto con l'interesse del minore, o manifestamente superfluo, il giudice non procede all'adempimento dandone atto con provvedimento motivato».*

[18] On the importance of the child's capacity of judgment (which could be considered as a sort of "safeguard clause"), see L. GALANTI, *Il minore come parte: finalmente il riconoscimento della Cassazione*, in *Riv. trim. dir. proc. civ.*, 2017, p. 349.

Capacity of judgment (*capacità di discernimento*) means that children understand what is necessary for their own sake and are capable of independently making decisions, at least to a certain extent.[19] Another definition of "capacity of judgment" focuses on children's ability to independently express their desires, opinions, aspirations.[20] Supranational provisions contain further definitions: the child is capable of judgment when «*capable of forming his or her own views*» or when he/she has «*sufficient understanding*»[21].

According to some decisions of the Corte di Cassazione (see in particular judgments 16 February 2018, No. 3913 and 17 April 2019, No. 10774)[22], the judge always needs to explain the choice not to hear a minor, regardless of his/her age. A lack of justification would amount to violating both the adversarial principle and the principle of fair trial.[23]

Nevertheless, in other judgments the Corte di Cassazione expressed a different view on the subject: the judge has no obligation to explain his/her choice not to hear a child under the age of 12, unless specifically asked.[24]

According to one interpretation, the more the child is close to the age of 12, the more detailed is the justification needed from the judge when the hearing is omitted.[25] According to another interpretation, it is however not possible, in practice, to assess whether or not children are capable of judgment without listening to them.[26]

Secondly, it should be determined when the right to be heard can be disregarded (besides when children lack capacity of judgment). As said, according to Article 336-*bis*, para. 1, the judge can omit the hearing when it clashes with the minor's best interest or is clearly unnecessary. Hearing children could be in contrast with their best interest when they are physically or emotionally vulnerable.[27] It is

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[19] For this definition of capacity of judgment, see E. Italia, *L'ascolto del minore*, cit., p. 716 (which quotes the definition developed by the Italian Forensic Psychology Association, Note 65); E. Di Napoli, F. Maoli, C*hild Participation in Family Law Proceedings: Italy*, in W. Schrama, C. Mol, M. Bruning, M. Freeman, N. Taylor, *International Handbook on Child Participation in Family Law*, Cambridge, 2021, p. 219.

[20] M.A. Iannicelli, *La crisi della coppia genitoriale e il "diritto" del figlio minore di essere ascoltato*, cit., p. 95.

[21] See, respectively, the UN Convention on the Rights of the Child and the European Convention on the Exercise of Children's Rights.

[22] See *infra*, para. 4.

[23] See the view expressed by the Italian Corte di Cassazione (in judgment October 21, 2009, No. 22238); *infra*, para. 4.

[24] See in particular: Corte di Cassazione, judgment 7 March 2017, No. 5676; Corte di Cassazione, judgment August 9, 2019, No. 21230 (*infra*, para. 4).

[25] M.A. Iannicelli, *La crisi della coppia genitoriale e il "diritto" del figlio minore di essere ascoltato*, cit., p. 96.

[26] L. Galanti, *Il minore come parte: finalmente il riconoscimento della Cassazione*, cit., p. 356.

[27] M.A. Iannicelli, *La crisi della coppia genitoriale e il "diritto" del figlio minore di essere ascoltato*, cit., p. 98.

not sufficient, however, that the judge refers to a generic condition of psycho-physical stress due to the parents' clash.[28]

The hearing seems unnecessary when the proceeding only concerns property or economic issues, when the matter is irrelevant for the child, when his/her opinion has already been expressed in the same proceeding – or in another one regarding the same matters – or when the child's opinion is requested about uncontested facts.

Furthermore, children shouldn't be heard when they refuse to do so. Being heard is their right – as stated in Article 315-*bis* – but this would no longer be the case if they were obliged to express themselves.

Following an interpretation, in practice it is hardly possible to violate the child's best interest by hearing him/her.[29] In many cases, assessing children's point of view (rather than having a traumatising effect) gives them an opportunity to share their opinions and feelings about the situation they are in. Pursuing the child's best interest shouldn't be an excuse for depriving him/her of the procedural safeguards provided by law, as stated in the above-mentioned Guidelines on child-friendly justice.[30]

Thirdly, it is necessary to shed light on who hears the child and what he/she is informed about. As mentioned earlier, Article 336-*bis* sets out that it's the judge who carries out the hearing, possibly with the assistance of experts like psychologists, social assistants, other professionals. This provision is aimed at establishing direct contact between the judge and the minor. It also requires the judge to inform the child about the nature of the proceeding and the effects of the hearing. In particular, children should know that the final decision won't rest with them.[31]

Someone has claimed that children must be informed by others, besides the judge: their parents, their relatives and third parties (like the public prosecutor, experts, social service workers, judicial assistants, professionals, and the child's special curator).[32]

Fourthly, under the Italian law, hearing a child isn't the same as examining a witness[33]. As said, the hearing is a right and pursues the child's best interest, in ac-

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[28] Corte di Cassazione, judgment July 27, 2017, No. 18649 (*infra*, para. 4).

[29] F. MAZZA GALANTI, *La tutela e l'ascolto dei figli minorenni nelle controversie separative in regime di affidamento condiviso*, in *Minori giust.*, 2018, p. 23.

[30] F. TOMMASEO, *Il processo civile familiare e minorile italiano nel contesto dei principi europei*, in *Dir. fam. pers.*, 2012, p. 1265.

[31] On how minors shouldn't feel responsible for the judge's decisions after being heard, see P. MARTINELLI, *La professionalità mite del giudice delle relazioni*, in *Minori giust.*, 2015, pp. 133-145. On how this aspect should be explained carefully when informing the child, see F. MAZZA GALANTI, *La tutela e l'ascolto dei figli minorenni nelle controversie separative in regime di affidamento condiviso*, cit., p. 30.

[32] G. BALLARANI, *Contenuto e limiti del diritto all'ascolto nel nuovo art. 336-bis c.c.: il legislatore riconosce il diritto del minore a non essere ascoltato*, cit., p. 851.

[33] F. DANOVI, *L'ascolto del minore nel processo civile*, cit. On the specificity of the child's hearing if compared to other similar acts, see S. PELLICCIOTTA, *Sottrazione internazionale di minori e mediazione*, in

cordance with supranational provisions like Article 3 of the UN Convention on the Rights of the Child. The last remark leads to the following conclusion: the judge doesn't always have to abide by what children claim to want.

On the one hand the judge is compelled by law to hear the child and to provide an explanation when this doesn't happen, on the other hand he/she can disregard children's desires when they are against their best interest.[34] Articles 315-*bis* and 336-*bis* should, thus, be interpreted in accordance with case law and, in particular, with what claimed by the European Court of Human Rights in the judgment C. v. Finland.[35]

The ECtHR didn't share the view of the Supreme Finnish Court, which supported two children's desire to live with their dead mother's partner rather than with their father. The Strasbourg Court found that the decision didn't pursue the minors' best interest, since it didn't consider the possibility that they had been manipulated. Besides, it deprived the children of a relationship with their father. In the Court's view: «***[…]*** *the decision-making procedure failed to strike a proper balance between the respective interests and […] there has been a violation of Article 8 of the Convention in that respect*».[36]

In addition to Articles 315-*bis* and 336-*bis*, a further provision of the Civil Code deserves special attention: Article 337-*octies*, which some have criticised. Before coming to that, it should be noted that Article 315-*bis* has been criticised too, essentially because it doesn't refer to the child's right to be informed. More specifically, the provision doesn't require that – prior to the hearing – he/she is informed in a child-friendly language about the proceeding and its outcome.[37]

Article 337-*octies* regards the child's hearing in case of conflicts between parents.[38] The first issue is that the provision seems to put emphasis on the judge's powers (see its title: «*Poteri del giudice e ascolto del minore*»).

Secondly, according to Article 337-*octies*, it is the judge who orders that the child is heard («*il giudice dispone l'ascolto del figlio minore*»). The focus appe-

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Riv. trim. dir. proc. civ., 2017, p. 763, spec. p. 766 (*"L'ascolto del minore costituisce una figura* sui generis*"*).

[34] With regard to this matter in international child abduction cases, see M.A. Lupoi, *La sottrazione internazionale di minori: gli aspetti processuali*, in *Riv. trim. dir. proc. civ.*, 2014, p. 111.

[35] ECtHR, 9 August 2006, *C.* v. *Finland*, App. No. 18249/02 (*infra*, para. 4).

[36] *Ibidem*, para. 59. Concerning this judgment, see M.G. Ruo, *Ascolto e interesse del minore e "giusto" processo: riflessioni e spunti dalla giurisprudenza della Corte europea dei diritti dell'uomo*, in *Minori giust.*, 2008, pp. 115.

[37] G. Recinto, *Legge n. 219 del 2012: responsabilità genitoriale o astratti modelli di minori di età?*, cit., p. 1482.

[38] Article 337-octies belongs to Title IX, Chapter II, of the Civil Code, relating to parental responsibility after separation of the spouses, dissolution of marriage or cessation of its civil effects, annulment or nullity of marriage or after proceedings concerning children born out of wedlock.

ars, therefore, to be, once again, on the judge rather than on the child and his/her rights.[39]

The Civil Code contains further provisions about the child's right to be heard:

- Book I, Title VI, Chapter V of the Civil Code (relating to dissolution of marriage and separation of the spouses), Article 155: regarding separation, this provision makes reference to Title IX, Chapter II of the Civil Code (see in particular Article 337-*octies*);[40]
- Book I, Title VII, Chapter IV (relating to recognition of children born out of wedlock), Article 250, para. 4: when one of the parents wants to recognise a child and the other is opposed to this possibility, the judge orders that the child is heard when he/she is at least 12 years old, or even younger if capable of judgment;[41] Article 252, para. 5: in case a child is going to live with one parent (the parent having recognised him/her), who has got another family, the judge hears the other children – if they disagree with the change – when they are at least 12 years old, or even younger if capable of judgment; Article 262, para. 4: when a parent recognises his/her children born out of wedlock, the judge decides which surname they will be given after hearing them when they are at least 12 years old, or even younger if capable of judgment;
- Book I, Title VII, Chapter V (relating to declarations of paternity/maternity issued by a judge), Article 273, para. 2: before the judge issues a declaration of paternity/maternity, it is necessary to obtain the child's consent if he/she is at least 14 years old;
- Book I, Title IX, Chapter I (relating to declarations of parental responsibility and to children' rights and duties), Article 316, para. 3: in case parents disagree with how to exercise parental responsibility, the judge must hear their children when they are at least 12 years old, or even younger if capable of judgment; Article 336, para. 2: in certain proceedings, like those relating to the loss/reinstatement of parental responsibility, children are heard when they are at least 12 years old, or even younger if capable of judgment;
- Book I, Title X, Chapter I, Section II (relating to the appointment of the child's guardian), Article 348, para. 3: before appointing a guardian, the judge hears the child when he/she is at least 12 years old, or even younger if capable of judgment;

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[39] On this aspect, see (among others) P. VIRGADAMO, *L'ascolto del minore in famiglia e nelle procedure che lo riguardano*, in *Dir. fam. pers.*, 2014, pp. 1656. On Article 337-octies of the Civil Code containing an exception to Article 316-bis, see A.G. CIANCI et al., *Nuovo titolo IX del Libro I rubricato* "Della responsabilità genitoriale e dei diritti e doveri del figlio", cit., p. 134 (*«salvo quanto disposto all'art. 337-octies»*).

[40] See Note 38.

[41] In this case, the obligation to hear the child would be particularly stringent (E. ITALIA, *L'ascolto del minore*, cit., p. 726).

- Book I, Title X, Chapter I, Section III (relating to the exercise of guardianship), Article 371, para 1, No. 1: in case important decisions about children's lives are taken – like decisions regarding the place of living, their education or work – the judge hears them when they are at least 10 years old, or even younger if capable of judgment;
- Book I, Title XI (relating to the child's custody), Article 402, para. 1: in case of children in institutional care, the judge can decide – under certain conditions – to appoint the institution as their legal guardian. This provision doesn't refer to the child's right to be informed and heard about the consequences of such a decision, which seems inconsistent with (for example) Article 348 of the Civil Code.

In light of the foregoing, it should be pointed out that the above-mentioned provisions don't make explicit reference to children's right to receive information.

3.2. *The relevant provisions contained in the Italian Code of Civil Procedure*.

Further provisions on the child's right to be heard are contained in the Italian Code of Civil procedure:

- Book I, Title III, Chapter I (relating to the parties), Article 78: in case of emergency, when a minor doesn't have someone representing him/her, it is possible to appoint a special curator. The provision doesn't say if the child should be informed and heard before the special curator is appointed;
- Book II, Title I, Chapter II, Section III, Para. 8 (relating to testimonial evidence), Article 248: children who are under the age of 14 can only be heard when this is necessary, due to specific circumstances;
- Book IV, Title II, Chapter I (separation of the spouses), Article 708, para. 3: in case the spouses don't want to reconcile, the President of the Court issues an order to take all temporary and urgent measures in the interest of the spouses themselves and their children. The President previously hears the spouses and their representatives. Article 709-*ter*, para. 2: concerning the exercise of parental responsibility, when parents' behaviour goes against their children's best interest (for example, by violating custody arrangements), the judge can amend former decisions. It both cases, it is now specified whether the judge informs and hears the children before taking a decision.
- Book IV, Title II, Chapter IV (relating to decisions affecting minors or incapacitated persons), Article 732, para. 2: when the court takes a decision affecting a minor – or an incapacitated person – in closed session, the judge supervising cases concerning guardianship gives an opinion. It is unknown whether the child is heard before the opinion is given.

As the above shows, it would be desirable that the Code of Civil Procedure was more specific about the need to inform and hear a child before a decision involving him/her is taken.

3.3. *Other relevant provisions of Italian Law*

- Law No. 898 of December 1,1970: according to Article 4, para. 8 (relating to divorce), in case the spouses don't want to reconcile, the President of the Court issues an order to take all temporary and urgent measures in the interest of the spouses themselves and their children, to appoint the examining magistrate and to set a date for the hearing before him/her. The President previously hears the spouses, their representatives and the children when they are at least 12 years old, or even younger if capable of judgment. Unlike Article 708 of the Code of Civil Procedure, this provision specifies that children must be heard. It doesn't however say anything about the need to inform them before the hearing takes place.
- Law No. 184 of May 4, 1983 (relating to adoption and child custody) as amended, contains a number of provisions about the child's right to be heard:
- Title I-*bis* (relating to child custody), Article 4: according to para. 1 of this provision, before local social services order child custody (in the context of «*affidamento familiare*»), parents' consent is required and the child is heard when he/she is at least 12 years old, or even younger if capable of judgment. According to para. 5-*quater* of the same provision, in case the foster family wants to adopt the child (see para. 5-*bis*), he/she is heard under the same conditions stated above. Under these same conditions, children are heard before the judge supervising cases concerning guardianship asks the juvenile court – if necessary – to take further measures in their interest (see para. 6).
- Title II, Chapter I (relating to adoption), Article 7, para. 3: under the same conditions stated in Article 4, the child is heard about the possibility of being adopted. According to para. 2 of the same provision, his/her consent is required when he/she is at least 14 years old.
- Title II, Chapter II (relating to declaration of adoptability), Article 10, para. 5: in case of neglected minors, when the court confirms, amends or revokes urgent decisions in this regard, they should be heard under the same conditions stated in Article 4; Article 15, para. 2: before the juvenile court declares that a minor is adoptable, it hears him/her under the same conditions stated in Article 4; Article 19: due to a declaration of adoptability, the exercise of parental responsibility is suspended. Therefore, the juvenile court appoints a guardian and takes further measures in the child's interest. It should be pointed out that Article 19 doesn't mention the child's right to be informed and heard about the effects of the above measures. The same remark applies to a decision revoking adoptability (case referred to in Article 21).
- Title II, Chapter III (relating to pre-adoption custody or «*affidamento preadottivo*»), Article 22, para. 6: before the juvenile court orders pre-adoption custody in regard to a child, he/she is heard under the same conditions stated in Article 4, A minor above the age of 14 also expresses his/her consent. Article 23, para. 1: before the juvenile court revokes, if necessary, a decision

ordering pre-adoption custody, the child in question is heard under the same conditions referred to in Article 4.

- Title II, Chapter IV (relating to the adoption decision), Article 25, para. 1: one year after a child's custody is ordered, following a declaration of adoptability, the juvenile court hears him/her under the same conditions stated in Article 4. If the child is 14 years old, his/her consent is also required.
- Title III, Chapter I (relating to international adoption), Article 32, para. 1: when the necessary conditions are met, the Commission for international adoptions declares, in regard to a child, that adoption suits his/her best interest. In this case, the child is granted an authorisation to enter Italy and a permanent residence permit. It should be noted that this provision lacks reference to children's right to be informed and heard before the Commission takes the above measures[42].
- Title IV, Chapter I (relating to adoption in special cases), Article 45, para. 2: in case a child is adopted without a declaration of adoptability (see Article 44), he/she is heard under the same conditions stated in Article 4.

As can be seen, the provisions mentioned above don't make explicit reference to children's right to receive prior information.

- *Law No. 64 of January 15, 1994 contains a specific provision on children's participation in international child abduction proceedings, where the relevant legal framework is represented by the 1980 Hague Convention on the civil aspects of international child abduction*[43] *and, as concerns abductions occurring within the European Union, the Regulation No 2201/2003.*[44] *With the Law No 64/1994, Italy ratified the 1980 Hague Convention and introduced the necessary implementing rules governing the procedure for return of the child. According to Article 7(3), the juvenile court shall hear the child «if appropriate». While the provision does not explicitly state that the hearing is mandatory (nor qualifies it as a right of the child), the latter has been given a flexible interpretation by Italian courts over the years on the basis of the evolving understanding of the fundamental right of the child to be heard.*[45] *On this topic, the decision of the Corte di Cassazione, judgment February 14, 2014, No. 3540*[46] *results*

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[42] In other words, Law No. 184/1983 doesn't say that the child should be informed and heard before the Commission grants him/her an authorization to enter Italy and a permanent residence permit: yet, these measures have significant effects on his/her life. However, Article 34, para. 1, of the law at issue affirms that, in the context of international adoption, the child having entered Italy has the same rights as Italian children in the case referred to in Article 4. Among them, the right to be heard if he/she is at least 12 or – if younger – when he/she has capacity of judgment.

[43] Convention on the Civil Aspects of International Child Abduction, October 25, 1980, available at http://www.hcch.net.

[44] Council Regulation (EC) No 2201/2003 of November 27, 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000, in OJ L 338, December 23, 2003.

[45] Most recently, Corte di Cassazione, April 4, 2019, No 10874. On the same terms, Corte di Cassazione, June 4, 2019, No 15254.

[46] For the maxim of the decision, see the project database (at fn. 1).

of particular interests: in a case of international child abduction, where the Hague Convention of 1980 and the Council Regulation No. 2201/2003 were applicable, the Court expressly stated that the respect of Article 12 of the Convention on the Rights of the Child of 1989 and Articles 3 and 6 of the Strasbourg Convention of 1996 «requires that the child receives all the relevant and appropriate information, according to his age and his degree of development» - provided that those information are not harmful for his or her wellbeing. The provision mentioned above doesn't make explicit reference to children's right to receive prior information, even though courts have mentioned it with reference to Article 12 of the Convention on the Rights of the Child of 1989 and to Articles 3 and 6 of the Strasbourg Convention of 1996.

- Decree-Law No. 132 of September 12, 2014 (converted into Law No. 162/2014): this legislative act aims at simplifying the procedure relating to – among others – separation of the spouses, dissolution of marriage or cessation of its civil effects, when the parties are willing to find an agreement. According to Article 6, para. 2, of Decree-Law No. 132/2014,[47] the Prosecutor of the Italian Republic approves the agreement that the parties have found under their lawyers' guidance – «*convenzione di negoziazione assistita*»[48] – if it pursues children's best interest (in case they are involved). In contrast, when the agreement doesn't suit children's best interest, the Prosecutor of the Italian Republic sends it to the President of the Court, who sets a date for a hearing involving the parties. The provision doesn't say if children are informed and heard before the Prosecutor of the Italian Republic approves the agreement (in the first case) or at the hearing involving the parties (in the second case).
- Legislative Decree No. 142 of August 18, 2015 (regarding the specific case of a foreign minor seeking asylum in Italy): according to Article 18, para. 2: in order to pursue his/her best interest (for example, through family reunification), the child is heard considering his/her age, level of maturity and personal development. According to para. 2-*bis* of the same provision (inserted by Law No. 47 of April 7, 2017): unaccompanied minors receive emotional and psychological support at any stage of the proceeding. This support is provided by persons designated by the child himself/herself or chosen under certain conditions, with his/her consent. According to para. 2-*ter*, unaccompanied minors have the right to take part in the proceeding through their legal representatives and to be heard.[49] To this scope, a cultural mediator is appointed. We could argue that the law at issue contains the obligation to prior

[47] As amended by Law No. 162/2014.

[48] For the expression *"Prosecutor of the Italian Republic"*, see https://www.giustizia.it/giustizia/it/mg_2_1_4_2_2.wp (last consulted on 25.11.2020).

[49] Concerning the right to be heard in regard to foreign minors, see F. DI LELLA, *I minori stranieri non accompagnati tra vulnerabilità e resilienza*, in *Familia*, 2019 (online).

inform unaccompanied children on the basis of two elements. First of all, it is necessary to psychologically support them during the proceeding; secondly, they have the right to participate in such a proceeding and to be heard. Nevertheless, Article 18 lacks any express reference in this regard.

3.4. *Provisions relating to the child's right to be informed outside judicial proceedings*

In the light of the above, children's right to be informed in civil proceedings appears to be only an incidental question, dealt with by law in connection with the right to be heard. The same could be observed about case law (see *infra*, para. 4).

However, Italian law contains some provisions focusing on the child's right to be informed, with particular reference to two fundamental rights: data protection and health.

The right to data protection was deeply reformed, in the European Union, by Regulation (EU) 2016/679.[50] In Italy, this regulation led to Legislative Decree No. 101 of 10 August 2018, which amended Legislative Decree No. 196 of 30 June 2003.

Among the provisions of the General Data Protection Regulation on the data subject's right to information when he/she is a minor,[51] Recital 58 and Article 12 should be mentioned.

According to Recital 58: «[...] *Given that children merit specific protection, any information and communication, where processing is addressed to a child, should be in such a clear and plain language that the child can easily understand*».

According to Article 12, para. 1, the information about data processing shall be given to the data subject «*in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child* [...]».

Moving on to children's right to be informed about their health, reference should be made, in particular, to Law No. 219 of December 22, 2017 on informed consent and the so-called «*biotestamento*» (which concerns the person's will in regard to medical treatment).

According to Article 3, para. 1, of the law at issue, value is given to the child's abilities to understand and to make decisions. Depending on those abilities, chil-

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[50] Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), in OJ L 119, May 4, 2016. EU Regulations, as is well known, have general application, are binding in their entirety and directly applicable in the Member States (see S. Van raepenbusch, *Droit institutionnel de l'Union européenne*, Bruxelles, 2016, p. 400).

[51] For the definition of "data subject", see Article 4, No. 1, of the General Data Protection Regulation.

dren are informed about possible actions to be taken concerning their health, so that they can express their will.[52]

In our view, these provisions constitute a benchmark to appreciate that the Italian legislator could have addressed in a more specific and adequate way the child's right to information in the context of civil proceedings.

However, in spite of the shortcomings stated above, in recent years there has been a significant change in the relevance of minors' right to be consulted on certain matters. It suffices to recall that Legislative Decree No. 154/2013 replaced (in Italian Family Law) "parental authority" with "parental responsibility".[53] On this basis, it could be argued that Italian law no longer sees minors as subject to their parents' authority. In contrast it sees them as vulnerable persons but independent actors with their own views, feelings and wishes, to be taken into account depending on their level of maturity. Therefore, on the one hand, legal systems should grant children the protection they need, on the other hand children shouldn't be deprived of their right to be asked what they think about significant events in their lives.[54]

In line with this idea, the Italian legislator could consider improving the existing provisions on the child's right to be heard in civil proceedings, by stressing the need to prior inform him/her in an appropriate way.

3.5. *Protocols and guidelines adopted by civil courts and juvenile courts in Italy*

The lack of specific indications by the legislator on the modalities of child participation (as well as on the need to provide the child with information concerning the audition) has suggested the adoption, by certain civil courts and juvenile courts, of Protocols on the hearing of the child.

Firstly, it is worth highlighting that the cited Protocols have been adopted in relation with the hearing of the child in proceedings. Therefore, when it comes to the right to information, the latter is considered only in connection with the audition of the child.

Secondly, not every Protocol contains indications on the opportunity to provide the child with pertinent information about the content, modalities, reason and outcomes of the audition.

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[52] In original language: *«La persona minore d'età […] ha diritto alla valorizzazione delle proprie capacità di comprensione e di decisione, […]. Deve ricevere informazioni sulle scelte relative alla propria salute in modo consono alle sue capacità per essere messa nelle condizioni di esprimere la sua volontà».*

[53] Respectively, *«potestà genitoriale»* and *«responsabilità genitoriale»*. On the second concept being inserted by Legislative Decree No. 154/2013, see A.G. CIANCI et al., *Nuovo titolo IX del Libro I rubricato* "Della responsabilità genitoriale e dei diritti e doveri del figlio", cit., p. 89.

[54] On children's freedom of self-determination, see C. IRTI, *Persona minore di età e libertà di autodeterminazione*, *in Giust. civ.*, 2019, p. 617.

Sometimes, the Protocols mention the right to information by making reference to Article 12 of the Convention on the Rights of the Child, or Article 3 of the Strasbourg Convention of 1996, with no further indication. Some Protocols expressly mention the need to provide the child with adequate information about the audition (and prior to the audition), but this assessment is not correlated to any indication on the concrete modalities with which the information is provided. No specific indication is given in this regard, resulting in the matter being left to the sensitivity and willing of the judge, the lawyer, the parents or other professionals involved. This is the approach, for instance, of the Courts of Messina, Torino and Rome. The latter also emphasizes the lack, in the Italian legal system, of institutional figures that can represent the interests of the child in civil proceedings. The Protocol of Rome also states that the judge should always inform the fact that his or her opinion is only one of the elements that will be considered for the purposes of the final decision.

In many cases, the Protocols confirm the practice to assign to the judge the duty to give information to the child, prior to proceeding with the audition. However, it is not specified whether the information should be provided days or hours before the audition, or if it is sufficient to provide information just before the audition. The Protocols of the courts in Tuscany and the Protocol of the courts in Milan also attribute to the judge the duty to give the child proper information about the audition (and prior to the audition), about the reason for his or her involvement in the proceeding, about the consequences and impact of the final decision. In this case as well, the Protocols do not give further details about the content of the information and the modalities through which the information is transmitted to the child. The Protocol of the courts of Palermo states that information can be provided by the judge "during the audition".

An interesting practice concerns the Protocol of the court of Pordenone, that provides for the appointment of a *Consulente Tecnico per l'Ascolto*, a professional expert conducting the audition of the child on behalf of the judge. The Protocol mentions the necessity to inform the child on the modalities and on the scope of the audition, as well as on its consequences.

4. *Relevant supranational provisions for the Italian legal system*

As already mentioned in the previous paragraphs of the present report, the Italian legal system respects the fundamental rights of the child, as expressed in the Convention on the Rights of the Child of 1989. The child's fundamental right to participate and express his/her views in proceedings concerning him/her is one of the guiding principles of the Convention (as stated in art. 12), and it consists in one of the main preconditions to ensure that the child's best interests are taken into primary consideration in all cases concerning him or her.

The Convention on the Rights of the Child considers essential to provide adequate information in this respect.[55] The UN Convention lays down that: «*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* […]» (Article 12, para. 1). It also affirms that children's right to freedom of expression includes freedom to receive information (Article 13, para. 1), in the light of the fundamental acknowledgement that individual provisions of the UN Convention can only be understood and implemented when read and interpreted in conjunction with each other.[56]

Nevertheless, other than expressly stated in Article 13 of the Convention, the child's right to participation in legal proceedings encompasses the right to receive adequate information before, during and after the proceeding. According to the Committee for the Convention on the Rights of the Child, the child's right to information is an essential precondition for the realization of the child's right to express his or her views.[57] In order to this right to be fulfilled, the child must have access to all necessary information about the nature of the decision and the decision-making process, about the possible consequences and about the modalities in which the hearing or conversation takes place.[58] Providing information to children also fulfils their best interests, since it serves as a tool to reduce stress, anxiety and other forms of harm that may derive from the contact between the child and the justice system: children should be given the instrument to better cope, through a correct involvement that allows them to better understand the decisions that are taken.[59]

Children's rights to receive information in legal proceedings can also be distilled from other sources of international and regional human rights. At the regional level, the European Convention on the Protection of Human Rights (ECHR) does not contain a separate article on the child's right to participate, but this right has been incorporated into art. 8 according to the interpretation given by the European Court of Human Rights (see *infra*, para. 4).

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[55] G. LANSDOWN, *Every Child's Right to be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment No*. 12, p. 22; G. RECINTO, *Legge n. 219 del 2012: responsabilità genitoriale o astratti modelli di minori di età?*, in *Dir. fam. pers*., 2013, p. 1475; L. SEVESO, *La sottrazione internazionale di minori: alcuni aspetti processuali*, in *Minori giust*., 2009, p. 101.

[56] As remarked by L. LUNDY, *'Voice' Is Not Enough: Conceptualizing Article 12 of the United Nations Convention on the Rights of the Child*, in *British Educational Research Journal*, 2007, p. 932.

[57] General Comment No. 12 (2009) of the Committee on the Rights of the Child, point 25: «*The realization of the right of the child to express her or his views requires that the child be informed about the matters, options and possible decisions to be taken and their consequences by those who are responsible for hearing the child, and by the child's parents or guardian. The child must also be informed about the conditions under which she or he will be asked to express her or his views. This right to information is essential, because it is the precondition of the child's clarified decisions*». See also points 41 and 45.

[58] W. VANDENHOLE, TÜRKELLI G.E., LEMBRECHTS S., *Children's Rights. A Commentary on the Convention on the Rights of the Child and its Protocols*, Cheltenham, 2019, p. 146.

[59] A. PARKES, *Children and International Human Rights Law: the Right of the Child to be Heard*, 2013, New York, p. 92.

As concerns the international provisions to which Italy is bound, it is relevant to cite the European Convention on the exercise of children's rights, concluded in Strasbourg on 25 January 1996 under the auspices of the Council of Europe.[60] The Convention has confirmed the statements of Article 12 of the Convention on the Rights of the Child and has granted the child specific procedural rights. According to Article 3, the child «*considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights: a) to receive all relevant information; b) to be consulted and express his or her views; c) to be informed of the possible consequences of compliance with these views and the possible consequences of any decision*».[61] According to Article 6 of the same convention, the judicial authority shall «*ensure that the child has received all relevant information*» before taking a decision.

The system of ratification envisaged by the 1996 Convention is peculiar in the sense that States are required to specify, in the instrument of ratification, at least three categories of family proceedings to which the Convention is applicable. In this regard, the Law 77/2003 has included within the scope of application of the Convention: i) proceedings concerning the judge's intervention in case of disagreement between the parents exercising parental responsibility (Article 145 Civil Code); ii) proceedings for the denial of paternity (Articles 244 and 247 Civil Code); iii) proceedings to challenge the recognition of paternity (Article 264 Civil Code); and iv) proceedings concerning the administration of the child's assets by the parents (Articles 322-323 Civil Code). However, a decision of the Corte di Cassazione of 2007 is rather interesting in the part in which it has attributed a value of general principle to the rules of the Strasbourg Convention of 1996.[62] As a consequence, according to the court, even international child abduction proceedings are subject to the rules of the Strasbourg Convention on the hearing of the child and the right of the child to receive adequate and pertinent information about the proceeding. Information that should be appropriately modulated according to the age and maturity of the child, and should, nevertheless, be omitted if it could have dangerous consequences on the child's wellbeing.

Furthermore, the right of the child to be heard, as well as the right to receive information, have constituted the object of two sets of guidelines, developed by the Committee of Ministers of the Council of Europe and by the International

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[60] Entered into force on July 1, 2000. Text of the Convention and status table are available at https://www.coe.int. The Convention has been ratified in Italy with the Law March 20, 2003, No. 77.

[61] Article 2 of the Strasbourg Convention provides the following definition of «*relevant information*»: «*information which is appropriate to the age and understanding of the child, and which will be given to enable the child to exercise his or her rights fully unless the provision of such information were contrary to the welfare of the child*».

[62] Corte di Cassazione, judgment July 27, 2007, No. 16753.

Association of Youth and Family Judges. The Council of Europe's Guidelines on child-friendly justice (adopted in 2010) state that: «*Children should be provided with all necessary information on how effectively to use the right to be heard* [...]».[63]

The above has been commented by a number of authors.[64] One of them (E. Italia) affirms that the link between children's right to receive information and their right to be heard in judicial proceedings also results from the Italian Forensic Psychology Association Guidelines on child's hearing.[65]

The IAYFJM guidelines extensively address the right to information,[66] also stressing how the child should be correctly informed about the decisions that are made, in a language that he or she can understand.

The existing EU acquis in the field of children's rights builds on those international provisions: as known, Article 3(3) of the Treaty of the European Union explicitly recognises the promotion of children's rights in internal and external affairs as an objective of the EU, as well as Article 24 of the EU Charter of Fundamental Rights. It is natural that the EU instruments in the area of civil cooperation in civil matters are strictly connected with aspects related to fundamental rights of the child. The analysis of the national legislation and practice impacts on EU private international law instruments in the field of family law: indeed, not all those instruments impose direct duties to hear the child. Furthermore, they don't address the opportunity or the methods for child participation in judicial proceedings. What is certain is that the child's fundamental rights must be respected by European judicial authorities and legal practitioners in all actions concerning the child, transnational cases included.

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[63] See the English version of the Guidelines, available at the website of the Council of Europe, p. 28. On how these Guidelines highlight children's right to receive information prior to being heard in judicial proceedings, see M.G. RUO, *Giusto processo civile minorile e spazio giuridico europeo, indicazioni della Corte Europea dei diritti dell'uomo e Linee Guida del Consiglio d'Europa per una Giustizia* Child Friendly, in *Dir. fam. pers.*, 2013, p. 297.

[64] Besides RECINTO and RUO (notes 55 and 63), see R. LOMBARDI, *L'ascolto del minore nei procedimenti di separazione e divorzio su accordo delle parti tra fonti sovranazionali e diritto interno*, in *Familia*, 2019 (online); A. SILIBERTI, *Ascolto del minore in sede di separazione: il giudice deve motivare la decisione di non disporre l'ascolto diretto*, in *ilFamiliarista.it*, 2018 (online); E. ITALIA, *L'ascolto del minore*, in *Fam. dir.*, 2020, p. 713.

[65] Available at https://aipgitalia.org/ (last consulted on November 25, 2020).

[66] See the para. 2.3.3 of the IAYFJM Guidelines.

5. *Relevant case law*

5.1. *National case law*[67]

Looking at the Italian case law when children are involved in civil proceedings, research shows that very few decisions address explicitly the child's right to receive adequate information in proceedings. This shows that the issue is not frequently raised as a relevant point of discussion and objections are not raised in courts when the child does not receive information about the proceeding.

Indeed, the number of decisions in this context should be regarded as both quantitative and qualitative data, in that it could be the index of the attitude of courts "not to raise" the problem at all. Moreover, according to these judgments, courts seem to consider it an incidental question to inform children in the context of civil proceedings concerning them: this need appears to be mentioned only in connection with children's right to be heard.

A change in the Corte di Cassazione's view on the issue was marked by: Corte di Cassazione, judgment April 16, 2007, No. 9094; Corte di Cassazione, judgment July 27, 2007, No. 16753.

Before this change, the Corte di Cassazione affirmed – for example in judgment December 7, 1999, No. 13657 – that it was within the judge's discretion whether the child was [to be] heard or not.[68] It should be mentioned, however, that even in those years, Italian judges paid some attention to the child's opinion in the context of Family Law.[69] With regards to that, see Court of Naples, judgment December 10, 1981; Corte di Cassazione, judgment January 15, 1998, No. 317; Corte di Cassazione, judgment November 9, 2004, No. 21359. Concerning the Italian Constitutional Court,[70] see judgment January 30, 2002, No. 1,[71] according to which – in case of questions related to "parental authority" – the child capable of judgment is a party to the proceeding.[72] It is thus necessary that the adversarial principle applies in regard to him/her (in the Constitutional Court's view, Article 12 of the Convention on the Rights of the Child completes the Civil Code «*with the view to consider the child as a part in the proceeding, with the necessity to apply the adversarial principle*»).[73]

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[67] Available in the project's database (see fn. 1).

[68] V. Malfa, *L'ascolto del minore alla luce della legge n.219/2012*, in *Iura & Legal Systems*, 2015, p. 15.

[69] *Ibidem*.

[70] The name of the court is *Corte costituzionale*; in the present paragraph, it will be referred to as the Constitutional Court.

[71] For the maxim, see the project's database (at fn. 1).

[72] On the concept of parental authority, see Note 53.

[73] On the importance of the judgment in question, see (among others) M. Labriola, *L'avvocato del minore*, in *Familia*, 2019 (online).

Going back to the Corte di Cassazione, according to judgment July 27, 2007, No. 16753, on the one hand being heard is children's right, on the other hand children should receive, in order to be heard, "*relevant and appropriate information*" («*informazioni pertinenti e appropriate*»).[74]

In Corte di Cassazione (United Chambers), judgment October 21, 2009, No. 22238,[75] hearing a child is necessary when his/her custody is at stake. Omitting the hearing without adequate justification would amount to violating both the adversarial principle and the principle of fair trial («*Costituisce quindi violazione del principio del contraddittorio e dei principi del giusto processo il mancato ascolto dei minori*»).[76]

In judgment February 14, 2014, No. 3540, regarding a case of international child abduction, where the Hague Convention of 1980 and the Council Regulation No. 2201/2003 were applicable, the Corte di Cassazione expressly stated the following: the respect of Article 12 of the Convention on the Rights of the Child of 1989 and Articles 3 and 6 of the Strasbourg Convention of 1996 «*requires that the child receives all the relevant and appropriate information, according to his age and his degree of development*» – provided that those information are not harmful for his or her wellbeing.

According to Corte di Cassazione, judgment March 7, 2017, No. 5676, hearing a child grants him/her the opportunity to be informed and to express himself/herself. Both these possibilities constitute a fundamental right, which pursues the child's best interest («*L'ascolto costituisce una modalità, tra le più rilevanti, di riconoscimento del diritto fondamentale del minore ad essere informato ed esprimere la propria opinione […] nei procedimenti che lo riguardano, costituendo lo strumento peculiare di partecipazione alle decisioni che lo investono e al conseguimento del suo preminente interesse*»).

Nevertheless, according to the same judgment, the judge has no obligation to explain his/her choice not to hear a child under the age of 12, unless specifically asked («*non si ravvisa l'obbligo endoprocedimentale del giudice […] di motivare ancorché senza alcuna sollecitazione di parte, sulla valutazione discrezionale relativa all'omesso ascolto*»). The Corte di Cassazione affirmed the same in judgment August 9, 2019, No. 21230 (see *infra*).

In Corte di Cassazione, judgment March 27, 2017, No. 7762, it was stated that hearing a child party to the proceeding – about a matter affecting him/her – is an essential step to be taken, resulting in the judge needing to take into account the outcome of the hearing («*l'imprescindibilità dell'audizione […] non solo consente di realizzare la presenza nel giudizio dei figli, in quanto parti 'sostanziali'*

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[74] *Supra*, para. 2.

[75] For the summary, see the project's database (at fn. 1).

[76] *Supra*, para. 2.

del procedimento […], ma impone certamente che degli esiti di tale ascolto si tenga conto»). This judgment makes reference to Corte di Cassazione, judgment November 9, 2004, No. 21359 (*supra*) and Corte di Cassazione, judgment October 7, 2014, No. 21101 (*infra*).

In Corte di Cassazione, judgment May 24, 2018, No. 12957, it was stated that in case of separation of the spouses, a child less than 12 – who has some capacity of judgment – must be heard, under penalty of nullity, on the matters involving him/her. If the child is not heard, the judge will have to explain it («*Ritiene la giurisprudenza di legittimità che nel giudizio di separazione personale tra coniugi, l'audizione del minore infradodicenne capace di discernimento – direttamente da parte del giudice ovvero, su mandato di questi, da parte di un consulente o del personale dei servizi sociali – costituisce adempimento previsto a pena di nullità ove si assumano provvedimenti che lo riguardino, salvo che il giudice non ritenga, con specifica e circostanziata motivazione, l'esame manifestamente superfluo o in contrasto con l'interesse del minore, Cass. civ. sez. I n. 19327 del 29 settembre 2015*»).

Corte di Cassazione, judgment February 13, 2019, No. 4246 (in line with Corte di Cassazione, judgment 7 March 2017, No. 5676), established that hearing a child – who is at least 12, or even younger when he/she has some capacity of judgment – grants him/her the opportunity to be informed and to express himself/herself. Both these possibilities amount to a fundamental right, which pursues the child's best interest («*Ne consegue che l'ascolto del minore di almeno dodici anni e anche di età minore ove capace di discernimento, costituisce una modalità, tra le più rilevanti, di riconoscimento del suo diritto fondamentale ad essere informato e ad esprimere le proprie opinioni nei procedimenti che lo riguardano, nonché elemento di primaria importanza nella valutazione del suo interesse*»).

According to Corte di Cassazione, judgment May 7, 2019, No. 12018: in the Court's view, hearing a child – who is at least 12, or even younger if capable of judgment – in a proceeding involving him/her is the best way to respect his/her fundamental right to be informed about it («*costituisce una modalità, tra le più rilevanti, di riconoscimento del suo diritto fondamentale ad essere informato e ad esprimere le proprie opinioni nei procedimenti che lo riguardano*»).[77]

Further judgments of the Corte di Cassazione on the issue (in chronological order):

- Judgment March 26, 2010, No. 7282.
- Judgment June 16, 2011, No. 13241.
- Judgment May 17, 2012, No. 7773.
- Judgment March 8, 2013, No. 5847.
- Judgment March 15, 2013, No. 6645.

[77] *Supra*, para. 2.

- Judgment May 15, 2013, No. 11687.
- Judgment October 7, 2014, No. 21101.
- Judgment March 26, 2015, No. 6129.
- Judgment September 29, 2015, No. 19327.
- Judgment July 27, 2017, No. 18649.
- Judgment February 16, 2018, No. 3913.
- Judgment December 13, 2018, No. 32309.
- Judgment April 17, 2019, No. 10774.
- Judgment August 9, 2019, No. 21230.

Moreover, the Constitutional Court, in its judgment January 30, 2002, No. 1[78] has declared that the Convention on the Rights of the Child of 1989 (and in particular its Article 12 on the right to be heard) has a self-executing character and is, therefore, directly applicable in the Italian legal system without the need to adopt specific rules for its implementation.

5.2. *Supranational case law*

The supranational case law mentioned in this paragraph includes some judgements of both the European Court of Human Rights and the EU Court of justice that are relevant for the Italian legal system.

Whilst most of the ECtHR decisions below focus on the act of hearing a child in a proceeding involving him/her (or, more broadly, on the relevance of a child's opinion in this context), only a small percentage of them expressly deals with the importance of prior informing him/her. Judgment of 16 December 1999, T. v. The UK and judgment of 24 September 2007, W.S. v. Poland belongs to this small percentage (*infra*).

The second one actually refers to how a child should be heard in a non-invasive way in a judicial proceeding, rather than to the need to inform him/her. However, one of the methods suggested by the court consists in hearing the child with the assistance of a psychologist: it seems reasonable to think that giving the child adequate information about what the conversation entails forms part of the appointed professional's duties. In our view, by referring to it the Court stressed the significance of informing the child about the possible effects of the hearing.

Nevertheless, in view of the foregoing we could argue that the ECtHR case law has not yet paid sufficient attention to the problem of the child's right to be informed in the context of judicial proceedings.

Moving on to the Court of Justice, only one of the judgments below regards the act of hearing a child in a judicial proceeding (linked to EU Regulation 2003/2201), without addressing the need to prior informing him/her.

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[78] For the maxim, see the project's database (at note 1).

The rest of the EU Court case law referred to concerns a broader question: the necessity to interpret Regulation 2003/2201 in the light of the best interests of the child. This regulation contains Article 11, according to which the child must be «*given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity*».[79] In the light of the best interest principle, this means that the judge hears the child every time it is beneficial for him/her, and that the child receives relevant and appropriate information prior to the hearing.

5.2.1. *European Court of Human Rights case law*[80]

- Judgment of September 23, 1994, Hokkanen v. Finland, app. No. 19823/92: according to para. 61, «[...] *the Court of Appeal came to the conclusion that the child had become sufficiently mature for her views to be taken into account and that access should, therefore, not be accorded against her own wishes […]. The Court sees no reason to call this finding into question*». The Court confirmed that the child, who was 12 years old when the case was dealt with at a national level[81], was mature enough for her refusing contact with her father to be taken into consideration.
- Judgment of June 9, 1998, Bronda v. Italy, app. No. 22430/93: according to para. 62, «[...] *while a fair balance has to be struck between S.'s interest in remaining with her foster parents and her natural family's interest in having her to live with them, the Court attaches special weight to the overriding interest of the child, who, now aged fourteen, has always firmly indicated that she does not wish to leave her foster home. In the present case, S.'s interest outweighs that of her grandparents*». In the Court's view, it was necessary to give value to a child's view about her custody; at the time of the judgment, she was 14 years old. Her opinion consisted in a firm refusal to live with her grandparents, since she wished to stay at her foster home.
- Judgment of December 16, 1999, T. v. The UK, app. No. 24724/94: according to para. 84, «[...] *The Court does* [...] *agree with the Commission that it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings*». Even though it regards a criminal law case, this judgment is relevant for the present analysis. The Court underlined the necessity to take into account, in case of a child charged with an offence, his/her age, level of maturity and "intellectual and emotional capacities". The Court also emphasised the need to foster the child's understanding of the

[79] Article 11 (referring to the "return of the child"), para. 2, of the regulation at issue.
[80] The date mentioned always refers to the final decision.
[81] For more details about this aspect, see para. 37 of the judgment.

proceeding and his/her participation into it: by mentioning this need, it seems that the Court made indirect reference to the significance of informing the child about each step of the proceeding.

- Judgment of July 8, 2003, Sahin v. Germany, app. No. 30943/96: according to para. 73, «*As regards the issue of hearing the child in court, the Court observes that as a general rule it is for the national courts to assess the evidence before them, including the means used to ascertain the relevant facts […]. It would be going too far to say that domestic courts are always required to hear a child in court on the issue of access to a parent not having custody, but this issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned*». On the one hand the ECtHR considered it excessive to always hear a child in regard to his/her relationship with the parent not having custody. On the other hand the Court thought the hearing was a possibility, by affirming that the decision whether to hear a child or not depends on the specific circumstances of the case at issue, like his/her age and level of maturity.
- Judgment of July 8, 2003, Sommerfeld v. Germany, app. No. 31871/96: according to para. 72, «[...] *the Court notes that the girl was thirteen years old when she was heard by the District Court judge on the question of access […]. The same judge had already questioned her, at the ages of ten and eleven, in the context of the first set of proceedings […]. Having had the benefit of direct contact with the girl, the District Court was well placed to evaluate her statements and to establish whether or not she was able to make up her own mind. On that basis the District Court could reasonably reach the conclusion that it was not justified to force the girl to see her father, the applicant, against her will*». Basing on the above-mentioned paragraph of the judgment, it could be argued that for a judge to evaluate the child's view on a certain matter, it is necessary to have direct contact with him/her.
- Judgment of September 22, 2004, Pini et al. v. Romania, apps. Nos. 78028/01 and 78030/01: according to para. 157, «*It must be pointed out that in the instant case the children rejected the idea of joining their adoptive parents in Italy once they had reached an age at which it could reasonably be considered that their personality was sufficiently formed and they had attained the necessary maturity to express their opinion as to the surroundings in which they wished to be brought up*». According to para. 164, «*[...] The children's consistent refusal, after they had reached the age of 10, to travel to Italy and join their adoptive parents carries a certain weight in this regard. Their conscious opposition to adoption would make their harmonious integration into their new adoptive family unlikely*». In a case of international adoption, the Court judged that the children's opinion – children who had reached the age of 10 – was significant to assess the probability of their integration into a new adoptive family.

- Judgment of August 9, 2006, C. v. Finland, app. No. 18249/02[82].
- Judgment of April 25, 2007, Eski v. Austria, app. No. 21949/03: according to para. 40, «*The Court further observes that the district court granted the adoption after having heard evidence from the child, her adoptive father and the child's mother. On that occasion the child, then aged nine and a half, stated that she considered her adoptive father as her father and supported the adoption*». In this judgment, the ECtHR gave value to the fact that the national court had heard the child about her mother's husband adopting her; the child supported the adoption, while her biological father was opposed to it.
- Judgment of September 24, 2007, W.S. v. Poland, app. No. 21508/02: according to para. 61, «*[...] the Court observes that it has not been shown or argued that the authorities envisaged or made attempts* [...] *to test the reliability of the victim in a less invasive manner than direct questioning. This could have been done, for example, by more sophisticated methods, such as having the child interviewed in the presence of a psychologist and, possibly, also her mother, with questions put in writing by the defence, or in a studio enabling the applicant or his lawyer to be present indirectly at such an interview, via a videolink or oneway mirror*». Although it regards the case of a child victim of a crime, this judgment is useful to understand the Court's view about how a child should be heard in the context of a judicial proceeding. Some possible ways to do it without being invasive are mentioned, like hearing the child in a protected space.
- Judgment of June 20, 2011, Plaza v. Poland, app. No. 18830/07: according to para. 86, «[...] *The Court is of the view that the approach of the domestic courts, which considered that it was of the greatest relevance to the custody and access issues to establish the psychological situation of the child and take her wishes into consideration* [...], *cannot be open to criticism*». The Court appreciated the decision made at national level, regarding a minor who refused contact with her father, since this decision took into account her point of view on the issue (in the same vein, see judgment of November 28, 2011, Sbârnea v. Romania, app. No. 2040/06, para. 131, in relation to the action of social services).
- Judgment of May 1, 2018, M.K. v. Greece, app. No. 51312/16: according to para. 91, «[...] *la volonté exprimée par un enfant ayant un discernement suffisant est un élément clé à prendre en considération dans toute procédure judiciaire ou administrative le concernant*».[83] This judgment is relevant for the purposes of this paragraph since the child's opinion is defined as a «key

[82] *Supra*, para. 2.
[83] An official English version of the judgment is not available.

element» to be taken into account during the proceeding, when he/she is sufficiently mature.

5.2.2. *EU case law*

As stated above, among the decisions of the Court of justice mentioned in this paragraph, only one refers to the act of hearing the child, namely the judgment of December 22, 2010, Joseba Andoni Aguirre Zarraga v Simone Pelz, Case C-491/10 PPU.

According to its para. 66: «[...] *whilst it is not a requirement of Article 24 of the Charter of Fundamental Rights and Article 42(2)(a) of Regulation No 2201/2003 that the court of the Member State of origin obtain the views of the child in every case by means of a hearing, and that that court thus retains a degree of discretion, the fact remains that, where that court decides to hear the child, those provisions require the court to take all measures which are appropriate to the arrangement of such a hearing, having regard to the child's best interests and the circumstances of each individual case, in order to ensure the effectiveness of those provisions, and to offer to the child a genuine and effective opportunity to express his or her views*».

According to para. 68: «*It follows that, before a court of the Member State of origin can issue a certificate which accords with the requirements of Article 42 of Regulation No 2201/2003, that court must ensure that, having regard to the child's best interests and all the circumstances of the individual case, the judgement to be certified was made with due regard to the child's right freely to express his or her views* [...]».

According to Article 42 of Regulation 2003/2201, when a child is brought abroad (to «*a Member State other than the Member State where the child was habitually resident*» before being abducted)[84], in case his/her return is «*entailed by an enforceable judgment given in a Member State*»,[85] this judgment is automatically recognised by another Member State when the decision «*has been certified in the Member State of origin*».[86] The certificate referred to is issued if – among various conditions – «*the child was given an opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity*».[87]

According to the judgment in comment, Article 42 of the regulation doesn't imply the obligation for the judge to always hear the child, since it exists a «*certain degree of discretion*». However, when the hearing takes place, it is necessary that the child is put in the position to freely express himself/herself.

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[84] Article 11, para. 1, of the regulation at issue.
[85] Article 42, para. 1, of the regulation at issue.
[86] *Ibidem*.
[87] Article 42, para. 2, a), of the regulation at issue.

Further decisions of the Court of justice have focused on the need to interpretate Regulation 2003/2201 in accordance with the child's best interest.

In the judgment of December 22, 2010, Barbara Mercredi v. Richard Chaffe, Case C-497/10 PPU, at para. 46, the Court of justice stated the relevance of the child's best interest when determining his/her habitual residence («*Since the articles of the Regulation which refer to 'habitual residence' make no express reference to the law of the Member States for the purpose of determining the meaning and scope of that concept, its meaning and scope must be determined in the light of the context of the Regulation's provisions and the objective pursued by it, in particular the objective stated in recital 12 in the preamble to the Regulation, that the grounds of jurisdiction established in the Regulation are shaped in the light of the best interests of the child*»).

Similarly, the judgment of October 1, 2014, E. v. B., Case C-436/13, stated that «*With respect to the objectives pursued by Regulation No 2201/2003, it should be noted that recital 12 in the preamble thereto provides that the grounds of jurisdiction established in that regulation in matters of parental responsibility are shaped in the light of the best interests of the child*» (para. 44). The same was argued by the Court of justice in judgment of November 12, 2014, L v. M, Case C-656/13, para. 48, and in the judgment of October 9, 2014, C v. M, Case C-376/14 PPU: when determining the child's habitual residence, it is necessary to respect his/her best interest and, to this end, to take into account and balance all the circumstances of the case at issue (see para. 56). In the same vein, see judgment of February 15, 2017, W and V v. X, Case C-499/15 (para. 60) and judgment of June 28, 2018, HR, Case C-512/17 (para. 40).

6. *The effectivity of the hearing as dependent on the right to receive adequate information: gaps and deficiencies in the Italian legal system*

From the above analysis, it results that the right of the child to receive appropriate information in civil proceedings is not enshrined in many legal provisions, even in those concerned with child participation.

The Italian legal system has accepted and implemented the indications of international conventions on the need to hear children before taking any decision concerning them. However, analogous attention does not seem to reach the right of the child to receive adequate information before, during and after judicial proceedings.

Firstly, it seems that the few legal provisions concerned with information to children are the ones that regulate the hearing of the child in proceedings (see *supra*, Article 336-*bis* of the Civil Code, which is a provision of general application for all proceedings *concerning* the child). Children's right to information is considered in very few provisions, which are not specifically dedicated to the enjoyment

of such a right, but they rather mention it within the right of the child to be heard during the proceeding. Thus, it seems that the Italian legal system considers the right to information to be especially important in case the judge hears the child – an approach that should certainly be welcomed, yet it does not express a general consideration for the right to information in its autonomy.

Secondly, and concurringly, aside from few decisions, case law fails to explicitly address the child's right to receive adequate information in proceedings. As previously highlighted, this occurrence shows that the issue is not frequently raised as a relevant point of discussion and objections are not raised in courts when the child does not receive information about the proceeding. Since the case law does not address this point, that could be the index of the attitude of courts "no to raise" the problem at all.

The analysis of current practices in Italy has someway confirmed the aforementioned consideration, as it will be seen in the following paragraph. What is important to understand, in our opinion, is the importance of the information stage on the effectiveness of the hearing of the child. Participation of children in proceedings is not sufficient *per se* to pursue the child's best interests, rather it may be even harmful for the child if not adequately prepared to this important stage of the proceeding and if he does not receive information.[88] It seems that some progress can be made in this regard as concerns the implementation of the rights of the child in civil proceedings: this paves the way to further discussion at the international and European level.

7. *Analysis of the current practices in Italy*

The questionnaires from lawyers and judges gave some interesting insights to the research, especially as concerns the best practices that are currently ongoing in Italian civil proceedings and the perception that legal practitioners have on the existence, content and importance of children's right to information.

7.1. *General section: The children's right to information in civil proceedings*

In the General Section of the questionnaire, the scope was to have a general idea about judges' and lawyers' perception on the existence of a general right of the child to receive adequate information in civil proceedings, – especially when EU instruments in the field of civil cooperation in civil matters were concerned. Respondents were asked whether the Italian legal system includes a general obligation to provide written or oral information to children in the disputes involving

[88] Despite the indications given in the General Comment No. 12 (2009) of the Committee on the Rights of the Child, point 16: «*States parties have to ensure that the child receives all necessary information and advice to make a decision in favour of her or his best interests*».

them or capable to affect their life and future. Indeed, answers to this question were generally oriented towards considering the information phase as a part of the child's hearing during the proceeding.

Only three respondents declared that there is a general obligation to provide information to children in the Italian legal system, stated by the Civil Code (336-*bis* of the Civil Code). One of those respondents stated that this duty is upon the child's parents (referring to Article 315-*bis*) and upon the judge if the child is heard by the court (with the duty to provide information on the nature of the proceeding and on the effects of the audition). Another respondent stated that the right to information derives directly from Article 12 of the Convention on the Rights of the Child of 1989 and from the Strasbourg Convention on the Exercise of Children's Rights, which also impose that the information shall enable the child to understand the effects of the decision and the impact of the latter over his or her life. It was highlighted that the rules expressing the children's right to information do not give much indication on the content or the extent of this information.

Four respondents reported that there is no general rule to inform the child in the Italian legal system, even if information is provided, when the child is heard by the judge. This was indicated as the moment of the judicial proceeding when the child is provided information. This means that the information is given orally to the child, most of the time during or shortly before the hearing. One of the respondents stated that the right of the child to information indirectly derives from Article 12 of the Convention on the Rights of the Child of 1989.

According to other nine respondents, there is no general obligation to provide information to the child in civil proceedings. Nevertheless, three answers specified that the child is usually given information. One respondent stated that, in this context, «t*he information provided to the child is usually generic and oriented towards the purpose of reassuring the child that is about to experience the audition*».

From the experience of practitioners, it was also possible to gain the general perception that the duty to inform the child is strictly interconnected with the right of the child to be heard, in the sense that the (few) provisions addressing the right to information are mainly concerned with the child's hearing. Unsurprisingly, when asked whether the Italian legal system provides for an obligation to inform the child also «*where there is no obligation for the judge to hear the child*», the almost totality of respondents answered negatively. Only one answer stated that there is a general obligation to give information to the child, even though the relevant legal provisions were not indicated.

No clear pattern seems to subsist according to differences in information, according to the age of the child and as concerns the content of the information.

Another question was aimed at understanding whether children are informed before the start of the proceeding and, in this case, how long before this information takes place. Answers to this question are interesting in the fact that seven respondents declared that the child is never given information *before* the start of the

proceedings. Three respondents declared that the child is barely informed in this preliminary stage, and five other respondents stated that the child is "sometimes" informed. In only one case, the respondent stated that the child is always informed before the start of the proceeding.

When asked how long before the proceeding children are provided with the information, all respondents stated that «*there is no fixed rule in this regard*».

As concerns the information during the course of the proceedings, the majority of respondents stated that the child is "sometimes" (8) or "barely" (5) given information *during* the proceeding. Only two respondents stated that the child is "often" provided with information.

The rate and extent of information given to the child are lower when it comes to communicating the outcome of the proceeding: according to five respondents, the child is "barely" given information at this final stage. Three respondents stated that the child is "sometimes" given information. Six respondents stated that the child is never given information after the end of the proceeding.

Another question on the general characteristic of the Italian legal system concerned the existence of a professional that has the duty to help the child in expressing his/her opinion in civil proceedings. What emerges from the analysis of the Italian legal system is it lacks an established institutional figure that has the duty to help the child in expressing his or her opinion. A special curator of the child may be appointed in certain situations of higher conflict or when there is no parent who can exercise parental responsibility over the child. However, this role does not seem to encompass also the specific duty to facilitate the participation of the child in the proceeding (even if this duty could be inferred by the fact that the special curator protects the interests of the child). In certain cases, practitioners have made reference to the special curator, to social workers or the community personnel, or also to a psychologist.

Further data that emerged from the answers is that in the Italian judicial system, parents are not usually prepared by the judge or other public institution on how to assist their children and how to explain them the situation or the outcome of the proceedings. Only in one case, it was explained that parents receive suggestions and advice from the judge or from the special curator on how to explain the situation to children and how to communicate the outcome of the proceeding. Therefore, this aspect seems to be left, to a larger extent, to the responsibility of the parents (or to the sensitivity of the lawyer of one of the parents).

A lack of diffused and consolidated practice also concerns the possibility for the child involved in civil proceedings to have access to child-friendly materials. The majority of respondents answered that those materials are never provided in courts or by the institutions involved in civil proceedings. Only in one case it was stated that those materials are "often" at disposal of the child (respondent referred to short movies or brochures); in four cases, respondents stated that those materials are "barely" found.

Some important data, that is relevant for cross-border proceedings involving children, is the jeopardized presence of tools and services for children that do not understand the local language. Two respondents didn't answer to this question. The other respondents were almost equally distributed: six stated that the child is not provided with this assistance; six answers were positive and made reference to translation services and/or cultural mediators. This is an aspect that would need to be implemented for the purposes of a child-friendly justice in the context of cross-border proceedings.

As concerns children with special needs, information does not result to be adequately provided by public institutions in every case: two respondents didn't answer this question. In four cases the answer was positive: children with special needs are provided with the assistant of a psychologist (two answers) or the proceeding is assigned to a honorary judge (who is usually a professional having specialized scientific knowledge in dealing with children). Three respondents stated that "sometimes" this type of service is provided. One respondent's answer was "barely" and reference was made to the assistance of a psychologist and to the usage of I.T. aids. Six respondents declared that children with special needs are not provided with adequate information.

7.2. *Proceedings on parental responsibility and rights of access*

This section of the questionnaire was dedicated to proceedings on matters of parental responsibility, which, therefore, fall into the scope of application of Regulation (EC) No. 2201/2003 (as well as the Regulation (EC) 2019/111 that will enter into force in 2022). This section is of direct interest for the application of EU instruments in the field of judicial cooperation in civil matters.

From the answers collected, it results that the child is usually heard in parental responsibility proceedings before issuing a decision on the merits. The majority of respondents explained the conditions that Italian law imposes in order to admit a child's audition: the child shall be above twelve years of age or capable of discernment; the audition shall not be manifestly superfluous, and shall not constitute a harmful situation for the child.

Respondents were also asked who is charged with the hearing of the child. Almost all the answers were oriented towards the judge proceeding directly to hear the child, eventually with the assistance of a psychologist or a social assistant. In general, in all answers respondents stated that the audition is directed by the judge. The assistance of a psychologist or a social assistant is considered discretional and based on a prudent assessment of the judge when the case presents delicate aspects of child protection. One respondent stated that the judge proceeds alone, in any case. Only one of the respondents envisaged the possibility that the audition is conducted directly by the psychologist or the social assistant. However, in that questionnaire, all the three possible answers (judge, psychologist, social assistant)

were marked. In one case, it was declared that the child is not heard in civil proceedings on parental responsibility.

All respondents but two declared that, in parental responsibility proceedings, parents are not usually allowed to attend the hearing, when the audition of the child is performed. This is in line with the research conducted on the Protocols adopted by certain courts and juvenile courts, which are in principle contrary to parent's participation during the child's/children's auditions.

When the child is heard, the majority of respondents (ten out of sixteen) stated that the child is always provided with information before the audition. In two cases, it was stated that the child is often provided with information in this stage. In two cases, it was stated that this preliminary phase of information occurs sometimes. In one case, the answer was "barely".

The characteristics of the preliminary phase of information seems to be, in this case, very well defined. There are two typical scenarios, to which almost all respondents referred to:

- The child is given information about the hearing a few days before, usually by the parents or the social worker, or
- The judge provides the child with information shortly after the audition, or at the initial stage of it.

One respondent did not answer this question.

From all the collected answers, it was possible to infer that there are no general rules on *how* the information is provided. As already explained, it results that information is usually given to the child before the audition. This means that the information phase may occur shortly after the audition (or, in some cases, a few days before). Doubts may be raised if the preliminary stage of information, shortly after the audition, may qualify as a proper preparation of the child or rather a part of the audition itself, to which the child is present without a prior knowledge of the situation. In the latter scenario, preparation of the child inevitably falls upon the responsibility of the parents or the social worker.

Respondents were asked whether the child is usually provided with information in presence of a person they trust: also in this regard the practice of Italian courts does not follow a clear path. It seems that the presence of a person of trust may be necessary or recommended if the circumstances require so, but it does not happen on a fixed basis. Most of the answers referred to a parent (or a tutor/curator), a psychologist or a social assistant (likely, to be already involved in the proceeding).

The content of the information provided to the child is various and mixed according to the different experiences. The child may receive information about the reasons of the hearing (6 answers), the presence of other persons at the audition (9), the functions of the professionals attending the audition (5), the extent of disclosure of the child's declarations (6), the availability of procedural safeguard (2), the behavioural rules that the child needs to respect during the hearing (1), the

rights of the child (9), the background information about the case (8), the hearing possible outcomes (6).

An important information that results to be usually provided by the child is the following: children are effectively informed that their opinion is important, but they won't be responsible for the final outcome of the proceedings. In twelve cases out of sixteen, respondents stated that the child is "always" informed that his or her opinion won't determine the outcome of the proceedings. In two cases, it was stated that the child is "often" reassured about this important aspect.

On the other hand, at the end of the audition, the child does not always receive feedbacks and information about the audition itself and about the following steps of the proceeding. This does not seem to be a usual practice of Italian courts. In nine cases, respondents stated that the child is "never" provided with this kind of information. Three times the answer was "barely", and three times the answer was "sometimes". Only in one case, the answer was "often".

The final stage of proceedings may also present delicate profiles when it comes to informing the child about the final decision on the merits. While there is no specific rule in this regard, the practice seems to put this responsibility outside of courts: in four cases respondents stated that the child is not informed at all about the decision. In nine cases, this duty is left to the parents or to the child's special curator. In five cases, answers mentioned the social worker or the psychologist involved in the case of a particular child. It appears that the judge does not have a role in this regard. The reported answers show that there is no fixed rule about the modalities with which this kind of information may be provided.

7.3. *International child abduction*

This section makes reference to international child abduction proceedings and to return proceedings. The section comprehends proceedings for the return of the child under the 1980 Hague Convention, and also return applications following a decision of non-return, according to art. 11 of the Regulation (EC) No 2201/2003.

The hearing of the child – as well as the necessary procedural guarantees – may be difficult in the context of child abduction proceedings, where the court has to act expeditiously and shall take a decision on (non-)return within six weeks. Providing assistance and proper information to the child could in general constitute an even greater challenge for courts and practitioners, since the collaboration of the parent that is taking care of the child is not always guaranteed. Also, the high degree of urgency of those proceedings may constitute another important obstacle.

The jeopardized practice of Italian courts as concerns children's hearing in child abduction proceedings is already known and has been subject of extensive research.[89] The reported answers, somehow, confirm this trend. When asked if

[89] Among others, see the results of the VOICE project cited at fn. 2.

the child is heard in abduction proceedings, in seven cases respondents said that the child is usually heard if he or she is above twelve years of age or capable of discernment. In three cases, the answer was "no". In three cases, the answer was "sometimes" (in one case: i.e. when it is necessary to ascertain the conditions of the child).

In Italy, return proceedings for cases of international child abduction are of competence of the juvenile court. In this context, it is possible to appoint an honorary judge that has specific competences in treating children. In the light of this, it may be unnecessary for the judge to be assisted by a psychologist or a social assistant (honorary judges usually *are* psychologists or social assistants, as well as psychiatrist or other professionals in the field). This may be one of the reasons why, in return proceedings, it seems to be the judge alone to conduct the hearing (seven answers). This does not exclude the assistance of another professional, if the judge considers this advisable (this was reported in four answers). In return proceedings, parents do not usually attend the audition of the child (thirteen answers).

As concerns the modalities with which the child may be provided with information before the hearing, the answers reflect a practice that is somehow analogous to parental responsibility proceedings. In eight cases, respondents have stated that the child is "always" or, at least, "often" provided with information before the audition, usually a few days before the hearing or within the same day. In two cases, the child results to be "sometimes" informed before the audition. The judge is the subject that usually does this, orally (this answer recurred four times). In other cases, it was stated that the information is provided by the parents, or by the social worker, or by the Central Authority involved in the abduction case.

In in international child abduction proceeding, there seems to be no established practice in the Italian judicial system as concerns the content of the information that may be provided to the child. This content is neither predetermined by law, nor by any instrument of soft law. Considering the answers above, according to which it is usually the judge who gives] information to the child, it is possible to infer that the content of the information is decided by the judge himself on a case-by-case basis. The child may receive information about the reasons of the hearing (7 answers), the presence of other persons at the audition (4), the functions of the professionals attending the audition (6), the extent of disclosure of the child's declarations (3), the availability of procedural safeguard (1), the behavioural rules that the child needs to respect during the hearing (1), the rights of the child (8), the background information about the case (7), the hearing possible outcomes (6).

In child abduction proceedings and when the child is heard, judges and lawyers seem quite sensitive to the necessity to inform the child that his or her opinion is important, but he or she won't be responsible for the final outcome of the proceedings. In five cases out of nine (other answers left blank), respondents stated that the child is "always" informed that his or her opinion won't determine

the outcome of the proceedings. In four cases, it was stated that the child is "often" reassured about this important aspect.

When a decision of return is issued, there is no consolidated practice in the Italian legal system towards informing the child about the final outcome of the proceeding. In particular, when the child has to return to the country of habitual residence following a judicial order, the fact that the child is informed is not institutionalized within the proceeding: only in three cases, respondents declared that the information is provided. In one case, it was reported that the information is usually provided by the judge or by the parents. In one case, reference was made to the social services. In four cases, no answer was given. There are also answers that may indeed raise some concern. In six cases, it was stated that the child is not informed at all about the decision of return. In two cases, it was explicitly stated that the child is informed "*at the moment of the enforcement*" of the return order, by the Prosecutor or by the police or by the social worker. In one case, it was specified that the information is provided only at the enforcement stage «*in order to avoid double abductions*». There are no relevant legal provisions on this aspect in the Italian legal system.

The absence of a specific obligation to inform the child about the imminent return may result in a lack of preparation of the child before the enforcement. Ten respondents to the survey declared that the child is never prepared and informed about the enforcement. One respondent didn't answer to this question. This shall raise the doubt about a strong gap in this regard in the Italian legal system. In one case, the respondent explained that the child may be informed "in writing" by the social services about the imminent enforcement of a return order. In one case, it was stated that the child is prepared by the police or by the social workers at the moment of the enforcement, «*in order to avoid double abduction*».

7.4. *Maintenance proceedings*

The general obligation to enable children's participation in all proceedings affecting them is also relevant in the context of support and family maintenance. However, as in other contexts, it is always necessary to ascertain whether the matter under discussion "affects" the child and, subsequently, that the child is capable of forming his or her own views. Under these conditions, art. 12 of the Convention on the Rights of the Child of 1989 also applies in cases of maintenance and to proceedings under the Regulation (EC) No. 4/2009. It should also be borne in mind that it is not unusual that maintenance issues are discussed by the court in the context of a family dispute in a broader sense, *i.e.* in the context of divorce, separation or parental responsibility.

When proceedings on maintenance or child support are celebrated outside a divorce/separation/marriage annulment proceeding (i.e., autonomous maintenance proceedings), practice seems to show that the child is not usually heard: the majority of answers collected has expressed a negative position in this sense. In three

cases, it was stated that sometimes the child may indeed be heard and informed before the hearing. In one case, no explanation was given as concerns the person who may provide those information, nor the how and when of informing the child. In another case, the respondent stated that the child is given information concerning the reason of the hearing, the presence of persons other than the judge during the audition, the content of his or her rights and the relevant information about the object of the proceeding. In the third case, the respondent stated that the child is given information concerning the reason of the hearing, the presence of persons other than the judge during the audition, the function of the professionals that are present during the audition, the rights of the child and the consequences of the audition for the purposes of the final decision. Generally, the child is orally provided information before the audition.

7.5. *Special representative or special curator of the child*

The answers to this Section were quite homogeneous in demonstrating a knowledge of the institute of the special curator. In the Italian legal system there is no figure such as the *guardian ad litem* as happens in certain Nordic countries, but the special curator can be appointed in the abovementioned situations and he or she has the duty to protect the interests of the child.

The special curator of the child is appointed in case of emergency, where the child is not represented by someone who holds parental responsibility. Those are cases of emergency of particular conflict, in which it is necessary to provide the child with a person representing his or her best interests. According to art. 78 of the Civil Code: «*In case of emergency, when a minor doesn't have someone representing him/her, it is possible to appoint a special curator*».

In general, the child has the right to separate representation (through a special curator) where there is a situation of relevant conflict and when the parents are in conflict of interests. Apart from actions oriented towards the establishment of parenthood, or the contestation of the parent-child relationship (that are not relevant for the purposes of this research), all the answers collected made reference to all cases in which there is a strong conflict between the parents. This may occur in the hypothesis of limitation or termination of parental responsibility, as well as when it is necessary to take measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

In absence of specific provisions in this regard, legal practitioners seem to be divided in understanding the existence of a particular duty to inform the child during a civil proceeding, which is upon the special curator. Eight respondents answered "no", while other six answered "yes". Two respondents declared that they didn't know the answer. No specific legal provision addresses the fact that the representative may have the duty to prepare the child for the hearing. From the answers collected, it does not seem that the special curator has a specific duty to give adequate information to the child: this may happen as a consequence of a free

choice of the curator. One respondent also noticed that the special curator rarely has a direct contact with the child alone, but is helped by a social worker.

7.6. *Training needs and open suggestions*

The professionals addressed by the survey have been asked whether, in their professional experience, have even attended trainings on specific topics related to child participation, child protection and the right to information.

The results show that there are some cases in which professionals are provided with specific trainings on «*children's rights and/or how to protect and fulfil the best interests of the child in civil proceedings*» (thirteen affirmative answers). Some respondents have also declared to have participated in trainings concerning «*child-friendly behaviour related to children involved in proceedings*» (ten positive answers). However, when it comes to more specific trainings such as «*child-friendly language for informing children*» **or** «*how to explain parents how to inform their children about proceedings*», most of the respondents answered negatively.

Professionals have also been asked other inputs as concerns further action that should be done in order for children to receive complete and adequate information about the proceeding that concerns them. The most relevant answers concerned the institution of professionals within the organization of social workers, with the specific role to provide information to the child in civil proceedings.[90] Similarly, respondents addressed the opportunity to institute a specific professional appointed with the management of every situation in which the child is in direct contact with the court, and appointed with the duty to provide information.[91]

Moreover, several answers expressed the need for a more comprehensive and clear legal framework that expressly states the rights of the child and the duties of the judge, the lawyer and the special curator, as well as of the social workers and that defines the modality of information.[92] This could also be done through the development of common guidelines for courts and practitioners.

The need for a better preparation of legal practitioners interfacing with the child has also been raised: one respondent expressed the following idea: «*I believe that the information on the proceedings concerns only the case of the audition of the child and the subsequent measure and that an expert in communication with the minor is necessary to perform this informative function*».

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[90] Three answers have raised this point.
[91] Two answers.
[92] Two answers.

8. *Conclusions*

In Italy, the legal status of children has considerably evolved in recent decades. The initiatives taken at the local level are due to the influence of the international community, which is more and more attentive to the needs of children and has taken concrete initiative to better their conditions in different areas. In particular, those initiatives have taken in great consideration the necessity to protect the child from the harm that could derive from the contact with the justice system. The latter represents a delicate environment for the child: often, this is the place were important decisions about the child's future are taken. At the same time, the contact between the child and the justice system can potentially influence the future perception that the child has of the public authority.

The transposition of the principles and standards set at international and regional level are not always easy to implement at local level: domestic law is not always ready to take in full consideration the instances of the international community. International standards need to find their way into policies, legislation and daily practice. The analysis of the Italian legal system in the field of children's right to information has shown that many initiatives can still be promoted to improve the contact of the child with the justice system. Indeed, implementing the right to information requires concrete initiatives that go beyond the mere recognition of the right itself in a legislative instrument. Providing information to the child before, during and after a judicial proceeding consists in setting up a series of concrete measures and, most of all, in specialized training for judges and other practitioners.

From the present analysis, it is possible to draw a few preliminary conclusions that may serve as a basis for subsequent research and for future action.

In Italy, children do not have a statutory right to receive information about the procedures in which there are involved: Article 336-bis of the Civil Code establishes this right with reference to every procedure concerning the child, thus having a general scope of application, but there are several limitation of subjective and objective nature in the enjoyment of such a right. Firstly, it should be noticed that Article 336-bis establishes the right of the child to be heard in civil proceedings concerning him or her, but this right is limited to children above twelve years of age or capable of discernment. It is within those limits that the right to information is consecrated, being instrumental to a better implementation of the right to be heard. Therefore, it shall be concluded that the right to information is not consecrated as a general right of the child *per se*, but only as it serves the right to be heard. Secondly, the rule establishes a precise objective delimitation in the content of the information, since the obligation to inform only encompasses «*the nature of the proceeding and the effects of the hearing*».

A limited awareness of the fundamental right of the child to be informed (in its well-rounded and comprehensive content and relevance) may also emerge

from the fact that a very few case law address explicitly the child's right to receive adequate information in proceedings. As previously highlighted, this occurrence shows that the issue is not frequently raised as a relevant point of discussion and objections are not raised in courts when the child does not receive information about the proceeding. Since the case law does not address this point, that could be the index of the attitude of courts "no to raise" the problem at all.

Taking into account the aforementioned characteristics and content of the relevant legal provisions and case law, it is not surprising that legal practitioners addressed by the survey have often declared that the Italian legal system does not foresee a general obligation to inform the child in civil proceedings, even if sometimes reference was made to Article 12 of the UN Convention on the Rights of the Child. The right to information is rather perceived as a corollary of the right to be heard: when asked whether the Italian legal system provides for an obligation to inform the child also «*where there is no obligation for the judge to hear the child*», the almost totality of respondents answered negatively.

Uncertainty emerges also as concerns the timing, the concrete modalities (i.e., the subject that has the duty to inform the child) and the content of the information. A first, general, fact that is valid as a general indicator on the overall situation of the Italian legal systems is that the duty to inform the child is not specifically assigned to a professional or a legal practitioner involved in judicial proceedings affecting the child. Even if in Italy there is a specific institute that consents to appoint a special curator for the child – in situations where there is a conflict of interests between the child and his or her parents –, it is not clear whether the special curator has a specific duty to inform the child before, during and after the proceeding. This may happen as a consequence of a responsible choice of the special curator.

In parental responsibility proceedings, falling under the scope of application of Regulation (EC) No 2201/2003 (as well as the Regulation (EC) 2019/111 that will enter into force in 2022), the information stage is perceived as directly connected to the audition of the child. A positive aspect is that the child is usually provided information before the audition. However, the typical scenarios show that this is usually done a few days before the audition or shortly after the audition (if not at the initial stage of the latter), raising doubts on the efficacy of this practices as an effective tool for child preparation, that may consequently fall upon the responsibility of the parents or the social workers. Moreover, an irregular practice emerges as concern the content of the information provided to the child.

On the other hand, at the end of the audition, the child does not always receive feedbacks and information about the audition itself and about the following steps of the proceeding. This does not seem to be a usual practice of Italian courts. The final stage of proceedings may also present delicate profiles when it comes to informing the child about the final decision on the merits. While there is no specific rule in this regard, the practice seems to put this responsibility outside of courts.

No sensitive differences in the described practice seem to emerge from the analysis of international child abduction proceedings, either as concerns the timing and modalities in which the child is provided information or having regard to the content of the latter. If child abduction proceedings fall under the competence of the juvenile court, thus benefitting from the specialized background of honorary judges that are usually involved in those cases, the jeopardized practice of Italian courts as concerns the audition of abducted child (with all the practical difficulties underlying those kind of cases) may have detrimental effects also on the right to information. A relevant aspect emerges from the phase that follows the child's audition and after the decision is taken, showing a low degree of awareness as concerns the importance of child's involvement and preparation in this stage of the proceeding. In this context, a particular attention should be given to practitioners' testimonies stating that, when the enforcement of a return order is necessary, the child is prepared by the police or by the social workers at the exact moment of the enforcement, «*in order to avoid double abductions*».

Child-friendly or child-sensitive measures to fulfil and implement the right to information are less frequently in place, this circumstance stemming as a direct consequence of a lack of recognition in the legislation and the case law and having as an effect a lack of practical measures that may constitute a guidance for lawyers, judges and other practitioners involved in cross-border civil proceedings. The research, considering the current practices existing in Italy as described by the professionals involved, revealed a jeopardized (if non existing) guidance or codes of conduct for judicial or other competent authorities to ensure that children receive information. This emerges, *inter alia*, from the protocols adopted by civil and juvenile courts, that sometimes expressly mention the need to provide the child with adequate information about the audition (and prior to the audition), but without describing any concrete modality on how to provide the information. The creation of guidelines on best practices for legal practitioners may, therefore, constitute an opportunity to fulfil the needs emerged in the research, that has also been specifically expressed through the need to foster a more comprehensive and clear legal framework, as well as a better preparation of the legal practitioners interfacing with the child.

Chapter 6

CHILDREN'S RIGHT TO INFORMATION IN CIVIL PROCEEDINGS IN ITALY: THE ROLE OF SERVICE PROVIDERS IN SOCIAL AND HEALTH CARE TO PROVIDE CHILD-FRIENDLY INFORMATION IN CIVIL PROCEEDINGS.

Daja Wenke

1. *Introduction*

This report is part of a two-stream research process conducted in Italy in the context of the MiRI project coordinated by the University of Genoa. The University of Genoa analysed the right to information of children involved in civil proceedings primarily from a legal perspective and specifically with a focus on the justice system, and Defence for Children International – Italy (DCI Italy) conducted a parallel analysis with a focus on service providers in the fields of social welfare, education and health and their role in providing information to children involved in civil proceedings. The complementary nature of these two research components helped to broaden the analysis and to offer a more comprehensive view of how the relevant legislation is applied in practice by state officials, service providers and practitioners in different fields.

In light of the specific research design in Italy, this report builds on and complements the legal analysis developed by the University of Genoa[1] and reviews examples of service practice, based on the responses to a survey questionnaire administered with service providers in the social and health care fields throughout Italy. The examples of practice gathered through the survey are discussed in light of the normative framework of international and European standards concerning the right of the child to information in the context of civil proceedings.

Whereas the focus rests on the right of the child to information in the context of civil proceedings, the analysis also takes into account some key elements of the contexts in which children seek and receive information in relation to civil proceedings. The right to information is an important element of the so-called "participatory rights of the child" and very closely relates to general child rights principles, such as the right to non-discrimination, the right to development, the best interests of the child as a primary consideration and the right to be heard. In addition, the principles of child-sensitive justice and procedural safeguards are considered relevant for children's access to and effective use of information in the context of civil proceedings.

2. *Methodology*

This report was developed on the basis of a desk review of relevant international and European standards relating to the rights of the child involved in civil proceedings, guidance and recommendations for policy and practice issued by international and European bodies such as the Committee on the Rights of the Child and the Council of Europe, as well as a selected number of research reports relevant to this theme.

The desk review was complemented by the data gathered through the survey questionnaire targeting service providers. DCI Italy developed the survey questions on the basis of the questionnaire for legal practitioners and judiciary and the overall survey guidance elaborated by the University of Genoa in collaboration with the MiRI project partners. For the elaboration of the questionnaire, DCI Italy also reverted to previous works in this field.[2]

The survey questionnaire was disseminated widely to service providers in the social, educational and health care fields across the Italian territory. Throu-

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[1] F. PESCE, F. MAOLI, R. BENDINELLI, *Children's right to information in civil proceedings in Italy*, National Report Italy, MiRI – Minor's Right to Information in EU Civil Actions, University of Genoa, January 2021. Cf. Chapter 6 of this Volume.

[2] See for instance: LAW AND INTERNET FOUNDATION, DEFENCE FOR CHILDREN INTERNATIONAL – ITALY et al., *Methodology for a Rights-based Individual Assessment of the Needs of Child Victims of Crime*, E-PROTECT, 2019, http://defenceforchildren.it/files/DCI_-_E-Protect_English.pdf (last accessed July 23, 2021), p. 40.

gh a special edition newsletter, Defence for Children International – Italy, which also represents the International Social Services in Italy, reached out up to 876 contacts. The survey questionnaire was first disseminated in July 2020, followed by a reminder in September 2020. The Regional Council of social workers of the Liguria Italian Region has provided substantial support to the development of the questionnaire and its dissemination.

A total of 91 responses to the survey were received, of which 36 were complete and 55 had been filled in partially. The respondents were mainly social workers (42 responses, i.e., 46%) and psychologists (14 responses, i.e., 15%). Other professional groups who participated in the survey included educators or pedagogues (7 responses, i.e., 8%), child neuropsychiatrists (4 responses, i.e. 4%). Twenty-four respondents did not specify their professional backgrounds (26%). Among the respondents, 56 (62%) were employed by the social services of a municipality or local health care centre (*Azienda Sanitaria Locale – ASL*). Two respondents stated to be free-lance service providers, two worked in socio-pedagogic day-care centres for children and four in different types of residential care facilities offering accommodation and care for children or parents with children.

The responses came from 12 Italian regions going from the North to the South. The response rate was particularly high from Veneto (13), Liguria (12), Lombardy and Sicily (10 each), Puglia (8) and Emilia-Romagna (6). There were four responses each from Campania and Tuscany, two from Lazio, one response each from Friuli-Venezia Giulia, Marche and Piedmont. Nineteen respondents did not provide out information about their region of origin.

The vast majority of respondents were senior professionals with over 20 years of experience (41 respondents, i.e., 45%) and with 11 to 20 years of professional experience (15 respondents, i.e., 16%). Six respondents stated to have 6-10 years of experience and eight had 1-5 years of experience.

The responses are to be considered individual responses from a random sample. They are not representative of the whole Italian territory nor of the different professional groups or institutional affiliations working with and for children involved in civil proceedings. Despite this significant limitation, the responses provide a valid insight into the service practice of professionals across the country.

The survey questions were phrased in such a way that the responses would help to identify clues about systemic methods, approaches and good practice, as well as prevailing lades in law, policy and practice. The analysis of the responses has, therefore, a highly informative value, despite the data biases.

In February 2021, preliminary results of the MiRI project in Italy and data gathered through the survey questionnaire were presented at a national seminar. The seminar was organised on two consecutive afternoons, with a three hours session each. Eighty participants who registered in the seminar included social workers and psycho-social practitioners from different regions of Italy. The purpose of the seminar was to further discuss local and national examples of practice in relation

to children's access to information in civil proceedings and to promote awareness and application of relevant EU laws in this field. The consultations with practitioners who participated in the seminar was instrumental to reaffirm the main findings emerging from the survey questionnaire, as well as the strong interest of practitioners to inform children involved in civil proceedings, and the scarcity of tools and materials they can use for this purpose.

3. *The right to seek and access information: a fundamental right and procedural safeguard*

3.1. *The right of the child to seek and access information*

Access to information is a fundamental precondition for children to exercise each and all of their rights and to participate in a meaningful way in decisions and proceedings concerning them. The right of the child to seek, receive and impart information (UN Convention on the Rights of the Child, article 17) is a fundamental right of the child and a procedural safeguard for children's involvement in administrative and judicial proceedings. Children require information in a language they can understand, adapted to their age and maturity to be able to effectively exercise their rights. To prevent discrimination, the communication of information has to take into account the child's national and social origin, gender and culture, as well as possible experiences of violence and the correlated health impairments or trauma.[3] When providing children with information, state officials and service providers are, therefore, challenged to assess the child's specific communication and information needs and adapt language, methods and contents of their communication accordingly.[4]

3.2. *The "participatory rights" and evolving capacities of the child*

Article 12 of the UN Convention on the Rights of the Child affords the child, who is capable of forming his or her views, the right to express those views in all matters affecting him or her and provides that these views are given due weight in accordance with the child's age and maturity. This right applies to the child's participation in social and political matters (Article 12.1) as well as in judicial and administrative proceedings (Article 12.2).

The right to be heard is often interpreted as a right to "participation". Participation refers to consultations and hearings of children to ensure that their views

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[3] COUNCIL OF EUROPE, *Guidelines on child-friendly justice*, 2010.

[4] COUNCIL OF EUROPE, *How to Convey Child-friendly information to children in migration, A handbook for frontline professionals*, Building a Europe for and with Children, 2018.

and perspectives inform decision-making processes and procedures affecting them. Participation is relevant for each child individually, as well as for groups of children and, more generally, for the whole child population. Due to its significance, the right to be heard is considered a general principle of the UN Convention on the Rights of the Child and, as such, the right of the child to be heard can be claimed and enforced and should be considered in the implementation and interpretation of all other rights.[5]

Together with other civil rights and freedoms, article 12 is at the centre of the so-called "participatory rights of children". These include, in particular, the right of the child to freedom of expression (article 13), freedom of thought, conscience and religion (article 14), freedom of association (article 15), and the right to seek and access information (article 17).[6]

The right to be heard is also closely interlinked with other general principles of the Convention: the right to non-discrimination (article 2), the primary consideration of the best interests of the child (article 3), and the right to development (article 6).

The Convention recognises that the evolving capacities of the child need to be considered to understand the degree to which children are able to exercise their right to be heard, in accordance with their age and maturity. The child's needs, demands and use of information evolve accordingly. Article 5 provides that the direction and guidance from parents – or a guardian – are important to support a child in exercising his or her rights with gradually increasing autonomy as the child grows up and develops his or her capacities.[7]

3.3. *Access to information as a procedural safeguard*

Under international law, access to information in the context of administrative and judicial proceedings is considered a procedural safeguard, together with other requirements that need to be in place to ensure judicial proceedings, which are carried out in conformity with the principles of rule of law, due process and fair trial. Where information is not provided effectively to the parties concerned, or other procedural safeguards are not in place, the legality of a proceeding could be challenged.

For administrative and judicial proceedings involving children, procedural safeguards have to be sensitive to the rights and needs of the child. This requires

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[5] United Nations Children's Fund, *Implementation Handbook for the Convention on the Rights of the Child,* Fully Revised Edition, 2002, p. 159. Committee on the Rights of the Child, General Comment No. 12 (2009), The right of the child to be heard, CRC/C/GC/12, July, 1 2009, https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf (last accessed July 23, 2021), par. 2.

[6] United Nations Children's Fund, *Implementation Handbook for the Convention on the Rights of the Child,* Fully Revised Edition, 2002, p. 159.

[7] Committee on the Rights of the Child, General Comment No. 12 (2009), The right of the child to be heard, CRC/C/GC/12, July 1, 2009, par. 68, 69, 80.

special consideration to the provision of information in a language that the child understands, the hearing of the child, representation by a guardian or representative where children are not represented by their parents, legal assistance and access to remedies.[8]

For the context of best interests determinations for children involved in administrative or judicial proceedings, information is the basis on which social workers and judges, as well as children themselves, make a decision on the best interests of the child. The Committee on the Rights of the Child underlines that States parties have to "ensure that the child receives all necessary information and advice to make a decision in favour of his or her best interests".[9]

Effective access to information is connected to several obligations of the state that are directly or indirectly relevant to guarantee that all procedural safeguards are sensitive to the needs of the child. This requires effective information on the right to access legal representation, to access documentation and legal reasoning of the proceedings, as well as access to legal remedies. The Committee on the Rights of the Child noted, for instance, that in preparation for the hearing of a child in court proceedings, the competent authorities have to ensure that the child is informed about his or her right to be heard and the way in which the views expressed by the child will be used and taken into consideration. The child has to be informed about the possibility to be heard either directly or through a representative. In addition, the child has to be informed about practical aspects of the hearing, such as the date and time, the location, the modalities of the hearing and about any participants who are present or are following the hearing through video transmission from another room. The child has also to be informed about the possible consequences of the choices he or she makes and the impact that his or her views may have on decisions and outcomes of proceedings.[10]

The right to information imposes an obligation on the competent authorities to inform the child about the outcomes of any administrative of judicial proceedings concerning him or her. This information must include a transparent legal reasoning of how the child's views have been heard, considered and taken into account and how they have been weighed against other evidences and legitimate interests involved in the case. Making this written documentation accessible to the child and his or her representative, is a safeguard against tokenistic hearings of children

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[8] COMMITTEE ON THE RIGHTS OF THE CHILD, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, CRC/C/GC/14, May 29, 2013, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FGC%2F14&Lang=en (last accessed July 23, 2021), par. 89. COMMITTEE ON THE RIGHTS OF THE CHILD, General Comment No. 12 (2009), The right of the child to be heard, CRC/C/GC/12, July 1, 2009, par. 40-47.

[9] COMMITTEE ON THE RIGHTS OF THE CHILD, General Comment No. 12 (2009), The right of the child to be heard, CRC/C/GC/12, July 1, 2009, par. 16.

[10] COMMITTEE ON THE RIGHTS OF THE CHILD, General Comment No. 12 (2009), The right of the child to be heard, CRC/C/GC/12, July 1, 2009, par. 41, 42, 45.

that are merely conducted as a formality. On the basis of this information, the child may consider to challenge decisions or court rulings, launch a formal complaint or access legal remedies. To be able to exercise this right, children have to be informed about how to access child-sensitive complaint mechanisms and how to appeal against a court ruling.[11]

3.4. *Children as informed decision-makers and competent service users*

The adoption of the UN Convention on the Rights of the Child in 1989 marked a milestone in a process of change regarding the role of children in society and their upbringing. By providing for all the human rights of children, which are all closely interconnected, the Convention recognises the right of the child to develop their evolving capacities, resources and potentials, the right to protection from all forms of violence and exploitation, the right of the child to seek, receive and impart information and to have their views heard and taken into account in all matters concerning them. This broad perspective reflects the concept of children's agency, viewing children not only as persons with a limited legal capacity and in need of special protection, but also as informed decision makers and active members of society – and as rights holders.[12]

Although childhood and family structures are typically shaped by traditions, culture and religion, the way children are raised and cared for in families around the world has been changing significantly over the past decades, with new dynamics created by globalisation, mobility and digitalisation. Children are no longer expected to tacitly obey adults but are taught to seek and reflect on information and to form an opinion, to participate in matters concerning them and to act as responsible members of their families and communities. Adults encourage children to take responsibility for their actions and to judge what is good for them and others. Children demand respect from parents, teachers and service providers, and complain when they feel their views and interests are not taken into account.

In light of these developments, adults need to reflect on their own roles in relation to children – including as service providers and state officials. The relationship between adults and children is no longer focused only on protection but is also based on communication, mutual respect, trying to understand the perspectives and ways of thinking of the child and the adult. These changes influence the role of professionals working with children and parents. Social workers, professionals in childcare, youth work and education, health care professionals, law enforcement officials and the judiciary observe and feel these changes in their work. They are challenged to adapt their skills and working methods accordingly.

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[11] Committee on the Rights of the Child, General Comment No. 12 (2009), The right of the child to be heard, CRC/C/GC/12, July 1, 2009, par. 45-47.

[12] Committee on the Rights of the Child, General Comment No. 12 (2009), The right of the child to be heard, CRC/C/GC/12, July 1, 2009, par. 1.

Children can be competent service users from a young age, as long as they receive the appropriate support to participate and get involved in accordance with their evolving capacities. Consulting children can be essential to understand how services can become meaningful for them, how to support them so that they trust and collaborate with service providers and in proceedings.[13]

3.5. *A trend towards evidence-based working methods and service tools that reflect the evolving childhood*

As childhood and the role of children in the society evolves, some of the methods and tools that service providers used in the past are today no longer considered appropriate or effective. Across Europe, there is a trend towards an increasing use of evidence-based methods that have been developed, tested and refined on the basis of empirical data and demonstrated to enhance the quality of service provision and outcomes for children, families and professional service providers. Some of these tools are guiding service providers in transforming their own professional roles, attitudes and behaviours to gradually take on the role of a facilitator who is coaching and guiding children and families in taking responsibility for resolving problems and challenges they are struggling with.[14] These trends can be also expected to gradually change the methods and approaches used in providing children with information in the context of civil proceedings as a key to their empowered participation in the proceedings and the respect of their views.

4. *Informing children involved in civil proceedings: Examples of service practice in Italy*

Service providers, who are most directly working with children and families involved in civil proceedings in Italy, include those social workers employed by the municipalities and the local health care centres (ASL), as well as education professionals, psychologists, child-neuropsychiatrists, medical staff, guardians, specialists who assess children and families for the purpose of writing opinions (official opinion writers/*Consulente Tecnico d'Ufficio CTU;* Specialists hired by the child's parent(s) or representative to assess the case for an opinion/*Consulente Tecnico di Parte CTP*).

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[13] D. WENKE, *Service Providers as Champions for Non-Violent Childhoods, Service provision for children and parents to end corporal punishment*, Non-Violent Childhoods Project, Council of the Baltic Sea States, Stockholm, 2018, http://www.childrenatrisk.eu/nonviolence/2018/11/09/service-providers-as-champions-for-non-violent-childhoods/ (last accessed July 23, 2021), p. 13.

[14] D. WENKE, *Service Providers as Champions for Non-Violent Childhoods, Service provision for children and parents to end corporal punishment*, cit., p. 13.

4.1. *Knowledge on the right to be heard and the right to information*

Responses to the questionnaire reflect a rather low level of awareness of the participating professionals with regard to the right of the child to information. Thirty-three respondents (36%) affirmed to be aware of a general obligation to provide written or oral information to a child with regard to matters that concern the child or could influence the child's future life. Four respondents denied to be aware of this right. Four respondents recognised this right only for specific contexts, with reference to the Italian Civil Code. Comments provided in response to this questions also referred to the UN Convention on the Rights of the Child and Council of Europe Conventions concerning children's rights. Fifty respondents refrained from expressing themselves.

When asked if the right to information depended on the age of the child, 19 respondents affirmed and largely referred to the age of 12, as well as the maturity and capacity of discernment of the child (21%). Seventeen respondents were of the opinion that the obligation to provide information to the child did not depend on age (19%). Five responded that they did not know, 50 withheld a response.

Twenty-six respondents (29%) provided more detailed information on the type of information that should be provided to the child, indicating either information about the proceedings and the hearing or information about the situation of the child and the family, and what will happen to him or her. Some respondents combined both. These responses demonstrate that the knowledge of the professionals, who are aware of the rights of the child in this field, is relevant but fragmented. Sixty-five respondents abstained from answering the question.

Twenty-three respondents (25%) confirmed that the child should generally be heard in the context of civil proceedings that concern him or her before issuing the decision or judgement. Eleven respondents affirmed this only for specific cases and circumstances. One respondent denied and four were uncertain. Fifty-two did not respond. The majority of comments on this question referred to the age of the child and his or her capacity of discernment as the main criteria to determine a child's right to be heard.

4.2. *Professional experience in providing information to children involved in civil proceedings*

Despite the numerous senior professionals who participated in the survey, many respondents have no or little experience in providing information to children involved in civil proceedings. Only 21 affirmed that they are frequently providing information to children in proceedings (23%), six said to have occasionally provided information to children and seven rarely did so (7 and 8%, respectively). Six respondents did not have any specific experience in this regard. Fifty respondents abstained from answering.

Among the 34 respondents who affirmed to have provided information to children involved in civil proceedings, the majority have experiences in civil pro-

ceedings concerning parental responsibility (21 frequently, 8 occasionally, 3 rarely). Although the respondents have less experience with international child abduction cases, these cases are sometimes part of their work (one respondent stated to have often provided information to children in international child abduction cases, one occasionally, 3 rarely).

In addition, 9 respondents stated that they have occasionally or frequently provided information to children involved in civil proceedings concerning other issues, in particular cases regarding high-conflict parental separations, placement decisions and adoptions, child abandonment and neglect, substance abuse by a parent, psychological issues, dysfunctional families or cases of violence against a child, proceedings initiated due to the child's behaviour, visiting rights and others.

4.3. *Information in a language that the child understands*

Enabling the child to exercise his or her right to be heard in the context of civil proceedings requires the relevant service providers and authorities to communicate information in a language that the child understands, with due regard to age, abilities, health and evolving capacities of the child. Child-friendly information is essential to enable the child to form an opinion and to express his or her views. It can be delivered in written form, in a conversation, through the use of videos, as well as through internet-based and digital communication tools or applications.

In cases of children belonging to minority groups and non-national children, quality interpretation and cultural mediation may be required to prevent discrimination. In cases of children who cannot be represented by their parent(s), where this would be contrary to the best interests of the child or where parents are unavailable or unable to represent the child, the child has a right to be assisted by a guardian or representative to ensure the child has access to information and is able to fully understand the information.[15] The Committee on the Rights of the Child also underlines the need to ensure that younger children and children belonging to particularly marginalised and disadvantaged groups require targeted support to overcome any barrier in communication and enable effective access to information.[16]

The survey responses suggest a low to medium level of awareness of and access to cultural mediation and interpretation to facilitate communication with children involved in civil proceedings. Twenty-nine respondents (32%) stated that these services are available for situations where a child or a parent does not under-

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[15] D. WENKE, *Guidelines Promoting the Human Rights and the Best Interests of the Child in Transnational Child Protection Cases*, Council of the Baltic Sea States Children's Unit and Expert Group for Cooperation on Children at Risk, Stockholm, 2015, https://www.childrenatrisk.eu/projects-and-publications/protect-children-on-the-move/ (last accessed July 23, 2021), pp. 23-24, 89-92.

[16] COMMITTEE ON THE RIGHTS OF THE CHILD, General Comment No. 12 (2009), The right of the child to be heard, CRC/C/GC/12, July 1, 2009, par. 4.

stand Italian. Five respondents stated that interpretation or similar services are not available, and two respondents were uncertain. 55 respondents did not respond.

The comment of one respondent indicated that cultural mediation services are available from voluntary associations. This suggests that the question to what degree service providers can rely on the support from interpreters and cultural mediators from within the public service system or need to seek out private volunteer services may be an area for further research. From a child rights-based perspective, the provision of quality interpretation is directly connected to the right to information and to be heard as a procedural safeguard and, in consequence, has to be offered and provided in a systematic way and free of charge for the users.

In some situations, the direct involvement of an interpreter can bear some risks for the child, where the conversation with the child might include disclosure of sensitive information, such as acts of violence within the family or community. In small diaspora groups, minority populations or other rather closed social groups, children or adults might feel inhibited to speak openly and disclose sensitive information in the presence of an interpreter from the same population group. Experience from several European countries shows that the use of telephone interpretation could be an alternative to be considered in these situations.[17]

Whereas the use of interpretation and cultural mediation is not uncommon in the survey sample, respondents appear to have less experience in meeting other special communication needs of children, such as physical disability or mental health issues. Among the respondents, only 13 (14 %) have occasionally, and 11 (12%) rarely, provided information to children with special communication needs. In these situations, respondents mostly relied on specialists to facilitate the communication with the children. Special information material and attention to the room where the conversation takes place were also mentioned as support measures. Twelve respondents stated that this has never been part of their work. Fifty-five respondents did not respond.

These findings are not easy to interpret as they could imply that, among the non-representative sample of respondents, the experience of working with children whose communication abilities are impaired by a disability or mental health issue is underrepresented. Considering the specific skills and additional effort required to enable effective communication with children who have special needs, and the high risk of discrimination against this group, any follow-up research and the development of methodological guidelines should dedicate special attention to this field.

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[17] D. Wenke, *Guidelines Promoting the Human Rights and the Best Interests of the Child in Transnational Child Protection Cases*, cit, p. 42.

4.4. *Child-friendly materials*

Child-sensitive communication for the provision of information is a fundamental precondition for children to exercise their right to be heard and to have their views taken into account. Child-friendly materials can be made available as brochures handed out to children, videos, presence of service providers through social media, drop-in centres or others. Child-friendly materials help to support the information flow, communication and mutual understanding of children and service providers, including in the digital environment.

In Italy, the national Ministry of Labour and Social Policy has developed a child-friendly guide for children who are placed in foster care. The booklet is intended to be used by service providers working with children in foster care. It aims to inform children in a simple and direct language and through the use of illustrations: it explains what foster care is and how they and their family of origin can use the temporary placement in foster care as an opportunity to feel better and to gain confidence in handling their own situation.[18] The survey questionnaire did not capture signs that this booklet would be consistently used by practitioners. Although this finding has to be interpreted with care and in light of the limitations of the survey sample and the specific target group of the booklet in relation to foster care of children, a systemic use of this or other materials should have emerged from the responses and should have brought to light a higher number of positive responses with regard to a frequent or regular use of child-friendly materials.

In fact, the survey responses do not indicate that service providers would have established a routine to work with child-friendly materials when informing children on their rights and proceedings. Only five respondents affirmed that they have occasionally provided children with child-friendly materials explaining their right to information and/or to be heard during the proceedings. Five respondents stated that they had rarely provided child-friendly information materials to children. Twenty-six respondents have never done this and 55 abstained from responding to the question. Only one respondent affirmed to have collaborated in the development of child-friendly materials aiming to inform children about their rights in civil proceedings.

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[18] MINISTERO DEL LAVORO E DELLE POLITICHE SOCIALI [MINISTRY OF LABOUR AND SOCIAL POLICIES], ISTITUTO DEGLI INNOCENTI, *Linee di indirizzo per l'affidamento familiare, Versione per Bambine, bambini, ragazze e ragazzi [Guidelines for foster care, Version for children and adolescents]*, 2018, lavoro.gov.it/temi-e-priorita/infanzia-e-adolescenza/focus-on/minorenni-fuori-famiglia/Documents/etr-Linee-Indirizzo-affido-easy.pdf (last accessed July 23, 2021). MINISTERO DEL LAVORO E DELLE POLITICHE SOCIALI [MINISTRY OF LABOUR AND SOCIAL POLICIES], *L'intervento con bambini e famiglie in situazione di vulnerabilità Promozione della genitorialità positiva Versione Easy to Read – Facile da leggere [Services for children and families in a situation of vulnerability; Promotion of positive parenting], 2019,* https://www.lavoro.gov.it/temi-e-priorita/infanzia-e-adolescenza/focus-on/sostegno-alla-genitorialita/Documents/Linee-Indirizzo-famiglie-vulnerabili-Easy.pdf (last accessed July 23, 2021).

Materials that the few respondents have used to inform children, even if only rarely or occasionally, include information sheets, pictures or drawings and a brief video. Individual respondents reported that they would read the court file together with the child, describe the court building and the authorities that would be involved in the proceedings, and explain what would be happening during the court proceedings. One respondent reported to have invited a 13-year-old child who had experienced a very similar situation to tell her story to the child facing civil proceedings, with the parents' consent. These responses indicate the commitment and creativeness of individual service providers to provide information and prepare the child for the proceedings. The responses do not suggest that written or digital child-friendly materials would be generally in use. Searching solutions on a case-by-case basis requires time and effort from service providers within already busy schedules. The development of a more systematic and consistent approach to providing child-friendly information materials emerges, therefore, as one of the areas to further explore and to strengthen in follow-up activities.

4.5. *Age limits*

The Italian Civil Code provides for different statutory age limits regulating the age at which children have a right to heard. Article 315-bis, para. 3, provides the right of the child to be heard in all matters and proceedings concerning the child as of the age of 12 and even younger as where the child is considered to have the capacity of discernment.[19] In some cases, the age limit is higher or lower and ranks between 10 and 14 years.

As discussed in Pesce, Maoli and Bendinelli[20], questions concerning age limits are subject to different, at times conflicting, interpretations by Italian courts at all levels. The diversity of interpretations could be seen as an indicator of the weakness of this regulation, even considering the evolving role that children have in society and the rights afforded to them under international and European standards.

In its General Comment No. 12 on the right of the child to be heard, the Committee on the Rights of the Child "… discourages States parties from introducing age limits either in law or in practice, which would restrict the child's right to be heard in all matters affecting him or her".[21] The Committee advises States parties to recognise the right of the child to express his or her views on the basis of a general presumption that children are capable of forming their own views. Acting on this basis would require States parties, through their public institutions and agencies and delegated private partners, to automatically provide for the hearing of the

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[19] For a detailed discussion of different age limits and relevant court practice and rulings, see F. Pesce, F. Maoli, R. Bendinelli, cit., p. 8.

[20] F. Pesce, F. Maoli, R. Bendinelli, cit.

[21] Committee on the Rights of the Child, General Comment No. 12 (2009), The right of the child to be heard, CRC/C/GC/12, July 1, 2009, par. 21.

child's views in all matters concerning him or her, unless this would be contrary to the best interests of the child, and to duly motivate any exception.

The Committee notes that research demonstrates how "children's levels of understanding are not uniformly linked to their biological age. Research has shown that information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacities to form a view. For this reason, the views of the child have to be assessed on a case-by-case examination."[22]

In fact, research has evidenced that children are generally able to remember events and emotions they experienced. They are able to give accurate accounts of their experiences even at a young age. The child's capability to narrate in free recall and to resist suggestive questions by an interviewer, however, significantly evolves with age. The capability of children to provide accurate information and disclose what they remember depends on several factors. The location and environment of the place where the interview or hearing takes place are fundamental. A child-friendly place with as little distractions as possible, offers the most conducive conditions for interviewing or hearing children in the context of administrative or judicial proceedings. Support services should be available for the child before, during and after the hearing, in accordance with the child's needs and best interests. The most important factor influencing the accuracy and reliability of a child's statement is the interviewer's ability to elicit information and the child's willingness and ability to disclose it. Researches in this field have identified some fundamental principles and rules that professionals have to observe in order to positively influence the child's willingness and ability to express his or her views and what he or she remembers. These rules and considerations form the basis of evidence-based interviewing protocols, which guide the interviewer step-by-step through the interview, thus helping to create supportive conditions for the child to speak out and make an accurate statement.[23]

The Committee on the Rights of the Child specified that "a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trai-

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[22] COMMITTEE ON THE RIGHTS OF THE CHILD, General Comment No. 12 (2009), The right of the child to be heard, CRC/C/GC/12, July 1, 2009, par. 29.

[23] M.E. LAMB, Y. ORBACH, I. HERSHKOWITZ, P.W. ESPLIN, D. HOROWITZ, *Structured forensic interview protocols improve the quality and informativeness of investigative interviews with children: a review of research using the NICHD Investigative Interview Protocol*, in *Child Abuse and Neglect*, 2007, https://www.ncbi.nlm.nih.gov/entrez/eutils/elink.fcgi?dbfrom=pubmed&retmode=ref&cmd=prlinks&id=18023872. (last accessed July 23, 2021).

ned staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms."[24]

Whereas these evidence-based interviewing protocols are increasingly being used throughout Europe to conduct forensic interviews and hearings of child victims of crime even at a young age and when children are traumatised, the relatively high age limits defined under national law for the context of civil proceedings are not coherent with state-of-the-art knowledge and evidences regarding children's capability to make accurate and reliable statements.

4.6. *Interagency and multidisciplinary cooperation for informing and hearing the child in the context of civil proceedings*

As noted by Pesce, Maoli and Bendinelli[25], the right of the child to information in the context of civil proceedings has, thus far, been legislated primarily with regard to the hearing of the child, whereas the provision of information prior to the hearing and after the ending of the proceedings has not been explicitly regulated by law. Civil Code article 336-*bis* provides that the main responsibility to inform the child on the nature of the proceedings and the consequences of the hearing rests with the judge. The judge has the possibility to avail him- or herself of the assistance of a psychologist, social worker or other professional. The collaboration of judges with service providers would also be particularly important when judges are assessing the child's capacity of discernment as a precondition for the child to be heard. Wherever the risk is that an assessment of the child's capacity of discernment should decide about the right of the child to be heard in civil proceedings, the involvement of specially trained and competent professionals should, in fact, be assured.

Only four respondents out of 91 affirmed that there is a protocol for interagency and multidisciplinary cooperation in their district. Eleven respondents deny, while 19 are uncertain. Fifty-six did not respond.

Some respondents indicate courts of law that have set up cooperation protocols, for instance in the city of Milan. One respondent noted that a cooperation protocol exists in the criminal justice system but not for civil proceedings. The reluctance of some service providers to interagency and multidisciplinary cooperation is mentioned as a reason for the absence of cooperation mechanisms. One respondent notes that protocols exist on paper but are not operationalised.

The responses and the comments provided suggest that this field requires more attention in terms of research and analysis to support the development of child-sensitive cooperation protocols and make them fully operational in practice,

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[24] Committee on the Rights of the Child, General Comment No. 12 (2009), The right of the child to be heard, CRC/C/GC/12, 1 July 2009, par. 34.

[25] F. Pesce, F. Maoli, R. Bendinelli, cit.

strengthening the knowledge of service providers in this field and providing joint transdisciplinary and multi-professional training to this goal.

5. *Civil proceedings regarding parental responsibility*

Among the survey respondents, 27 stated to have heard or interviewed a child in the context of civil proceedings concerning parental responsibility (30%). Six denied having this experience and 58 abstained from responding.

Among the affirmative responses, 20 stated that they have frequently or occasionally done so in their capacity as social workers and in the context of the social and health care services provided by the municipality or the local health care centre. Service providers also have a role in the hearing of children as specialists who prepare opinions about the child or the family (CTU/CTP) and as court appointed experts providing special advice to the judge (*esperto ausiliario del giudice*). Twelve respondents stated to have frequently or occasionally supported the judge in hearing the child and the comments provided indicate that this happened primarily through expertise on child-sensitive communication and case assessment.

Only one response indicates that the collaboration with the judge may have been institutionalised in a systematic way as the respondent stated to be always called upon to support the ordinary judge of the Juvenile Court in hearing the child, whenever the child was an injured party to the case. Considering the reference made to cases where the child is an injured party, this response, although individual, raises the question whether the rights of the child in administrative and judicial proceedings might have been regulated more explicitly in relation to cases where the child is a victim of violence. This observation calls for a more detailed analysis of the degree of coherence between legal standards and practices across the different fields where children are involved in administrative and judicial proceedings, under civil and criminal, public and private law. Different standards in law and practice could amount to a *de jure* or *de facto* discrimination and determine a need for law reform to pursue coherent standards for all children involved in administrative or judicial proceedings.

Only 12 respondents affirmed that they have frequently provided information to children in proceedings concerning parental responsibility; 16 respondents have done so occasionally or rarely, and most of them in their capacity as social worker in the social welfare and health care system. There is a discrepancy between this number and the number of service providers who declare to have participated in the hearing of children, suggesting that only a part of them provided information to the child concerning the hearing.

This might be related to the division of tasks, whereas the judges are mostly in charge of providing information to children in relation to their hearing in civil

proceedings (see Pesce, Maoli and Bendinelli[26]. It also raises questions, however, as to how standards in law, policy and practice could guarantee provision of information to children in a more systematic and continuous manner, coordinating the different professionals involved with the child's case, especially those service providers who collaborate with the child in continuity before, during and after judicial proceedings, such as social services.

Respondents provided the following information about their actions to provide information to children at different stages of civil proceedings concerning parental responsibility:

- only 12 respondents stated that they had provided information to the child prior to the court proceedings (4 frequently, 4 occasionally and 4 rarely);
- 24 respondents provided information during the proceedings (12 frequently, 10 occasionally and 2 rarely);
- 17 before the hearing of the child at court (9 frequently and 8 occasionally);
- 15 during the hearing of the child (6 frequently, 7 occasionally and 2 rarely);
- 17 after the hearing (6 frequently and 11 occasionally);
- 17 after the conclusion of the court proceedings (7 frequently, 7 occasionally and 3 rarely).

Many respondents noted that there is no specific rule as to when information has to be provided to the child involved in the proceedings (19 respondents). Three respondents reported to always provide information to the child on a continuous basis during the proceedings and 12 stated to do so frequently. Seven respondents declared to do so occasionally and five rarely.

The information provided to children is mainly focused on the reason of the hearing (25 respondents) and on explaining the child that his or her views are important but that the child is not responsible for the outcomes of the proceedings and the judge's decision (22 respondents). In addition, respondents reported to inform the child about the overall purpose of the proceedings, the role of different officials and professionals involved in the hearing, the possibility that, in addition to the judge and the psychologist, other persons might be present at the hearing with access to the child's statement, how to behave during the hearing, and the relevance of the hearing and possible consequences for the judge's decision.

Twenty respondents provided information about the methods they used to inform the child. In most of the cases, this happened in a conversation with the child in the office of the service providers or at the child's home. Some respondents explained to use play or drawing to support the communication with younger children.

After the hearing of the child by the judge, the service providers are not necessarily involved in following up with the child. Only six respondents stated to

[26] F. Pesce, F. Maoli, R. Bendinelli, cit., p. 8.

always provide feedback to the child with regard to the hearing and next steps in the proceedings and 10 affirmed to do so frequently. Six respondents provide this information occasionally and two rarely. Ten respondents stated that they would provide this information personally, whereas seven noted that they collaborate with other service providers to this aim, such as a psychologist or child care staff. Where respondents are involved in providing this information to the child, they mostly do so in a personal conversation.

Only 12 of the respondents had occasionally or rarely been requested by the judge to offer support in providing information to the child. This was the case mostly during the hearing, but also before and after the hearing of the child, and more generally during the proceedings. Only one respondent stated to have been approached by the judge prior to the initiation of the proceedings and one after its conclusion with a view to offering support for informing the child.

Only few respondents have been asked to support the special support person appointed for the child in the context of civil proceedings (*curatore speciale*). Twenty respondents have never received such a request, two rarely, five occasionally and only three have frequently been asked for support. Where special support persons asked service providers for support, this tends to last the whole duration of the proceedings.

Parents or their representatives are also requesting service providers support to inform the child about the proceedings. Among the respondents, 20 stated that they have had these requests (2 frequently, 9 occasionally and another 9 rarely). These requests mostly regarded support to inform the child during the proceedings (12 respondents), but also before and after the hearing and in other phases.

Among the respondents, service providers from the social and health care sector have more often than others been involved in preparing the parents or other holders of parental responsibility in how to explain the reason of the proceedings and the matters at stake to their children and how to inform the children on the outcomes of the proceedings. Overall, however, only seven respondents stated to have done so frequently, 10 occasionally and 8 rarely. Five respondents have never done this and 61 did not respond. In case social and health care services provide this support to parents, this is typically requested from other service providers or the court, or results from an initiative taken by individual social workers. In fact, 16 respondents noted that they collaborated with other service providers in providing information and advice to parents. The respondents do not indicate any mechanisms in place to ensure this support was provided in a systematic manner or automatically.

After the judge's ruling, the service providers are not necessarily involved in following up with the child. Only 8 respondents stated that they always provide information about the outcomes of the proceedings and the consequences for the child and 9 do so frequently. Four respondents provide this information occasionally and four rarely.

Twenty respondents stated that they inform the child about the outcomes and consequences of the proceedings and they mostly do so in a personal conversation. Twenty-six of the respondents have provided this information in the presence of other officials or practitioners (3 always, 10 often, 11 occasionally and 2 rarely), such as a parent or foster parent, psychologist, social worker, the special support person of the child appointed for the purpose of the proceedings, the judge, or childcare and educational professionals.

6. *Conclusions*

Based on the review of survey responses in light of relevant international and European child rights standards, this paper concludes that there is no indication that the right of the child to information in the context of civil proceedings would have been addressed systematically in the Italian legal framework and social service practice. This paper confirms the analysis presented by Pesce, Maoli and Bendinelli[27] that the right of the child to information in the context of civil proceedings has been legislated for primarily in connection to the hearing of the child by a judge and insufficient attention has been given to regulating the right to information and correlated obligations of state and private service providers with continuity before, during and after proceedings.

The review conducted in this paper further concludes with the observation that this limited legal framework means an also limited service practice. Law reform is required to more specifically and explicitly regulate the right of the child to seek and access information at any stage where the child is involved in administrative or judicial proceedings, as well as the responsibilities of different service providers individually and in cooperation.

Based almost exclusively on the survey data, the objective of this study was to assess, if and how the strengths and limitations of the national legal framework are reflected in service practice. The findings invite for more systematic follow-up research on the role of service providers in implementing the rights of the child and the type of legislative, administrative and organisational support they may need.

Law reform itself will only be a first important step to initiate a process of change in this field. It will require a concerted action by policy-makers across different sectors and levels of the decentralised public administration to bring legal reform through to practice. Law reform is only sensible if complemented by effective implementation measures, such as systematic training, mechanisms for child-centred interagency and multi-disciplinary cooperation, systemic working methods that are evidence-based, child-sensitive and reflect the dynamics of mo-

[27] F. Pesce, F. Maoli, R. Bendinelli, cit.

dern childhood. Research may be needed to analyse the structures of the state administration and how it may create conducive conditions for the implementation of the right to information. In addition, data collection, monitoring and evaluation, communication and dissemination, including child-friendly materials, will be required to ensure effective implementation.

Considering the novelty of the issue for the legal context, policy and practice, a close collaboration between researchers, academics and policy-makers would be necessary to ensure that law reform processes are informed by state-of-the-art knowledge and evidence. More generally, advocacy for a national action plan might be considered to strengthen the rights of the child in administrative and judicial proceedings, aiming at the promotion of coherence across proceedings under civil, criminal or administrative law, public and private law.

Chapter 7

CHILDREN'S RIGHT TO INFORMATION IN CIVIL PROCEEDINGS IN LATVIA

Dana Rone

1. *Introduction*

This report reflects the results of the research carried out in Latvia in the framework of the project MiRI – *Minor's right to information in EU civil actions* (JUST-JCOO-AG-2018), on children's right to information in legal proceedings in Latvia, mostly concentrating on civil proceedings, and, in some aspects, in administrative cases.

Normative enactments and case law is analysed in this research, examining multiple legal aspects of the right of the child to information. The report contains excerpts from Latvian law and jurisprudence, thus providing close insight in actual legal situation.

At the beginning of the MiRI project a questionnaire was elaborated by the project partners, and later distributed to judges and lawyers in Latvia. The main goal of the questionnaire was to discover existing practice in Latvia about children's rights to information, including children's rights to be heard. The answers to the questionnaire and results of such research are analysed in this report, thus supplementing to the research of normative enactments and case-law.

An underlying interest of this research was to clarify at what level children's right to information is granted in Latvia, and how this right is supported by national law and interpreted in case-law. All national case law cited in the present report is available in the project's database.[1]

[1] Available at http://dispo.unige.it/node/1159.

2. *The children's right to information in Latvian law*

The children's right to information is an existing, but quite non-applied right in Latvian law. In comparison to children's right to be heard, which is well developed, supported by case-law and widely known, the children's right to information is standing in a shade, to put it poetically. Popularity of rights to be heard in comparison to silent rights to information can be seen from results of questionnaire, further analysed in this research.

The law on the protection of children's rights[2] is the main legal source of children's rights. The purpose of this law is to set out the rights and freedoms of a child and the protection thereof, taking into account that a child, as a physically and mentally immature person, has the need for special protection and care.[3] This law also governs the criteria by which the behaviour of a child shall be controlled and the liability of a child shall be determined. The law governs the rights, obligations and liabilities of parents and other natural persons and legal persons and the state and local governments in regard to ensuring the rights of the child, and determines the system for the protection of the rights of the child and the legal principles regarding its operation.[4] Chapter II of the law on the protection of children's rights, entitled "Fundamental rights of the child", directly legitimises 12 rights of the child, included, but not limited to, rights to life and development, rights to family, rights to individuality, rights to privacy and freedom and security, rights to wholesome living conditions, rights to education and creativity, etc.

The first sentence of the Article 13, part 1 of the law on the protection of children's rights provides that "a child has the right to freely express his or her opinions, and for this purpose, to receive and impart any kind of information, the right to be heard, and the right to freedom of conscience and belief". A wording of this rule is broad, still explicit and suitable to ascertain that children in Latvia have all of these rights:

- the right to freely express his or her opinions,
- to receive any kind of information,
- to impart any kind of information,
- the right to be heard and
- the right to freedom of conscience and belief.

Analysing Latvian case law, the greatest accent is put on the right to be heard, which is not only the right of the children, but an obligation of institutions working in child-related cases to find out this opinion. However, the other directly related

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[2] Latvian Law "*Bērnu tiesību aizsardzības likums*". Adopted on June 19, 1998. Available at: https://likumi.lv/ta/id/49096-bernu-tiesibu-aizsardzibas-likums

[3] *Ibid*. Article 2, part 1.

[4] *Ibid*. Article 2, part 2.

aspect of whether the child had received sufficient and adequate information so to be able to define his or her opinion, is less developed.

Only in one legal norm, explicit rule is included about provision of information to the child, namely, in cases where out-of-family care is terminated, "when favourable conditions for the development of a child have been ensured by the family of the parents of the child or the child has attained 18 years of age", "six months prior to leaving the institution the head thereof shall provide information in writing to a child on the guarantees specified in law, also the right to receive residential premises". No instructions are provided how such information shall be provided. The only requirement is concerning the form of information, namely, it shall be in a written form.

In other cases, the general rule – Article 13, part 1 of the law on the protection of children's rights – is applicable, on the basis of which the child has full rights to receive any kind of information, without specification about type of information and cases in which such information can be requested.

3. *Children's right to be heard Latvian law*

The right to be heard, which is stated in Article 13, part 1 of the law on the protection of children's rights, is one of the must rules in many family law disputes, especially in adoption, custody disputes, access rights disputes and in cross-border child abduction cases. Although interests of children are also analysed in large spectrum of other legal disputes, for instance, also in disputes about obligation to pay maintenance payments to the child, increase and decrease of the amount of maintenance payments, only in rare other cases opinion of the child is discovered, and maintenance cases in not within the scope of them. Mostly, opinion of the child is requested only in custody, access rights and custody cases, not others.

There is no age threshold below which opinion of the child is not asked or considered as decisive. Instead, individual approach is applied to each particular case, considering age of the child together with the extent of maturity of the child. Instruments of international law do not provide criteria for determining whether a child has reached an appropriate age and maturity level in order to be able to formulate his or her opinion intelligently. It should, therefore, be established by national regulation or judicial practice.[5]

[5] I. Kucina, *Bērnu pārrobežu nolaupīšanas civiltiesiskie aspekti. Bērns starp vecākiem un valstīm*, Riga: Tiesu namu aģentūra, 2020, p. 148.

3.1. *Children's rights to be heard in adoption cases*

Adoption is one of legal sectors, where opinion of the child shall be find out according to normative enactments. Latvian civil law, Family law part (*Civillikums. Ģimenes tiesības*) as the general civil law source, provides rules for adoption of minor children. Opinion of the child shall be discovered in two aspects. First, before adoption is finally approved by a decision of the court, a custody court (*bāriņtiesa*) – municipal institution, whose main duty is to defend the personal and property interests and rights of a child or persons under trusteeship[6] – finds out opinion of the child, and only then adopts its decision either recommending or not recommending for the court to approve adoption.[7] Cabinet of ministers regulations "Procedures for adoption",[8] which are adopted on the basis of the Civil law, describe in closer detail rules of adoption: "If the child to be adopted is under the age of 12 years, the orphan's and custody court shall have a conversation with the child to be adopted at his or her location and ascertain his or her opinion, as well as draw up the minutes of the conversation".[9] After ascertaining the opinion of the child to be adopted, the child care institutions and the custody court provide information regarding the child to be adopted to the Ministry of Welfare for continuation of the process. The other aspect where opinion of the child shall be discovered in the adoption process is related to opinion of brothers and sisters of the child to be adopted. Namely, the "Custody court shall, before taking a decision regarding the separation of brothers and sisters, half-brothers and half-sisters, ascertain the views of the child to be adopted and siblings, half-brothers and half-sisters. The opinion shall be clarified if the persons have a close mutual relationship or have lived on an undivided household".[10] There is no unified procedure approved by normative enactments of Latvia on how opinion of the child should be discovered.

3.2. *Children's rights to be heard in custody and access rights cases*

Custody disputes and access rights cases are another legal sectors, where opinion of the child shall be find out. Latvian Civil law, Family law part provides for substantial rules, regulating custody rights and access rights. As ruled in the Civil law, Family law part, "the parental dispute over custody rights shall be settled, taking into account the best interests of the child and clarifying the opinion of

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[6] Law on orphan's and custody courts. Adopted on June 22, 2006. Article 17, clause 1. Available at: https://likumi.lv/ta/id/139369-barintiesu-likums

[7] Civil law. Family law. Adopted on January 28, 1937. Article 169, part five. Available at: https://likumi.lv/ta/id/90223-civillikums-pirma-dala-gimenes-tiesibas

[8] *Adopcijas kārtība*. Cabinet of ministers regulations No. 667. Adopted on October 30, 2018. Available at: https://likumi.lv/ta/id/302796-adopcijas-kartiba

[9] Rules of adoption. Cabinet of ministers regulations No. 667. Article 8. Adopted on October 30, 2018. Available at: https://likumi.lv/ta/id/302796-adopcijas-kartiba

[10] Law on orphan's and custody courts. Adopted on June 22, 2006. Article 34, part 2.2. Available at: https://likumi.lv/ta/id/139369-barintiesu-likums

the child, provided that he or she is able to formulate it".[11] Civil procedural law (*Civilprocesa likums*) is a national law instrument providing for procedural norms, including for court cases on custody and access rights.[12] There are two chapters in the Civil procedural law, which are dedicated to custody and access rights cases: chapter 29 "Cases regarding annulment of marriage and divorce" and chapter 29.1 "Cases arising from the custody rights and access rights". Historically, chapter 29 is older and was included in the Civil procedural law at the moment of adoption of the law in 1998. chapter 29.1 was introduced in the Civil procedure law by amendments made on September 7, 2006, and the aim of such amendments was "to facilitate proceedings in cases concerning the interests of the child by providing for certain rules of jurisdiction as well as the principles of judicial proceedings which, to some extent, deviate from the principle of party races in civil matters, similar to those in divorce cases, by introducing the principle of objective investigation and emphasising aspects of the protection of the child's interests".[13] Following adoption of chapter 29.1, now two chapters of the Civil procedure law contain certain rules on custody and access rights cases, at times having clear borders between both chapters, but at times legally overlapping.

According to chapter 29 (on divorce cases), Article 238.1, and according to chapter 29.1 (on custody and access rights cases), Article 244.10 of the Civil procedure law, both parties in litigation can request the court to adopt fast speed, immediate and temporary decision on child-related matters, obliging the court to adopt such decision within one month after such claim is submitted to the court. It is obvious that one month is not sufficient time for both parties, court and custody court to prepare for full review of case, collection of evidence materials included. However in both chapters – chapter 29 (on divorce cases), Article 238.1, part four, and chapter 29.1 (on custody and access rights cases), Article 244.10, part four – the custody court is instructed to collect as much as preparatory materials as possible, so the custody court could orally report to the court which, accordingly, could adopt a temporary decision on the basis of such initial collection of information and evidence. One of the obligations entrusted to the custody court, is to find out "the point of view of the child if he or she can formulate it, considering his or her age and degree of maturity". An obligation to find out opinion of the child is formulated in literary identical wording in both chapters.

Both chapters contain a rule, which is extremely rarely applied in practice. Namely, the court deciding on temporary decision has rights to invite to the court a child and find out opinion of the child directly and personally. In most cases

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[11] Civil law. Family law part. Article 178.1, part two.

[12] Adopted on 14 October 1998. Available at: https://likumi.lv/ta/id/50500-civilprocesa-likums

[13] Annotation to the draft law "Amendments of Civil procedure law" (*Likumprojekta "Grozījumi Civilprocesa likumā" anotācija*), later adopted on September 7, 2006. Available at: https://www.saeima.lv/L_Saeima8/lasa-dd=LP1556_0.htm

opinion of the child is clarified with the help of specialized municipal institution – the custody court. However, also the court has rights to invite to the court a child and find out his or her opinion directly. Mostly, the court applies this right only in highly disputable cases and where a child, despite his or her under-age, is very mature. Therefore, in both chapters – chapter 29 (on divorce cases), Article 238.1, part five, and chapter 29.1 (on custody and access rights cases), Article 244.10, part five – the Civil procedure law provides that "if a court considers that it is necessary to clarify the information provided by the orphan's and custody court, it shall clarify the opinion of the child if he or she is able to formulate it considering his or her age and degree of maturity". The right of the court to find out opinion of the child by personal invitation to the court is formulated in literary identical wording in both chapters. This prerogative of the court is only applicable where the court considers that it is necessary to clarify the information provided by the orphan's and custody court. In most cases the court considers information provided by the orphan's and custody court as sufficient, thus skipping the need to invite the child to the court. There is no procedural order provided in law on how courts are questioning children if they are invited to share opinion on the basis of Article 238.1, part five, and Article 244.10, part five of the Civil procedural law. In most cases, the court (judges), together with a court secretary, remain in private with a child, permitting the custody court representative to assist the child. Other persons, parents included, are requested to leave the courtroom. Nevertheless, there are no rules for this procedure, and quality of conversation depend on skills and education of judges involved in the particular civil law procedure.

Also in cases where permanent judgment (not temporary decision) shall be adopted, the Civil procedure law provides right of the court to invite a child to the court and find out his or her opinion directly and personally. Article 239, part two (in chapter 29 on divorce cases) and Article 244.9, part two (in chapter 29.1 on custody and access rights cases) of the Civil procedure law in literally identical wording state that "in issues regarding granting of custody rights, childcare and procedures for exercising access rights, a court shall require an opinion from the orphan's and custody court and summon a representative thereof to participate in the court hearing, as well clarify the opinion of the child if he or she is able to formulate it considering his or her age and degree of maturity". Comparing this rule to Article 238.1, part five one can see that in temporary cases the child may be invited only "if a court considers that it is necessary to clarify the information provided by the orphan's and custody court". But in cases which are not proceeded for temporary decision, the court has rights to invite a child even if information provided by orphan's and custody court does not need clarification. Again, this rule is rarely applied, as, mostly, the orphan's and custody court professionally finds out opinion of the child and reports it to the court.

Similarly, as it will be further described in subchapter 2.5 of this report, also in civil cases the court shall ascertain, whether opinion of the child is expres-

sed freely and without any impact of other persons, for instance – one parent, with whom the child has spent proportionally longer time. The child's point of view is fundamental, but it is necessary to assess the overall situation and to take into account information on possible influence of the child's opinion and on child bullying, which has often occurred over several years. Consequently, the re-establishment of relations in such cases should take place gradually, cautiously and continuously.[14]

Although opinion of the child is considered during court proceedings on access and custody cases, right after the court adopts its judgment opinion of the child is not recognized as a condition which can possibly change enforcement of the judgment.[15] The child has only rights, but not obligation to realize access rights with a parent. Therefore, if court bailiff is invited to help enforcing judgment of the court on access right, the court bailiff will not act by coercive means to enforce a child to realize access rights with a parent. Enforcement of access rights with a child is not possible by coercive means, as that would be against the best interests of the child.[16] Therefore, opinion and reaction of the child is taken into account at enforcement of judgments in access rights cases, and, if the child actively express unwillingness to meet a parent, opinion of the child is decisive.

3.3. *Children's rights to be heard in determination of parentage cases*

An opinion of the child in some cases is asked in parentage disputes (*i.e.*, maternity and paternity). The substantial law ground in incorporated in the Civil law, Family law part.

Article 155, part seven of the Civil law provides that "recognition of paternity requires the consent of the child if he or she has attained twelve years of age". For children younger than twelve years of age written consent is not required, and there is no obligation included in the law to inform children about changes into paternity.

Article 156, part six of the Civil law says that "contesting of acknowledgment of paternity shall correspond the right of a child to identity and stable family environment". Therefore, in cases where paternity is contested, the court shall discover whether any possible legal changes in paternity of the child "corresponds the right of a child to identity and stable family environment". A list of legal tools how to ascertain what is identity of the child, how stable or unstable is his or her family environment, and what in particular case is a family *de facto* of the child, is provi-

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[14] Annual report of Latvian ombud. *Latvijas Republikas Tiesībsarga 2017. gada ziņojums*. Available at: https://www.tiesibsargs.lv/uploads/content/lapas/tiesibsarga_2017_gada_zinojums_1520515340.pdf

[15] G. Berlande, *Nolēmumu izpildīšana lietās, kas izriet no saskarsmes tiesībām*, in *Jurista Vārds*, June 16, 2020, No 24/25 (1134/1135), p. 47.

[16] Decision of the Riga city Vidzeme district court as of December 13, 2019 in civil case C30663418. Not published.

ded in the law. Therefore, the court can entrust these duties to the custody court – a specialized municipal institution – which, after review of family, situation reports to the court, so the court could proceed for adoption of a final judgment in the particular parentage case.

Procedurally, this norm is described in greater detail, affirming in Article 249.3, part three of the Civil procedure law that "a representative of the orphan's and custody court shall, upon a request of the court, provide information on the opinion of the child if he or she is able to formulate it considering his or her age and degree of maturity, and other evidence which have significance in the case". Part four further continues that "the parties shall be notified of the court hearing, and a representative of the orphan's and custody court shall be invited to the court hearing. If a court considers that it is necessary to clarify the information provided by the orphan's and custody court, it shall clarify the opinion of the child if he or she is able to formulate it considering his or her age and degree of maturity".

The wording for finding out opinion of the child is identical in all above civil procedural rules, not giving any age limit, instead providing that opinion of the child shall be find out "if he or she is able to formulate it considering his or her age and degree of maturity".

3.4. *Children's rights to be heard in cases regarding wrongful removal of children across borders to Latvia or detention in Latvia*

As a signatory of the Hague convention on child abduction[17] and as a Member State of the European Union applying Regulation (EC) No 2201/2003,[18] Latvia has national procedural rules on review of cases regarding wrongful removal of children accross borders to Latvia or detention in Latvia. Chapter 77.2 on this topic was included in the Civil procedure law by amendments adopted on 7 September 2006. With these amendments and with introduction of chapter 77.2 in the Civil procedure law, the provisions of the Civil procedure law are aligned with those of the Hague convention of October 25, 1980 on the Civil aspects of international child abduction, the Hague convention of October 5, 1961 on the authorities' mandate and legislation applicable to the protection of children, and the Hague convention of October 19, 1996 on jurisdiction, applicable law, recognition, enforcement and cooperation on parental responsibility and child protection measures, as well as the requirements of the Regulation (EC) 2201/2003.[19]

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[17] Convention of October 25, 1980 on the civil aspects of international child abduction.

[18] Council Regulation (EC) No 2201/2003 of November 27, 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

[19] Annotation to the draft law "Amendments of Civil procedure law" (*Likumprojekta "Grozījumi Civilprocesa likumā" anotācija*), later adopted on September 7, 2006. Available at: https://www.saeima.lv/L_Saeima8/lasa-dd=LP1556_0.htm

In a course of review of application about wrongful removal of children across borders, the court shall "clarify the opinion of the child if he or she is able to formulate it considering his or her age and degree of maturity".[20] In the same way, as in previously described disputes, also in child abduction cases the duty to find out opinion of the child is entrusted to the specialized institution in child-care matters – the custody court. If, since the decision to return a child back to the country of his or her place of residence more than one year has passed, upon request of the parent of the child or other person who has illegally transferred or held the child, an orphan's and custody court shall appoint a psychologist to provide an opinion, in order to determine the viewpoint of the child regarding his or her taking back to the country of his or her place of residence.[21] Notably, this is the only norm, where the law specifies that viewpoint of the child shall be find out through assistance of a psychologist. In all other cases, not related to child abduction, opinion of the child can be find by other methods and involved persons.

Mostly, in child abduction cases minor children below age of seven are involved, whose objective opinion is complicated to discover. Even if a child has reached such age, where he or she is capable to formulate sentences and answers, opinion of the child is frequently affected by the parent with whom the child has lately had greater contact. Therefore, there are doubts about the possibility to acquire objective opinion of a minor child[22] below the age of seven. Only children in school age in Latvia, from seven years) are capable to share objective opinion, but opinion of minor children shall be considered very critically, taking into account all aspects which can leave impact on a child.[23]

3.5. *Children's rights to be heard in administrative cases on termination and renewal of custody rights*

In cases concerning the suspension and renewal of custody rights, which are examined by administrative courts, the decision shall also affect the minor (child), whose custody shall be decided.[24] The minor should, therefore, be invited to the case as a third party. In addition, the minor should be invited directly to that status. Inviting a child's guardian as a third party (or, as the case may be, any other child's representative – author's remarks) does not mean that the child himself or

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[20] Civil procedure law. Article 644.19, part one.

[21] Law on orphan's and custody courts. Adopted on June 22, 2006. Article 44.2, part five. Available at: https://likumi.lv/ta/id/139369-barintiesu-likums

[22] M. Vainovskis, L. Medne, B. Bitāne, *Pārrobežu lietas par bērnu prettiesisku pārvietošanu vai aizturēšanu: aktuālie prakses jautājumi*, in *Jurista Vārds*, June 16, 2020, No. 24/25 (1134/1135), p. 30.

[23] M. Vainovskis, L. Medne, B. Bitāne, *Pārrobežu lietas par bērnu prettiesisku pārvietošanu vai aizturēšanu: aktuālie prakses jautājumi*, cit., p. 30.

[24] K. Zemīte, *Nepilngadīgās personas (bērna) viedokļa noskaidrošana*, in *Jurista Vārds*, December 15, 2020, No. 50 (1160).

herself has been invited to the case.[25] A minor person, as any other participant in the proceedings, has the fundamental right of Article 92 of the Constitution of the Republic of Latvia to a fair hearing of a case, as well as, from the point of view of the administrative process, the minor has the right to express himself or herself on a decision affecting his or her rights and legal interests. The State also protects the rights of the child, including private and family life, in accordance with Articles 96 and 110 of the Constitution, and particularly helps children affected by violence.[26]

The child can be heard directly in court. In cases involving a child, as in any administrative case, the principle of objective investigation and effective management of the process should be ensured. However, the specific nature of these proceedings is that any direct hearing or any other evidence (e.g., initial or repeated visits by psychologists, forensic examinations, etc.) with the involvement of the child, should be carefully assessed as to whether it is contrary to the best interests of the child. As a result, the court needs to fully clarify the circumstances of the case without harming the best interests of the child.[27]

4. *Relevant Latvian case law*

Latvian case law has further elaborated on children's rights to information and rights to be heard. This chapter provides collection of excerpts from Latvian civil and administrative case-law on these rights.

Supreme court of Latvia, Senate on January 10, 2008 in its judgment on administrative case No SKA-66/2008 (A42552906) decided that section 21, paragraph three of the law on administrative procedure provides for the participation of a minor person from 15 years in the proceedings, which means the possibility for such person to express his or her opinion also directly at the hearing. The Senate has acknowledged that a minor who has reached 15 years must also be invited to take part in the proceedings, as a minor, since that age, is considered intellectually mature enough to be able to participate in the case. The hearing of such an age-old is, therefore, essential.[28]

Supreme Court of Latvia, Senate on September 23, 2008 in its judgment on administrative case No SKA-457/2008 (A425278074) decided that:

- the opinion of a mature teenager must prevail. If the court decides against the child's opinion, the court should give special reasons for this;[29]

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[25] Supreme Court of Latvia, Senate judgment of January 10, 2008, case No SKA-66/2008 (A42552906), point 12. Available at: www.at.gov.lv

[26] K. ZEMĪTE, *Nepilngadīgās personas (bērna)*, cit., No. 50 (1160).

[27] *Ibid*.

[28] Point 10. Available at www.at.gov.lv.

[29] Point 12. Available at: www.at.gov.lv.

- the longer the time has passed since the termination of custody rights for parents, the more important is that the decision on the right of custody to be restored should also be given to the views of the minor. In this context, it should be assessed how much attachment to the minor has already been established with other caregivers and whether the renewal of custody rights will not cause psychological problems for the child and, thus, not ensure that the child's interests are respected.[30]

Supreme Court of Latvia, Senate on October 16, 2008 in its judgment on administrative case No SKA-513/2008 (A42548607) decided that:

- it is important to consider whether the minor himself wishes to attend the hearing. As can be seen from the circumstances of a particular case, a 14-year-old teenager himself wanted to attend the hearing;[31]
- the opinion of the child may also be received in writing by the court (for example, the child submits a letter to the court with his or her own vision of the situation);[32]
- the Administrative procedure law does not prohibit persons under 15 years of age from attending a hearing.[33] The opposite interpretation would be contrary to both the Law on the protection of the rights of the child and international legal enactments in the field of the rights of the child, which provide for the right of the child to be heard if the child is able to formulate an opinion and is judged on the basis of the age and maturity of the minor. It is also recognised in the regular practice of the administrative courts that, when deciding to restore custody rights, a child's opinion according to the age and maturity of the child should be taken into account;
- children under seven years of age or preschool are usually considered to be based on the behaviour and opinions of persons (usually one or both parents) with whom the child lives together at the time, and, therefore, the child's opinion may not be decisive in judging the case.[34]

Supreme Court of Latvia, Senate on March 12, 2009, in its judgment on administrative case No SKA-182/2009 (A42439708) decided that "the opinion of the child, in order not to repeat negative experience and feelings as much as possible, should be clarified comprehensively and qualitatively at the time of the hearing of the case in the orphan's court and that the child should be reheard in court only due to the essential necessity. Therefore, the basic approach in such cases should

[30] *Ibid*, point 11.
[31] Point 14. Judgment available at: www.at.gov.lv.
[32] *Ibid*, point 13.
[33] *Ibid*, point. 10.
[34] *Ibid*, point 14.

be that the minor should be involved in the process and asked as little as possible and by circle of persons as narrow as possible. If a direct hearing does not correspond to the best interests of the child, the opinion of the child shall be discovered indirectly.[35]

Supreme Court of Latvia, Senate on October 10, 2011 in its decision on administrative case No SKA-290/2011 (A42941109) recognized that:

- information entrusted by a child to other persons and relating to his or her private life may be passed on to one or both parents if it is necessary for the performance of their duties as legal agents and for the protection of the interests of the child, but when deciding on the disclosure of such information, the views of the child must be assessed, taking into account his or her degree of maturity and his or her right to privacy. For example, the opinion of the psychologist or the psychotherapist, which includes the opinion of the minor, should not be reported to the parent if there is a risk that the parent may take negative action against the child after consulting his or her opinion;[36]
- the teenager is able to evaluate and count on the fact that the information he provides to the psychologist, which may be reflected in the psychologist's opinion without his consent, will not be disclosed to other persons or disclosed to a limited extent. This also respects the private life of the teenager.[37]

Supreme Court of Latvia, Senate on May 7, 2012 in its decision on administrative case No SKA-426/2012 (A42941109) recognized that, in order to ensure the protection of the privacy and of the other rights of the child, the court may, in accordance with the fourth paragraph of Article 145 of the Administrative procedure law, impose a restriction on other participants in the proceedings to familiarise themselves with that view, including the parents of the child who have been suspended for custody rights.[38]

Supreme Court of Latvia, Senate on November 12, 2012 in its decision on administrative case No SKA-870/2012 (A420344312) recognized that hearing a child's point of view does not mean that the case will be judged in accordance with this point of view.[39]

Supreme Court of Latvia, Senate on February 3, 2014 in its decision on administrative case No SKA-238/2012 (A420532812) decided that the age of seven

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[35] Judgment available at: www.at.gov.lv.
[36] Point 11 and 13. Available at www.at.gov.lv.
[37] *Ibid*.
[38] Point 11. Available at: www.at.gov.lv.
[39] Point 11. Available at: www.at.gov.lv.

can be recognised as a sufficient age to take into account the information provided by the child on very specific circumstances. In such a case, the court further took into account the child's emotional attitude – a categorical reluctance to stay with the individual concerned, a real excitement, nervousness in thinking about such a possibility.[40]

Supreme Court of Latvia, Senate on June 29, 2015 in its decision on administrative case No SKA-915/2015 (A420286314) decided that, in assessing the written opinion of the child, importance should also be given to whether the written, or written by the child's own words, correspond to the content of the child's particular grandfather is speech.[41]

Supreme Court of Latvia, Senate on August 16, 2017 in its decision on administrative case No SKA-1032/2017 (A420187616) decided that a child aged 16 is capable of distinguishing his will from the will of adults. If a young person has independently communicated regarding the circumstances of the case, both with representatives of the orphan's court and in his or her capacity as a party to the proceedings, this means that he has been able to express his or her own opinion in the case and such opinion must be taken into account.[42]

Supreme Court of Latvia, Senate on April 16, 2018 in its decision on administrative case No SKA-238/2012 (A420532812) decided that the more mature is the minor, the more important is his/her point of view in the case.[43]

Supreme Court of Latvia, Senate on December 21, 2018 in its decision on administrative case No SKA-1598/2018 (A420294117) decided that the longer is the time in which the ruling of the court is not enforced and no decisions are taken in this respect, and the child does not meet or meet the other parent very rarely at this time, the more biased the child's opinion may become because of the influence of the parent the child lives with.[44]

Supreme Court of Latvia, Senate on December 10, 2019 in its decision on administrative case No SKA-1638/2019 (A420300517) decided that it may be objectively necessary for the court to re-establish the opinion of the child due to assessment of the circumstances of the case. However, the court should also assess the nature of the hearing, depending on the age and development of the child in question, including the nature of behaviour and thinking.

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[40] Point 8. Not published.
[41] Point 7. Not published.
[42] Point 6. Not published.
[43] Point 14. Available at: www.at.gov.lv.
[44] Point 17. Available at: www.at.gov.lv.

Supreme Court of Latvia, Senate on February 17, 2020 in its decision on administrative case No SKA-700/2020 (A420207818) found that:

- a mature teenager has already sufficiently grow-up to be able to make own-initiative decisions and to formulate an opinion on the situation in question;[45]
- the opinion of a teenager, as any opinion of a child, should be judged from the individual personality characteristics and perceptions of each child.[46]

Supreme Court of Latvia, Senate on September 17, 2020 in its decision on administrative case No SKA-1345/2020 (A420190719) found that a 10-year-old child who had delivered his own opinion, is at such an age that he is able to give an adequate opinion and assess the situation. The child had also provided a consistent opinion to the representatives of the institutions involved in the case (Orphan's Court, bailiff, police representative). Thus, the court did not question the credibility of the child's opinion.[47]

Supreme Court of Latvia, Senate on October 5, 2020 in its judgment on administrative case No SKA-1471/2020 (A420212519) decided that the court must examine not only the rule of law of the decision of the orphan's court under appeal, but also the current circumstances once made sure that the judgment of the court will be in the best interests of the child). The relationship between individuals and children in cases relating to children's and parental rights is usually dynamic and can change. The Senate has stated that the court's role in these cases means "holding your hand on the pulse" and clarifying all the objectively necessary information, including the juvenile's opinion, to decide whether the ruling is consistent with respect for the child's best interests.

5. *Analysis of the current practices in Latvia*

Answers to the questionnaire from lawyers and judges in Latvia have given additional useful information to the research.

SECTION 1 – BACKGROUND INFORMATION

This section of the questionnaire was devoted to the acquisition of certain background information of the respondents. In total, 25 respondents participated and answered the questionnaire.

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[45] Point 18. Available at: www.at.gov.lv.
[46] *Ibid*.
[47] Point 11. Available at: www.at.gov.lv.

18 respondents (72%) were from Riga, the capital of Latvia, and 7 respondents (28%) from other cities. 1 judge, 20 advocates and 4 members from municipal custody courts sent their answers.

Years of professional experience
Less than 1 year: 0
1-5 years: 5
5-10 years: 7
More than 10 years: 13

SECTION 2 - GENERAL
This section contained general question on children's right to information. The scope was to have a general idea on the perception of judges and lawyers on the existence of a general right of the child to receive adequate information in civil proceedings – especially when EU instruments in the field of civil cooperation in civil matters were concerned.

1. In your country, is there a general obligation to provide written/oral information to children, when the dispute involves a child or is capable to affect the child's life and future? Does it depend on the age of the child? What is the main content of this information?

Most of respondents answered that there is no such a general obligation, and that, mostly, children indirectly receive information either from the municipal institution, – the custody court, or from their parents. One respondent replied that it could be harmful for the child to hear about litigation between parents, and, therefore, only children of older age could be carefully informed. Respondents also wrote that, regarding adoption, the law is silent about exactly what information should be given to the child.

2. Are children informed before the start of the proceeding?

Always – 1
Often – 3
Sometimes – 12
Rarely – 5
Never – 4
These answers do not affect legal regulation, which is described in the 2nd chapter of this national report.
3. How long before the start of the proceeding children are informed?
Respondents have correctly replied that there is no precise time limit in which the child should be informed.

4. Are children informed during the proceeding?

Most of respondents (68%) have correctly replied that only sometimes children are informed during litigation.

5. Are children provided information after the proceeding?
Most of respondents (68%) have correctly replied that only rarely, and sometimes never, children are informed after litigation.

6. In general, in your legal system, is there a professional that has the duty to help the child in expressing his/her opinion?
Respondents have correctly replied, in 60% of answers, that only in some cases there is a special professional who helps the child to express his or her opinion.

If yes, is this professional neutral from the parties of the dispute and from the court institution?
In administrative process that is a special guardian appointed by the custody court. In civil cases a municipal institution, – i.e. custody court, which at times is assisted by a psychologist.

7. In general, and even when there is no obligation for the judge to hear the child under domestic law, does your legal system provide for an obligation to inform the child about the proceeding?
20 respondents out of 25 answered that there is no general obligation to inform a child about civil proceedings. Some respondents have included a reference to Article 13 of the Law on protection of children's rights, where such general right to receive information is included, but not in relation to civil proceedings.

8. Are parents prepared or advised by courts, or other public services, on how to explain to children the situation and how to communicate them the outcome of the proceeding?
21 respondents out of 25 have answered negatively, because, indeed, parents are not prepared by the judge or other public institution on how to assist their children and to explain them the situation or the outcome of the proceedings.

9. In civil proceedings, are children provided with child-friendly material on their right to information and to be heard?
If yes, which are these materials?
If yes, are there different materials on the basis of different age categories?
There are no child-friendly materials to receive information on rights, and 18 respondents have confirmed this fact. Although some respondents have answered that there are materials available, most probably this is ad hoc exceptional situation in separate institutions.

10. If the child does not understand the local language, are there translation services or materials available in order to guarantee that the child receives proper information?
Respondents have answered that translation services are available for communication with a child.

11. Is information adequately provided also to children with special needs? How?
13 respondents have answered that there is no such availability, which is almost true. Only in some cases psychologists can moderate information to a child with special needs.

Section 3: Proceedings on parental responsibility
This section is dedicated to proceedings on matters of parental responsibility, that, therefore, fall into the scope of application of Regulation (EC) No. 2201/2003 (as well as the Regulation (EC) 2019/111 that will enter into force in 2022). This section is of direct interest for the application of EU instruments in the field of judicial co-operation in civil matters.

12. In parental responsibility proceedings, is the child heard before issuing a decision on the merits (either directly, or through a representative or an appropriate body)?
88% of respondents have answered that a child is heard before issuing a decision.

13. Who hears the child? If the child is heard by the judge, is the judge assisted by a psychologist or an expert?
Respondents have given indications to the law, writing that either the custody court with or without the help of psychologist, or the court hears the child. Analysis of legal enactments is given in preceding chapters of this report.

Does one of the parents (or both parents) attend the hearing?
72.7% of respondents have answered negatively.

14. Is the hearing usually preceded by a phase in which the child is provided information?
How is the information provided?
When is the information provided?
45.5% of respondents have answered that proceedings never start with informative introduction, and 13.6% of respondents have answered that sometimes information is given. That's because there are no instructions provided on this phase. If the child is heard in the court, general information can be given by a judge.

What is the content of the information?
Most respondents have answered that very general information about the case is given to a child, and the reason why the child is invited and questioned is explained.

Are children informed at the beginning of the audience that their opinion is important but they won't be responsible of the final outcome of the proceedings?
There is no such requirement in a law to inform a child about this aspect. Therefore, answers of respondents are very diverse, covering in equal way all offered choices.

15. Is the hearing usually followed by a phase in which the child is provided feedbacks and information about the following steps?
54.5% of the respondents have answered negatively. Giving of any information fully depends on a particular judge or custody court official, since there are no instructions in legal enactments.

16. Do you usually provide information to children together with a person they trust? Who is this person?
46.2% respondents have answered "sometimes" and 30.8% -"rarely", as this fully depend on a particular person working with a child.

17. After the judge has issued a decision on the merits, who informs the child about the outcome of the proceeding (i.e., the decision and its consequences)?
How is this information provided?
In 64% of cases the answer is that the child is not informed at all about the decision. In fact, this answer correspond to legal reality: usually, parents of the child give this information.

SECTION 4: INTERNATIONAL CHILD ABDUCTION
This section makes reference to international child abduction proceedings and to return proceedings. The section comprehends proceedings for the return of the child under the 1980 Hague Convention, and also return applications following a decision of non-return, according to art. 11 of the Regulation (EC) No 2201/2003.

18. Is the child heard before the decision of (non)return in international child abduction cases under the 1980 Hague Convention on the Civil aspects of International Child Abduction (and, when applicable, the EC Regulation No 2201/2003 – from August 2022, Regulation EU 2019/1111)?
In 64% of answers, respondents have replied that the child is heard in some cases. In explanations to answers the respondents have clarified that the child is heard when the child can formulate his or her opinion and in cases provided in the Civil procedure law.

19. Who hears the child?
If the child is heard by the judge, is the judge assisted by a psychologist or an expert?
Does one of the parents (or both parents) attend the hearing?
Respondents have replied that the custody court is an institution which hears the child. At times the custody court is assisted by a psychologist. Parents can be present at the moment when the child is heard, but this is not regulated in the law.

20. Is the hearing usually preceded by a phase in which the child is provided information?
Who provides the information to the child? How is the information provided? When is the information provided?
In 40.9% of cases the answer is affirmative, and in 22.7% of cases the answer is "sometimes", leaving a 31.8% answers of "rarely". In fact this fully depends on the judge, because the law does not provide for instructions how the child should be informed.

What is the content of the information?
In 44.7% of answers respondents said that information is about the reason of questioning. Other answers equally divide among other choices.

Are the children informed at the beginning of the audience that their opinion is important, but they won't be responsible of the final outcome of the proceedings?
In 54.5% of cases answer is "sometimes", because this fully depends on the judge.

21. If a decision of return is issued, is the child informed about the decision? If the answer is YES, how is the child informed? By whom? ('Decision of return': decision adopted under article 11 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, ordering the immediate return of the child in the State of habitual residence)
In 77.3% of cases the answer is "yes". Information is given orally by one of parents, and procedure is not regulated by the law.

22. If a decision of return is issued, is the child prepared and informed about the enforcement of a return order? If the answer is YES, how is the child informed? By whom?
In 84% of cases the answer is "yes". A parent or custody court inform the child, but this is not regulated by the law.

SECTION 5: MAINTENANCE PROCEEDINGS

23. When proceedings on maintenance or child support are celebrated outside a divorce/separation/marriage annulment proceeding, is the judge under an obligation to hear the child?
In 92% of cases the answer is "no". Although maintenance proceedings relates to interests of the child, the law does not demand opinion of the child.

24. Is the hearing usually preceded by a phase in which the child is provided information?Who provides the information to the child? How is the information provided? When is the information provided? What is the content of the information?
There is no need to find out the opinion of the child in maintenance proceedings. Therefore, no information is required.

SECTION 6: SPECIAL REPRESENTATIVE OR SPECIAL CURATOR OF THE CHILD

25. In your country, has the child the right to be separately represented in civil proceedings?
If the answer is YES, please list the proceedings, as well as the relevant legal provisions, in which the child has the right of separate representation.
Most respondents (48%) have answered "in some cases", because, indeed, only in certain legal issues, mostly administrative cases, a special representative is appointed for the child.

In these cases, does this representation include the specific duty to provide the child with adequate information about the object, the scope and the possible outcomes of the proceeding?
Such obligation is not explicitly stated by the law, as confirmed by respondents.

If the child is heard during the proceeding, has the representative the duty to prepare the child for the hearing?
Respondents have answered "no" in 93.3% of cases.

26. In your country, is there the possibility to appoint a special curator or a guardian ad litem of the child in civil proceedings involving him/her?
If the answer is YES, please list the proceedings, as well as the relevant legal provisions, in which the appointment of the special curator or the guardian ad litem is foreseen.
In those cases, what are the main duties and responsibilities of the special curator or of the guardian ad litem?
Answers equally divide among yes, no and "I don't know". According to the law, only is some cases guardians shall be appointed.

SECTION 7: FINAL CONSIDERATIONS

27. Have you ever had a specific training for professionals on children's rights and/or how to protect and fulfil the best interests of the child in civil proceedings?
In 92% of cases respondents have replied positively.

28. Have you ever had a training on child-friendly language for informing children?
From all answers 68%, are negative and 32% positive.

29. Have you ever had a training on how to explain to parents how to inform their children about proceedings?
88% from all answers are negative and 12% positive.

30. Have you ever had a training on child-friendly behaviour to relate to children involved in proceedings?
76% of answers are negative and 24% positive.

31. What do you think can be done in order for children to receive complete and adequate information about the proceeding that concerns them in your country?
In this question, all answers are relevant and are reported below:

- It is a disputable question whether should the child be informed about everything, taking into account harmful and psychologically traumatic consequences of such information. It is a politically sensitive issue.
- A child shall be protected against painful and extra information related with conflicts between his or her parents.
- Reform of system, especially of custody courts, is required.
- Children shall receive information via psychologists.
- A new body – children ombudsman – shall be established, realising rights to information.
- Competent experts shall decide on this matter.
- It must be stated precisely by the law who and how must inform a child.
- It must be carefully decided how to present information to a child, so not to harm him or her.
- Guidelines shall be provided to courts and custody courts on how to talk to child and how to provide information to a child.
- Specialized literature is necessary for professionals working with children.

32. Is there any other aspect that has been omitted in this survey and that you think is relevant for the purpose of this research?
Four suggestions have been received:

- It must be analysed whether the child should really be informed about every litigation related to the child.
- Practice of each custody court is very different.
- Information can cause psychological trauma to the child, which is not acceptable.
- Particular children, who have gone through such proceedings, should be examined discovering whether information was beneficial for them or no.

Chapter 8

CHILDREN'S RIGHT TO INFORMATION IN CIVIL PROCEEDINGS IN PORTUGAL

Geraldo Rocha Ribeiro

1. *Children's right to information as an essential component of the right to be heard and to participate*

The Portuguese legal order recognises the right of every child with a capacity for discernment to freely express his or her views on matters affecting him or her, following his or her age or maturity, as and also to participate in those same decisions where those views are to be taken into account, as well as the right to be heard in proceedings affecting him or her.

Following the UNCRC, the right to be heard and participate stands as one of its four pillars, together with the right to life, non-discrimination and the right to the full development of one's personality. Considering the child as an autonomous person with full rights, without giving him or her the possibility of participating and being heard in matters concerning him or her, implies that adults know how to internalise this new conception of the child as a person and to give concrete expression to the child's best interest and respect his or her fundamental rights.

The right to be heard and to participate, expressed in art. 12 UNCRC, which binds Portugal, ensures the child's right to be part in decisions affecting him or her by freely expressing their decision and being heard and taken into account. Under this provision, whenever a decision that affects a child is taken, his or her opinions, wishes and feelings must be ascertained, regardless of age, gender, religion, social status or situation. It is a general principle applied to all children (including children with disabilities), and the implementation of all the rights enshrined in the convention.

This right of the child to be heard and to participate implies a dialoguing relationship between the child and the adult, listening to the child and considering the

child's opinion before making a decision that affects him or her. The hearing and participation of the child in a procedure concerning her or him must be carried out in a manner «*in which a child or children are heard and participate, and must be transparent and informative, voluntary, respectful, relevant, child-friendly, inclusive, supported by training, safe and sensitive to risk and accountable*».[1]

In the interpretation of domestic rules, it is also necessary to consider arts. 3 and 6 ECER, according to which:

> *(a) A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, and receive all relevant information; be consulted and express his or her views; be informed of the possible consequences of compliance with these views and the possible consequences of any decision. The judicial authority should hear the child personally if necessary in private, directly or through other persons, in a manner appropriate to the child's judgment, allowing the child to express his or her views and taking into account the views expressed by the child; and be informed of the possible consequences of acting by his or her views and of the possible consequences of any decision.*
> *(b) In proceedings affecting a child, the judicial authority, before taking a decision, shall: consider whether it has sufficient information at its disposal in order to decide the best interests of the child and, where necessary, it shall obtain further information, in particular from the holders of parental responsibilities; in a case where the child is considered by internal law as having sufficient understanding: ensure that the child has received all relevant information; consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child; allow the child to express his or her views; give due weight to the views expressed by the child.*

Another special consideration is also given to the Council of Europe Parliamentary Assembly Recommendation 1864 (2009) on Promoting children's participation in decisions affecting them: this recommendation establishes that, in participation, adults should not only be listeners but also consider and follow the views expressed by children, Member States should provide training on children's rights in decision-making processes, in particular for judges, prosecutors, lawyers, educators and medical staff, as well as for the development of all professionals working with children who can consult children of different age groups.

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[1] UN Committee on the Rights of the Child, *General Comment No. 12 (2009): The Right of the Child to Be Heard*, UN Doc. CRC/C/GC/12 of July 20, 2009, available at https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf (last accessed July 19, 2021).

The Council of Europe calls on all decision-makers to consider seriously the opinions, wishes and feelings of children, including very young children. The influence wielded by the child over the decision-making process will depend on his or her age and maturity. Participation should always be relevant and voluntary and should also be facilitated. Adults have a duty not to expose children to risks or overburden them with responsibilities that they cannot take on. Children have an unique knowledge about their own lives, needs and concerns. Their participation should be a major factor in any decisions directly affecting them. Therefore, children must be listened to and allowed to participate in decisions in all fields, especially in family life, health care, adoption issues and procedures, education, community life, access to justice and the administration of justice. Additional efforts are needed to ensure that children can express their opinions freely during judicial and administrative proceedings in a climate of respect, trust and mutual understanding. When promoting meaningful participation by children, special attention should be paid to avoid putting them at risk in any way, and to avoid harming, pressurising, coercing or manipulating them; children should have access to child-friendly information, appropriate to their age and situation.

Also, the Council of Europe's Committee of Ministers Recommendation CM/Rec (2012) recommended the necessity to ensure that every child can exercise his or her right to be heard, to be taken seriously and to participate in decision-making on all matters affecting him or her, taking into account his or her age and degree of maturity.

The Guidelines of the Council of Europe's Committee of Ministries on Adapted Justice for Children are also important in implementing this right. The Council of Europe emphasises the information adaptation to the child's needs proportionate to his or her level of understanding, the consideration of his or her views and opinions, and his or her right (positive and negative) to be heard and obtain the necessary information. The information should be transmitted in an understandable language, by qualified professionals, in an environment and conditions appropriate to his or her age, maturity, level of understanding or considering any difficulties of communication he or she may have.

Also giving effect to the obligations of States emerging from art. 11 UNCRC, art. 13 (2) HCCH 1980 Child Abduction Convention provides that the judicial authority may give reasons for refusing to return a child where it finds that the child objects to his or her return and has reached an age and degree of maturity which considers his or her views on the matter.

Within the European Union, the provides that children must freely express their views and that their views shall be taken into consideration in matters that concern them by their age and maturity (art. 24(1) CFR).

As an essential instrument of European integration, the hearing and participation of the child in legal proceedings involving him or her, by his or her age and maturity, is also particularly relevant as an essential condition for the enforcea-

bility of decisions relating to the rights of the child to be reunited with his or her parents or relating to the unlawful removal or retention of children (art. 23, 24(1)), 23(b), 41(3)(c), 42(2)(a) Brussels IIa concerning jurisdiction and the recognition and enforcement of judgments in matrimonial of parental responsibility matters).

To promote children's rights in order to break the vicious circle of inequality as a factor promoting respect for human dignity, the Recommendation 2013/112/EU urges Member States to enable and encourage the participation of children in decisions which concern them and which establish the right of the child to be heard in all judicial proceedings in which they are involved, promoting child-sensitive justice.

The right to freely express one's views and have one's views them considered is a fundamental human right of children recognised in art. 24(1) CFR and has general applicability and does not only relate to court proceedings. ECER enshrines children's procedural rights concerning in proceedings concerning family matters, including the right to freely express their views and to be informed, choose a representative, and be assisted by a person they trust. The ECHR does not expressly recognise this right, understanding that art. 8 of ECHR, which refers to the protection of private and family life, does not require national courts to hear children in all cases, making this right dependent on the circumstances of the case, on children's age and maturity.

The child's right to be heard is an autonomous right that is valid per se and instrumental in the child's best interests. It manifests itself in a triple dimension: (i) the right to speak and to express one's will, (ii) the right to actively participate in processes concerning the child and to have this opinion taken into account, and (iii) the recognition of the child as a subject of rights. The child's hearing is a process of dialogue, in which the child expresses or does not express what he or she wants as his or her right (it is not an obligation in which he or she is called to testify and to detail what one of the parents demands). There is an obligation to ensure that all conditions are in place for his or her opinion to be truly freely and unreservedly expressed, especially by ensuring that the person who will listen to the child recognises the true value to his or her voice, avoiding any constraint on the exercise of this right.

The child's right «*to express his or her views freely*» underlines the child's faculty to express his or her views without any kind of manipulation or undue influence or pressure and can choose whether to exercise his or her right to be heard. By requiring that due weight should be given to the child's views by age and maturity, art. 12 UNCRC makes it clear that age cannot determine the interpretation of his or her views. Therefore, the weight to be given to the child's opinion must be assessed on a case-by-case basis. Concerning the second paragraph of art. 12, the Committee on the Rights of the Child clarifies that this right applies to all relevant legal proceedings affecting the child.

2. *The evolution of the right to be heard in the Portuguese legal system: legislative provisions*

Art. 1878 (2) CC recognises the child's right to participate in family matters and the recognition of the growing autonomy in the organisation of his or her own life:

> *1. It is the parents' responsibility, in their children's interests, to watch over their safety and health, provide for their children, direct their education, represent them, even if they are unborn, and administer their property.*
> *2. Children ought to abide by their parents; however, according to their children's maturity, these should consider their opinion in important family matters and recognise their autonomy in the organisation of their own lives.*

With the Law 61/2008, art. 1901(2) (3) CC (Parental responsibilities in the constancy of marriage) states the principle that rules the exercise of parental responsibilities (including in cases of divorce, *de facto* separation, care provided by a third person, cohabitation, or civil partnership):

> *2. The parents exercise the parental responsibilities by common agreement and, if this is lacking in matters of particular importance, either of them can lodge an action before the court, which will try to conciliate.*
> *3. If the conciliation referred to in the preceding paragraph is not possible, the court shall hear the child before the ruling, except when circumstances advise against it.*

This last provision defines the principle of the required prior hearing of children, adhering to a democratic and participatory conception of parental responsibilities and the child's status as a subject of rights, endowed with a natural capacity to express his or her affections and feelings. It abolishes the age limit of 14 years following art. 12 UNCRC. The paramount criteria is the children's *de facto* capacity to express their opinion on matters concerning them and the right to be heard in all proceedings, and judicial and administrative procedures that affect them. The legal change was within Commission on European Family Law's Principles of European family law regarding parental responsibilities, namely principle 3:37:

> *1. Subject to Principle 3:6, the competent authority should hear the child in all proceedings concerning parental responsibilities, but if it decides not to hear the child, it should give specific reasons.*
> *2. The child's hearing should take place either directly before the competent authority or indirectly before a person or body appointed by the competent authority.*
> *3. The child should be heard in a manner appropriate to his or her age and maturity.*

Before this new version, the former (from the Law-Decree 496/77, 25-11) stated: «Parents exercise parental responsibility by common agreement and, if this is lacking in matters of particular significance, either parent can lodge a case before the court, which will try to conciliate; if this is not possible, the court will hear the child who is fourteen years of age before deciding, unless circumstances require it to be discouraged».

This sets the rule that, whenever a decision that affects a child is taken, his or her opinions, wishes and feelings have to be duly taken into account, having due regard to his or her age and degree of maturity. Age and maturity must be considered together, and these two factors do not solely concern the child's intellectual capacity. How children express their feelings, the development of their personality, their evolving capacities and their ability to confront various emotions and possibilities are just as important.

Even before the 2008 law, the LPCJP, in his art. 4(j) enshrines the principle of compulsory hearing of children, without any reference to age limits (Mandatory hearing and participation - the child and young person, separately or in company of their parents or a person of their choice, as well as the parents, the guardian or the legal representative, have the right to be heard and to participate in the acts and definition of the measure of promoting rights and protection).

There are several provisions to ensure child's participation in decision-making processes on his or her life project in the Portuguese legal system. Art. 1981(1)(a) CC requires the child's consent over the age of 12 to establish an adoptive parentage bond. The civil code also provides that, before a guardian is appointed, the child over the age of 14 must be heard, (art. 1931(2) CC). On the other hand, the child over the age of 16, when submitted to a guardian, has direct legitimacy to convene the Family Council, under art. 1957(1) CC. Under the LPCJP, child's opposition over the age of 12 makes it no longer legitimate the intervention of the entities with competence in matters of children and young people (art. 7 LPCJP) and the protection commissions (art. 8 LPCJP), per art. 10(1) LPCJP, giving rise to judicial intervention, by art. 11(c) LPCJP. Regarding children under 12 years of age, who can understand the meaning of the intervention, even if the opposition does not directly refer the case back to court, it is taken into consideration as relevant under art. 10(2) LPCJP.

In addition to the relevance of the child's will in legitimising the intervention of non-judicial authorities, the right to be heard by the protection commission or the Judge on the situations which gave rise to the intervention – and on the application, review or termination of promotion and protection measures – is guaranteed in proceedings affecting children over 12 year of age or even younger, where their ability to understand the meaning of the intervention is proven (art. 84(1) LPCJP). The child also has the right to be heard in determining and implementing the measure, requiring his or her consent to implement the promotion and protection agreement (art. 98(3) LPCJP).

The child or young person's hearing and participation in the intervention of promotion and protection of rights as provided for in art. 4, paragraph j) and 84, LPCJP. These rules establish that the children and young people are heard by the protection commission or Judge on the situations that gave rise to the intervention and regarding the application, review or termination of promotion and protection measures, under the terms provided for in art. 4 and 5 RGPTC.

In the context of the judicial procedure for adoption, the adopting party must be heard by the Judge, in the presence of the public prosecutor, following and in compliance with the rules laid down for the hearing of children in civil proceedings, which hearing must be conducted separately and in such a way as to safeguard identity (art. 3 and 54(1)(c) and (2) RJPA).

In the context of LTE, the hearing of the child is always carried out by the judicial authority (judge or public prosecutor) who; it may designate a social service assistant or another expert especially qualified to accompany the child in a proceeding and, if necessary, provide him/her with the necessary psychological support by a specialised technician, as well as and determine that the hearing does not take place in court or that it takes place without the use of professional clothing (art. 47 and 96 LTE).

A child who is the victim of a crime has the right to be heard in the proceedings, taking into account his or her age and maturity and, where there is a conflict of interest between him or her and the holders of parental responsibilities, he or she has the right to be appointed a representative (art. 7 (6) and 22 VS), thus reflecting a clear concern for systematic harmonisation and realisation of the child's rights to participate and be heard, art. 4 and 5 RGPTC.

In 2015 the OTM was revoked, and the new RGPTC regime approved, giving rise to the procedural realisation of the child's rights to be heard and to participate in proceedings. RGPTC establishes, in the first place, as one of the guiding principles of civil protection intervention, that the hearing and participation of the child, when he or she can understand the matters under discussion, according to his or her age and maturity should preferably carried out with the support of technical advice to the court, and with the possibility of accompanying the adult of his or her choice and, secondly, it put in place various implementing rules concerning the hearing of the child, in the dual aspect of his or her hearing or taking statements as evidence. This legal provision establishes a set of rules concerning the child's hearing and participation, which apply not only to civil proceedings but also to promotion and protection proceedings and with clear consequences for the hearing of children in criminal proceedings. It can be said that it enshrines the general principle ensuring the right to be heard of the children.

Art. 5 (child's hearing) RGPTC establishes that:

1. The child has the right to be heard, his or her opinion being taken into account by the judicial authorities when determining his or her best interests.

2. For the purposes of the previous paragraph, the Judge shall promote the child's hearing, which may occur in a judicial procedure specially scheduled for that purpose.
3. The child's hearing is preceded by providing clear information on the meaning and scope of the hearing.
4. The hearing of the child respects his or her particular circumstances, ensuring, in any case, the existence of appropriate conditions for this purpose:
a) The child is not subjected to an intimidating, hostile or inappropriate space or environment concerning his age, maturity and personal characteristics;
b) the participation of properly qualified judiciary actors.
5. To comply with the previous paragraph, preference is given to not wearing professional garments when hearing the child.
6. Whenever the child's interest justifies it, the court, on request or ex officio, may hear the child, at any stage of the proceedings, so that his or her statement may be considered as evidence in subsequent procedural acts, including the trial.
7. The taking of statements obeys the following rules:
a) The taking of statements is carried out in an informal and reserved environment, in order to guarantee, in particular, the spontaneity and sincerity of the responses, and the child must be assisted in the course of the procedural act by a specially qualified technician, previously appointed for this purpose;
b) The enquiry shall be made by the Judge; the Public Prosecutor and the lawyers may ask additional questions;
c) The child's statements shall be recorded by audio or audiovisual recording, and other suitable technical means may be used only to ensure their full reproduction when those means are not available, and preference shall in any case be given to audiovisual recording whenever the nature of the matter to be decided, or the interest of the child so requires;
(d) when in criminal proceedings the child has made statement for future use, these may be considered as evidence in civil proceedings;
e) When in civil proceedings the child has made a statement before a judge or public prosecutor, with due regard for the principle of adversarial proceedings, it may be considered as evidence in civil proceedings;
f) The taking of a statement per the preceding paragraphs shall be without prejudice to the giving of evidence at a trial, whenever this should be possible and should not jeopardise the child's physical and mental health and full development;
g) in any case not contrary to this provision, the civil procedural arrangements for advance evidence shall apply mutatis mutandis.

Thus, the environment or space in which the child is heard should not be intimidating, hostile or inappropriate to the child's age, maturity and personal characteristics, and statements should be made in an informal and reserved environment (art. 5(4)(a) and (7)(a) RGPTC).

The number of persons involved must be minimal and they must be adequately trained, and the assistance and follow-up of the child must be guaranteed by a

specially qualified technician or by a person of his or her confidence (art. 5(4)(b) and (7)(a) RGPTC).

The statements must be recorded by audio or audiovisual recording, preference being given to audiovisual recording where the nature of the matter to be decided or the interest of the child so requires (art. 5(7)(c) RGPTC).

The Judge shall make the examination, and the Public Prosecutor and lawyers may ask additional questions (art. 5(7)(b) RGPTC).

Despite all this, the child's hearing is an extraordinarily intense moment for the child and demanding the judiciary actors. They need special training and expertise to carry out the hearing, but taking into consideration also the difficulties of understanding the non-verbal behaviour or a reasonable knowledge of the various variables that may be present at the hearing (the environment, the conduct of the interview, the level of development of the child and, finally, those relating to the adults who are carrying it on).

These are the rights of participation of children, which go beyond the view of children as objects of parental authority and enshrine the concept of the child as a subject of law. The child's opinion is not binding, and it consists of one element, among others, to be considered in the decision. If the court deviates from the child's opinion, an increased duty to give reasons for the court decision should be required. As a principle, the child's will and opinion must be respected, if there is not a valid discouraging motive, from the point of view of the safekeeping of his/her best interests.

The child is heard preferably with the expert assistance and the comfort of an adult of his or her choice, except if the Judge discards such possibility given reasons for the refusal (art.42 (1), e) RGPTC). The hearing is a child's right but not an obligation. The child is free to refuse to express his or her opinion and remain silent. The Judge can decide that the child should not be heard when " serious reasons discourage him/her" (art. 1901 (2) (3) CC or if the defence of his/her best interests discourages him/her (art. 35 (2) (3) RGPTC) and: in this case the judge may use expert assistance to assess the child's capacity to understand (art. 42 (2) RGPTC). Specially trained experts report to the court afterwards whether the child should be heard in the courtroom or another place or through other means. Besides, while remaining a child's right, hearing the child cannot constitute an absolute obligation but must be assessed pending the child's best interests, as in cases involving agreements between the parties.

This means, in summary, that the hearing is discouraged if the child is not mature or incapable of expressing himself or if there are conflicts of loyalty, feelings of guilt or other psychological damage resulting from the child's involvement in the parents' conflict, as well as the danger of being coerced by the parents or a third person. The law presumes the child's natural capacity to be heard. The burden of proof of the incapacity or the prejudicial nature of the hearing rests with the person who invokes it, the parents or the Public Prosecutor, and: the Judge must investiga-

te the degree of maturity of the child and the psychological damage that may result from the hearing. A reasoned judicial decision must be taken to refuse to hear the child. Art. 35 (2) (3) RGPTC adopted the principle of the hearing of the child, in the Conference on the process of regulating parental responsibilities, following art. 4 (1), e) and 52 RGPTC. This principle extends to any proceeding relating to non-compliance agreement or decision on parental responsibility, or even if the decision is void and without effect. Art. 5 RGPTC establishes rules to be observed by the courts in hearing the child.

3. *Relevant case law*

3.1. *Relevance of the hearing and sanction for not hearing*

3.1.1. *Supremo Tribunal de Justiça (December 12, 2016)*[2]

I. A child's hearing cannot be regarded merely as a means of proof, but as a child's right to have his or her point of view considered in the decision process affecting him or her.
II. The exercise of the right to be heard, as a privileged means of pursuing the child's best interests, is naturally dependent on the child's maturity.
III. The current Portuguese law, following the various international instruments, has changed the way of determining the compulsory nature of such a hearing, having started to foresee (...) that the child should be heard when he or she has "the capacity to understand the matters under discussion, taking into account his or her age and maturity."
IV. The consideration of the child's maturity is the critical parameter in the decision to hear him or her, and the justification for not hearing is only dismissed when it is clear that his or her low age does not allow or advise him or her to be heard.
V. Not hearing the child affects the validity of final decisions as it corresponds to a general principle of substantive nature, and it is not suitable to consider as the nullity of proceedings.

3.1.2. *Relação do Porto (January 23, 2020)*[3]

Usually, because of the possibility it gives to for a better understanding of each child's opinion, the hearing of the child marks a very relevant contribution to each concrete case when it does not contain in itself the path for the choice of the proportional and adjusted protection measure.

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[2] ECLI:PT:STJ:2016:268.12.0TBMGL.C1.S1.F4, available jurisprudencia.csm.org.pt/.
[3] Processo n.º 822/17.3T8ETR.P1, available at www.dgsi.pt.

3.1.3. *Relação do Porto (November 4, 2019)*[4]

I - In law, the child is now entitled to a broad and extensive opportunity to be heard in legal proceedings concerning him or her.

II - The child's right to be heard appears as an exercise of his or her right to expression, but it also acts as a prerequisite for an effective right of active participation by the child in proceedings concerning him or her within the framework of a judicial culture that affirms the child as a subject of rights.

III- In the context of a promotion and protection process, there must always be an order, duly substantiated, reflecting whether or not the child needs to be heard.

IV- Failure to make such an order affects the validity of the procedure's final decision because it corresponds to a general principle of substantive relevance and is not appropriate to apply the procedural nullity regime to it.

3.1.4. *Relação de Guimarães (July 10, 2019)*[5]

It is not mandatory to hear the child under 12, contrary to what happens with a child over 12 years of age - art. 35 (3) RGPTC, only if he or she cannot understand the matters under discussion, and: this capacity will be evaluated on a case-by-case basis by the Judge who, for this purpose, may resort to the support of the expert assistance. However, in casu, the Judge, until the parents' request, decideds to hear the child and the expert assistance to the court is not compulsory. The law only speaks of this being "preferably" (al. c), of art. 4): the way and how the hearing is carried out is regulated by the said art. 5. Therefore, no nullity occurs, since the expert assistance to the court was not necessary, and the court could always hear the child without it. However, even if the alleged nullity were to occur, it would always be remedied, since it was not even, as we have seen, timely accused.

3.1.5. *Relação do Porto (April 20, 2019)*[6]

I - The child's right to be heard is an expression of the child's right to freedom of speech and of the expression of his or her will, but it also acts as a prerequisite for the child's effective right to actively participate in proceedings concerning him or her within a judicial culture that affirms the child as a subject of rights.

II - In a procedure for regulating parental responsibilities or altering such responsibilities, there must always be an order reflecting the need or not for the child to be heard, duly reasoned per his or her age and maturity.

III - The absence of such an order affects the validity of the decision issued without the child's right to be heard, as it is an infringement of a general principle

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[4] Processo n.º 1474/17.6T8PRD.P1, available at www.dgsi.pt.

[5] ECLI:PT:TRG:2019:1982.15.3T8VRL.A.G1.A6, available at jurisprudencia.csm.org.pt/.

[6] Processo n.º 371/12.6TBAMT-F.P1, available at www.dgsi.pt.

of substantive relevance and it is not appropriate to apply the system of procedural nullity to the child.

IV - Thus, not hearing the child without justification, constitutes a procedural fault and a clear violation of substantive law rules, and the court must not confine itself to seeing this omission in a strictly procedural perspective. However, it must instead repeat the failure to hear the child as an undeniable violation of that general principle of substantive relevance, and therefore procedural, affecting the validity of the delivered judgement.

3.1.6. *Relação de Guimarães (November 20, 2014)*[7]

I. The principle of hearing a child laid down in domestic and international law to which the Portuguese State is bound is based on the consideration that the child must be heard in decisions concerning him, out of respect for his personality.

II. This principle extends to the incident of failure to comply with parental responsibilities, in which the violation of rights of contact is involved.

III. The prior hearing of a child, taking account of his or her age and degree of maturity, is mandatory (see Article 4(i) LPPCJP ex vi Article 147-A OTM), so that failure to hold such a hearing renders the decision invalid.

3.1.7. *Relação de Évora (January 13, 2005)*[8]

I - "When regulating the parental authority, the child's opinion must be heard and considered in the assessment of his or her best interests, with a view to his or her integral development, that is to say, his or her physical, intellectual and moral development".

II - The will of the child, who is of age and of sufficient discernment to be able to decide what he wants in his life, namely when it comes to which of his parents he wants to live with, must be respected, if there is no valid reason to disregard him, from the point of view of safeguarding his best interests.

3.1.8. *Relação de Guimarães (March 20, 2018)*[9]

In cases of regulation of parental responsibilities, the child's benefit is that the judgment is to be given; the judgment will be reflected in the child's future. The child is at the centre of the procedure leading up to the final decision. The child's opinion must be accepted in the adjudication, provided it is not subject to external distortion or reveals a lack of adequate discernment of risks, that is to say, after having been duly assessed in the context in which the decision was taken and in the light of his or her best interests.

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[7] ECLI:PT:TRG:2014:43.13.4TMBRG.G1.93, available at jurisprudencia.csm.org.pt/.

[8] ECLI:PT:TRE:2005:1635.04.2.2D, available at jurisprudencia.csm.org.pt/.

[9] ECLI:PT:TRG:2018:1910.16.9T8BRG.A.G1.C7, available at jurisprudencia.csm.org.pt/.

3.1.9. *Relação de Coimbra (May 8, 2019)*[10]

I. The primary legal purpose behind regulating the exercise of parental responsibilities is the child's best interests.
II. Since this is a generic concept, the child's best interests must be ascertained case by case, while always keeping in mind the idea of the child's right to his or her healthy and normal development on the physical, intellectual, moral, spiritual and social level, in conditions of freedom and dignity. As far as possible, everything should be done in such a way as to contribute to the child's integral development in harmonious and happy terms.
III. The right of the child to be heard and to express his or her opinion in proceedings concerning and affecting him or her, taking into account his or her age and capacity for understanding/discernment of matters under discussion, has been enshrined precisely to achieve the best interest of the child.
IV. This does not mean that the decision to be taken should require the child to fully respect this opinion, but at least, it should be considered when weighing the interests at stakes and always bearing in mind the child's best interests.
V. Failure to hear a child in a case which directly concerns him or her, because aiming at taking a measure which may affect him or her in the future, cannot be regarded merely as a means of proof, but rather as the violation of a child's right, and may lead to the nullity of the decision which is to be given.
VI. The child's future residence after the parents' separation is of particular importance in regulating the exercise of parental responsibilities, since it may conflict with his or her development as referred to in II.
VII. The decision taken (albeit provisionally) by the court is not valid insofar as the child (at an age when he or she is at least sufficiently mature to understand the scope of such a measure of guardianship) was not heard by the court, and the court does not motivate its decision.

3.1.10. *Relação de Lisboa (February 27, 2013)*[11]

I. The prior hearing of a child when applying a precautionary measure is the principle, as laid down in Articles 77 to 110 of the LTE since the ex novo application of a precautionary measure (educational measures) is considered.
II. However, in the event of an ex officio review of the precautionary measure (educational measures) concerning the child, it is at the Judge's discretion to hear the child, the prosecutor and the authority responsible for enforcing the measure. Hearing them "where necessary", which is understandable as in this case, is simply a question of verifying the (in)subsistence of the conditions on which the already enforced measure is based.

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[10] ECLI:PT:TRC:2019:148.19.8T8CNT.A.C1.54, available at jurisprudencia.csm.org.pt/.
[11] ECLI:PT:TRL:2013:219.09.9T2AMD.B.L1.3.68, available at jurisprudencia.csm.org.pt/.

III. The non-exercise of such a faculty (of hearing) needs not be either reasoned or expressly mentioned.

3.2. *Purpose of the hearing: evidence-opinion and wishes*

3.2.1. *Tribunal da Relação de Coimbra (October 20, 2020)*[12]

The hearing of the child to allow him/her to freely express his or her opinion provided in art. 5 (1) (2) RGPTC is not to be confused with his or her hearing in order to take statements for evidence purposes, this involving questioning by the Judge, with additional questions by the Public Prosecutor and Lawyers, subject to the rules set out in art. 5 (6) (7) RGPTC.

It is in the child's best interest to keep in contact with both parents – when they demonstrate their ability to ensure the child's psycho-affective growth – to ensure the child's wellbeing and integral development (art. 1906 (7) CC).

Like other aspects of regulation, the contact's regime should be adjusted, if circumstances require.

3.2.2. *Tribunal da Relação de Lisboa (November 10, 2019)*[13]

I. The hearing of the child, provided for in arts. 4(1) and 5 RGPTC may serve two distinct aims, with different regimes: for the child to express his or her views regarding the family conflict and the measures to be adopted to overcome it (nos. 1 and 2); secondly, as a means of evidence (nos. 6 and 7).
II. The child's hearing, art. 5(1)(2) RGPTC, is mandatory as a rule, while the modality referred in paragraphs 6 and 7 is merely optional.
III. The child has the right to request that his or her hearing is not attended by his or her parents and their attorneys and opt for confidentiality as an exercise of the right.
IV. When the child exercises both the faculties provided for in III, the child's answers cannot be used as an evidence.
V. If the child requests that his or her parents and their attorneys should not attend the hearing but accepts the revealing the content of his or her statements, it may be used as an evidence, provided that the Court grant the parents' right *audita alteram partem*.
VI. The expression "if his opinion is taken into consideration" in art. 5(1) RGPTC must be interpreted as requiring the Judge to weigh the child's views and arguments, without the Judge being bound to decide following the child's opinion.

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[12] Processo n.º 4661/16.0T8VIS-R.C1, available at www.dgsi.pt.
[13] Processo n.º 3162/17.4T8CSC.L1-7, available at www.dgsi.pt.

VII. In a procedure to regulate the exercise of parental responsibility or its modification, in which the residence of two girls currently aged 14 and 17, respectively, is discussed the court must determine the alternate residence, even if they oppose it if it is convinced that this is the regime which best serves their interests.

3.2.3. *Relação de Lisboa (June 6, 2019)*[14]

I. The hearing of the child to give his or her opinion (art. 5 (1) (2) is not to be confused with the hearing for taking statements for evidential purposes (art. 5, (6) (7)).
II. The hearing of the child in order to freely express his/her opinion (art. 5(1)) is not subject to the rules set out in art. 5(6) (7) RGPTC, namely, to an interrogation –; by the Judge, with additional questions by the Public Prosecutor and lawyers –, recorded through audio or visual recording.

3.2.4. *Relação de Lisboa (July 1, 2017)*[15]

When the child's statement is recorded, the lawyers were allowed to formulate any additional questions they deemed appropriate, which they did not, after hearing the recordings, in a continuous act.

This absence of physical presence is not necessary, and very likely intimidating, since lawyers from such antagonised parents have so far failed to collaborate towards this other guiding principle of civil tutelage processes, namely that of Consensualisation (family conflicts are preferably settled by consensus, with recourse to specialised technical hearings and/or mediation, art. 4(1)(b) RGPTC.)

> «*Suppose the child has made a statement before a judge or public prosecutor, in compliance with the adversarial procedure principle: in that case, the statement may be considered as an evidence in civil proceedings; it follows that when in civil proceedings the child makes a statement without compliance with the principle of the adversarial procedure, it is reiterated if it is not considered to be the case: the sole consequence will be that those statements cannot be considered as evidence in the proceedings. In any case, in a culture of the child as a subject of rights, the principle of the hearing of the child has to be translated into the realisation of the freedom of speech and expression of the child's will, the right to active participation in the proceedings concerning the child him/herself and to have this opinion taken into account.*

[14] ECLI:PT:TRL:2019:3573.14.7T8FNC.C.L1.6.1A, available at jurisprudencia.csm.org.pt/.
[15] Processo 653/14.2TBPTM-J.L1, available at www.dgsi.pt.

3.3. *Child's capacity and assessment*

3.3.1. Relação do Porto (October 8, 2020)[16]

A 6 and a half-year-old child should be heard in the choice of schools between a public and a private one (for the 1st cycle attendance) when it is indicated that he or she has already attended the kindergarten of one of them for about two years.

At this age, the child, despite having difficulties in making decisions, and still being influenced by his parents, already develops an ethical sense, and can distinguish between good and wrong, not only in cases involving him but also in other situations.

3.3.2. *Relação de Guimarães (July 10, 2019)*[17]

The hearing of a child, even if under the age of 12, "unaccompanied by an expert assistance", is not a procedural nullity, since the expert assistance to the court, although preferential, is not required (al. c), of art. 4, art. 5 and no. 3, of art. 35, all of the RGPTC).

Art. 35(3), RGPTC states that "A child over the age of 12 years or younger who is capable of understanding the subject-matter under discussion, taking into account his or her age and maturity, shall be heard by the court following the terms prescribed in art. 4(c) and art. 5 unless the defence of his or her superior interest advises against it".

The art. 5 RGPTC enshrines the "guiding principles" governing tutelage proceedings. Paragraph c) establishes the principle: «Hearing and participation of the child - the child, capable of understanding the matters under discussion, having regard to his or her age and maturity, is always heard on the decisions which concern him or her, preferably with expert assistance to the Court, being assured, unless the judge refuses to give grounds, the accompanying adult of his or her choice whenever he or she shows an interest».

The second paragraph of the art. 5 states that the Judge assesses the child's ability to understand the matters under discussion on a case-by-case basis, who may, for this purpose, resort to the expert assistance.

3.3.3. *Relação de Guimarães (February 7, 2019)*[18]

The court aims to achieve the best possible solution given the case's concrete circumstances; it is to find the solution that will generate the least destabilisation and discontinuity in the child's life, already shaken by the parent's separation. The attribution of the child's residence to the primary figure of reference, if any, constitutes the solution most in keeping with the child's interests, since it promotes the

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[16] Processo n.º 12970/19.0T8PRT-C.P1, available at www.dgsi.pt.

[17] ECLI:PT:TRG:2019:1982.15.3T8VRL.A.G1.A6, available at jurisprudencia.csm.org.pt/.

[18] Processo n.º 784/18.0T8FAF-B. G1, available at www.dgsi.pt.

continuity of the child's primary affective relationship, corresponding, therefore, to the child's real and effective preference, provided that it gives evidence of allowing the child's contacts with the other parent.

The prior hearing of the child in any legal proceedings concerning him is the status quo. For this reason, the courts should hear the child, taking into account his age and degree of maturity and capacity of discernment. The child's opinion must be weighted according to the maturity he/she shows.

The child's alleged preference (at the age of 8) to stay in Portugal does not seem to be motivated nor does it reveal itself to be conscious, since there are no valid and attentive grounds for such a preference. Instead, it reveals immaturity, proper to his age, and could have been influenced.

Furthermore, the suggested preference cannot be the decisive criterion for establishing the child's future residence, since he is an under eight-year-old and people around him (father/grandparents) are likely to change his willingness to freely speak and to say what he virtually feels. Moreover, the concrete child, eight years old, is not mature enough to know what is best for him: if he lives in Portugal or Switzerland, or lives with his Father or his Mother since he was eight years old at the time he was heard, and went to live in Switzerland when he was only four, By associating Portugal with holiday periods (say with parents) and Switzerland with classes, school responsibilities and routines (also with both parents), you do not have the insight and real perception and terms of comparison to enable you to decide. The child's opinion should not be taken into account, as the preference to stay in Portugal is motivated by the paternal grandparents (he misses them) and play (football field), i.e., the opinion of an eight-year-old child, without real maturity that is sufficient to express a consistent, consistent and enlightened opinion.

Thus, the child's opinion is not mature (cf. art. 4 and 5), it is impaired in his/her ability to understand the issues under discussion and, potentially, has been driven by the parent with whom he lives since the beginning of the holidays on July 22, 2018.

The child's school education started, by a decision of both parents, in Switzerland in 2013. Since the language and teaching methods are different from those adopted in Portugal, once started the school in Switzerland, it is in the child's best interest to keep attending Swiss schools, despite his preferences to stay in Portugal. It is in Switzerland that the child has his centre of life organised.

As the appellant says, in Portugal, the child has the paternal family, which he misses (naturally), and in Switzerland, he has the maternal family, with which he has lived for the last five years, of the then eight of his life, which he will miss (naturally).

The child, eight years old, has not shown himself to be mature and capable of understanding the reason for his hearing, nor has he shown credible, well-founded and freely achieved reasons of preference. He did not show the discernment to understand the problem on which the court has focused (on the question of why he

likes being in Portugal more, he says «(...) *because he is with his paternal grandparents, whom he missed, and because he likes to play football, on a field he has next to home...*»). The Judge cannot base his decision on a vague and unfounded reference of a child of 8 years of age, without the necessary maturity to take a position.

As the appellant and the Public Prosecutor rightly point out, the Judge did not take into account essential facts which indicated the best interest of the child: from the very beginning the centre of Manuel's life in the last five years was in Switzerland, with his parents, relatives living there, friends he made and the school connection to Swiss education – (2 years of pre-school and two years of the first cycle). More than half of Manuel's life was spent in Switzerland, where he went when he was about three years, living with his paternal grandparents during the Christmas and summer school holidays.

The parent's conduct of unilaterally withholding his child in Portugal, hindering his studies in Switzerland and making it difficult for the child to live together with his mother, suggests, from the outset, that the parent does not prioritise the emotional and psychological wellbeing of the child and that he puts his interests first and foremost at the expenses of the child's wellbeing.

The documents show that, with some certainty, the child returning with his mother to Switzerland will find the housing, economic, educational and family conditions that he had.

Although the court may hear the child, it had to frame, interpret, value and critically analyse what he or she transmitted.

Therefore, for the reasons explained by the appellant and the Public Prosecutor, who presented himself well to defend the child's interests, and for the reasons just mentioned, we believe that the decision handed down should be changed.

3.3.4. *Supremo Tribunal de Justiça (October 18, 2018)*[19]

Art. 4 RGPTC prescribes that «*a child with the capacity to understand the matters under discussion, taking into account his age and maturity, is always heard on the decisions that concern him, preferably with the assistance of an expert appointed by the court, being assured the support of an adult of his choice whenever he shows interest in this unless the judge justifies his dismissal*».

For its part, art. 35, no. 3, specifies this requirement, prescribing that «*a child over 12 years of age or younger, capable of understanding the matters under discussion, taking into account his or her age and maturity, shall be heard by the court, following art. 4(c) and art. 5, unless the protection of his or her best interests would advise against it*». The hearing should be carried out with the diligence described in art. 5.

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[19] ECLI:PT:STJ:2018:533.14.1TBPFR.P2.S1.DB, available at jurisprudencia.csm.org.pt/.

No absolute rule emerges when we are dealing with a child under 12 years of age. His or her hearing should be assessed on a case-by-case basis in light of the elements relating to their age and maturity, with consideration of the child's best interests.

The parents who are now appellants have practically confined themselves to invoking, in a general manner and, as has been said, only in this appeal court, the need for such an expeditious hearing of minors, without giving any ponderous reasons that specifically demanded or advised it. The case also does not reflect (as they would no longer do at the time of the first judgment of the appeal) any doubt about the legitimacy and adjustment of its adoption.

The applicability of the prior hearing to the two youngest minors is notoriously ruled out, and the relationship with their parents is very tenuous since they only know the institution where they were taken in and which has been watching over their growth. Nevertheless, even for the two older children, considering both their age and maturity and the framework in which the decision of the bodies of trust developed with a view to their future adoption, this hearing is neither compulsory nor necessary, nor even convenient.

On the side of the children, specifically of the two older sisters, there is no evidence of a particular maturity which would allow them to freely express their thoughts and opinions within immediately feasible alternatives: continuation of the measure of foster care or the possibility of adoption.

3.3.5. *Relação de Lisboa (October 4, 2018)*[20]

Where the reassessment of a foster care measure is concerned, the parental responsibility holders, as well as young people over 12 years of age and children capable of comprehending the issues under discussion, must be heard before the decision is taken, either on the facts or on the measure applied and the need to extend it or not (art. 4 (j), 58(1)(d) and (h), 84 and 85 of the LPCJP).

3.3.6. *Relação de Lisboa (September 20, 2018)*[21]

In cases where there is a need to regulate to and/or modify the exercise of parental responsibilities, there should be a prior hearing of the child as established in law and doctrine, and: the courts should hear the child, considering his age and degree of maturity and capacity of discernment.

However, the Judge does not need to the hear child under the age of seven if he or she was heard months before the final decision by expert assistance, in whose report the child was heard and where he or she said what relationship he or she keeps with both parents.

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[20] ECLI:PT:TRL:2018:14091.09.5T2SNT.L1.2.55, available at jurisprudencia.csm.org.pt/.

[21] ECLI:PT:TRL:2018:10264.16.2T8LRS.B.L1.8.D0, available at jurisprudencia.csm.org.pt/.

This dismissal shelters the child from further non-mandatory diligence, also because so as it was not a question of an immediate redefinition of the child's current residence, but only of the need to provide for the extension of the regime of contact with the parent with whom the child does not habitually reside, made more difficult by the other parent.

It results from the provisions of art. 1906(7) CC that the greater closeness to both parents is in the child's best interests so that the court must make decisions that provide more significant opportunities for contact with both parents and for sharing responsibilities.

It is the child's best interest that establishes, and not that of the parents. Therefore, even if the parent's relation is litigious, the court should foster a regime that enhances the child's relationship with both parents. The issue to be taken in account is parenthood and not of an unsuccessful marriage or any relationship between the child's parents.

In case of major conflicts the intervention of the court is more urgent to establish, even if only provisionally, the terms of the regime for the child's contact with the parent with whom he or she does not live, thus guaranteeing the interest of the child to the contact with both parents.

3.3.7. *Relação de Lisboa (July 12, 2018)*[22]

I. The principle of the child's hearing, as laid down in national and international law to which the Portuguese State is bound, is based on the consideration that the child must be heard in decisions concerning him, on the grounds of regard for his identity.

II. This principle extends to the incident of the parental responsibility regime modification.

III. The prior hearing of a minor, taking account of his age and degree of maturity, is compulsory, so that failure to hold such a hearing renders the decision invalid.

3.3.8. *Supremo Tribunal de Justiça (April 5, 2018)*[23]

As a long time has passed since the beginning of the intervention, and as the child is already 11 years old it becomes necessary to assess and know the child's wishes as to the life-plan which would imply an adoption, as well as the consequences of total separation from his biological family. His opinion is necessary to assess what his best interest will be. This is much more relevant since the child is 11 wears old, an age at which it is natural to possess a considerable degree of discernment and a will of one's own.

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[22] ECLI:PT:TRL:2018:390.08.7TMFUN.F.L1.1.CC, available at jurisprudencia.csm.org.pt/.

[23] ECLI:PT:STJ:2018:17.14.8T8FAR.E1.S2.62, available at jurisprudencia.csm.org.pt/.

The child's hearing should be in person and conducted by the court with the assistance of psychologic or other experts.

3.3.9. *Relação de Lisboa (January 25, 2018)*[24]

A lawyer's appointment to a child is not required if the child's interest does not conflict with the parents' interests but rather is identical to the parent's position in conflict with the other.

The child's hearing cannot be dismissed because the parents or an attorney not representing the child stated what the child's opinion was.

3.3.10. *Relação de Lisboa (July 13, 2017)*[25]

I. The appointment of a lawyer is required when his or her a child's interests and those of his or her parents, legal representative or de facto guardian, are conflicting, and when the child with adequate maturity requests it from the court.
II. The law states a child over the age of 12 years is presumed to understand the matters under discussion. Considering his or her age and maturity, in principle, the Judge should not refuse him or her a request for a lawyer's appointment on the assumption that the justification put forward – by the child – for such a request does not prove to be sufficiently relevant.
III. Furthermore, the lawyer must act in such a way as to defend the legitimate interests of the represented party, without prejudice to compliance with the legal and deontological norms, always maintaining his independence in the exercise of his profession in any circumstances, and only be required to use all the technical knowledge and procedures which the legis artis consigns and which are supposed to be in his possession; it is, in the last instance, the appointed lawyer who shall be responsible for assessing the appropriate means to better defend – in the proceedings – the legitimate interests of the child.

3.3.11. *Relação de Porto (October 6, 2017)*[26]

And so we understand the presence, during the child's hearing, of the "expert" referred to in art. 5o no. 7 al. a) RGPTC may be dispensed by the Judge, to the extent that the child's statements reveal maturity, i.e. a genuine feeling of self-interest, in an enlightened relationship with all others, namely closer relatives (this situation usually occurs in adolescents aged 13, as is the case here, when the moment of puberty, leads to a gradual detachment from the parents, or the image of the parents).

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[24] ECLI:PT:TRL:2018:17627.17.4T8LSB.L1.6.21, available at jurisprudencia.csm.org.pt/.
[25] ECLI:PT:TRL:2017:1201.14.0T8VFX.L1.6.93, available at jurisprudencia.csm.org.pt/.
[26] Processo 572/16.8T8ETR-E.P1, available at www.dgsi.pt.

However, the same cannot be said of about recording the declarations, which contributes to the parents' total clarification, namely concerning the child's freedom to express his or her opinion. Once the child has been informed that his or her statements will be recorded to clarify the parents, the lack of correspondence between the time of the statements and the time of the parents' hearing – and their foreseeable immediate reaction, even if not verbally expressed – is sufficient to guarantee the free expression of the child's opinion. In this way, we do not see a real reason for not having recorded the child's statements – and despite the child's (scrupulous) sensitivity in confronting his or her parents, expressly referring to his or her annoyance at the fact that the mother may "be sad" at the child's will.

In that way, a nullity was committed, in the sense that 'the irregularity committed could influence the examination or decision of the case', the statements made having influenced, as they did, the conviction formed by the court, by the provisions of art. 195(1) CPC, as a subsidiary right – art. 33(1) RGPTC'.

3.3.12. *Relação de Coimbra (January 14, 2016)*[27]

In a proceeding about the right of a granddaughter's contact (art. 1887-A of the CC), the direct hearing of a child under the age of 5 is not mandatory, due to a lack of discernment adequate to express one's opinion of about the refusal to contact grandparents due to loyalty to the mother. After the death of the child's father, she does not promote and even refuses to contact the grandparents.

3.3.13. *Relação de Porto (October 8, 2020)*[28]

A 6 and a half-year-old child should be heard in the process of choosing a public or private school, principally when he or she has already attended kindergarten in one of them for about two years.

3.3.14. *Relação de Lisboa (July 14, 2020)*[29]

Art. 1887-A of the Civil Code, added by Law 84/95 of 31 August 1995, enshrined the child's right to contact their grandparents and recognised their right to contact his grandchild, which could be called "contact rights".

Art. 28 RGPTC does not provide for any legal derogation, in the context of provisional and precautionary decisions, from the general principles of hearing the child and the adversarial procedure.

Not hearing the child, in the context of the determination of a provisional system of contact between grandchildren and grandparents, results in the annulment of the contested decision and determines that the proceedings be dropped in order

[27] ECLI:PT:TRC:2014:194.11.0T6AVR.C1.06, available at jurisprudencia.csm.org.pt/.
[28] Processo 12970/19.0T8PRT-C.P1, available at www.dgsi.pt.
[29] Processo 24889/19.0T8LSB/A.L1/6, available at www.dgsi.pt.

to either hear the children, if their ability to understand so determines, or to be justified in not hearing them.

In this matter (contact with his or her grandparents), the law itself establishes a presumption that the relationship of the child with the grandparents is beneficial to the child, and the parents, if they successfully wish to oppose the refusal of such a relationship, will have to invoke and demonstrate concrete reasons for the prohibition, which presupposes prior adversarial proceedings.

3.4. *Binding nature of the opinion*

3.4.1. *Relação de Lisboa (May 23, 2019)*[30]

I – The court is not bound by the child's opinion and will, since the child's best interests often conflict with his or her own extravagant will and wishes.

II- The Judge must not be a mere receptacle of that will, desire or opinion, merely gathering it, observing it and uncritically abiding by it. Instead, he must decisively bring it together, submitting it to the judgment of the child's real, concrete and casuistic interest, for only in this way will he succeed in performing his duties.

3.5. *When is the child heard*

3.5.1. *Relação do Porto (October 24, 2019)*[31]

I. If the child has already been heard on the regulation of the exercise of parental responsibilities, he or she does not have to be heard again before the modification of the preliminary regulation of that exercise, if the aspect addressed by this decision is not new or original concerning those raised at that hearing.
II. The modification of the provisional arrangements may be decided by the court even if none of the parties has requested it, but the parties' hearing must precede the decision.
III. The modification of the current provisional regime, established by the parties' agreement and homologated by the court, should only be ruled if there is a non-compliance with that regime or if there are supervening circumstances that require the modification to safeguard the best interests of the child.

[30] ECLI:PT:TRL:2019:2403.15.7T8SXL.A.L1.2.2D, available at jurisprudencia.csm.org.pt/.
[31] Processo n.º 21097/17.9T8PRT-E.P1, available at www.dgsi.pt.

3.6. *Appointment of a curator or lawyer*

3.6.1. *Relação de Lisboa (January 25, 2018)*[32]

A lawyer's appointment to a child is not required if the child's interest does not conflict with the parents' interests but rather is identical to the parents' position in conflict with the other.

4. *The effectivity of the hearing as dependent on the right to receive adequate information: gaps and deficiency in the Portuguese legal system*

One of the problems that can be pointed out while dealing with the Portuguese legal system's entropies or inadequacies is the lack of standardised and technically validated procedures. The right to be heard and participating, in reality, depends more on the practice of the different judicial actors than on the legislation.

Standardisation, proper training, necessary critical sense about the way our children are heard are needed. There is also a need for proper training in child-friendly and understandable language to inform them.

Despite the difficulties, there are considerable achievements. The improvement of physical spaces for the child's hearing, more training offer, access and availability of expert assistance, and the development and dissemination of good practice manuals. Some of these improvements have resulted from the joint effort between specialists and judicial operators (bar association and magistrates),[33] or even from the work of experts who assist the courts (social security).[34] Also noteworthy is the courts' growing specialisation, circumscribing cases involving children in specialised courts (family and minors). Nevertheless, there is a lack of collective awareness of the importance of the child's information and participation. The exercise of the right tends to be exhausted at the concrete moment of the hearing (there is an idea of subsequent unaccountability as to the type of information to be provided about the process itself), as well as the lack of awareness of the actors themselves (in particular the parents) who are the figures closer to the children. There is an absence of a culture of children's rights, resulting in some cases in an idea of fulfilling a formality, without the child being included in decision-making processes.

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[32] ECLI:PT:TRL:2018:17627.17.4T8LSB.L1.6.21, available at jurisprudencia.csm.org.pt/.

[33] https://crlisboa.org/2017/imagens/Audicao-Crianca-Guia-Boas-Praticas.pdf.

[34] http://www.seg-social.pt/.

5. *Analysis of the current practices in Portugal*

5.1. *Common considerations*

Since 2015, as stated above, there are special rules that determine how and where the child's hearing should be carried out (art 5 RGPTC). The information provided to the child is made at the time of the hearing and is normally provided by the Judge. Sometimes, experts (social security assistants, psychologists) provide a context for the proceedings. Once the hearing has taken place, there is no continuity of information on the proceedings' outcome. The mediation of information is not guaranteed, beyond the very moment in which the proceeding takes place. It is up to the parents (or those who care for the child) to inform (when they do so) what happens after the hearing and about the outcome. There are no guarantees in keeping the child as the interlocutor in the process. The rule is that the child is only heard in the light of new facts or circumstances.

This means that the information is conveyed in a process-oriented, and usually, it has no follow-up. As a rule, the court's assistance experts only take steps to obtain information for the case. The approach is different depending on their formation and on the time the child is heard. There is no protocol or standard rules on how to be heard, although there has been an effort to train judges and raise awareness of the hearing's relevance.

It has been understood that, from the moment children enter primary school (at the age of 6 or 7), this is the framework that allows them to consider that they are minimally endowed with sufficient capacity of understanding and discernment to understand their rights. Depending on each age group, it is necessary to explain the collection of rights in clear and accessible language for the child/young person. The age group defines the child/young person's right to understand his/her rights.

The experts that assist are appointed by the court, being independent for either party. Even though it is established by law, the courts' faculty to resort to experts assistance does not always take place. Only in certain cases a psychologist or other health professional may be appointed in cases of more serious unprotection, when the child presents symptoms of emotional disorder, or when the parental or family conflict is more intense.

The child, who is capable of understanding the matters under discussion, taking into account his or her age and maturity, is always heard on decisions concerning him or her, preferably with the support of an expert, and is guaranteed, unless the judge gives grounds to refuse the hearing. The child can be heard with the presence of an adult of his or her choice whenever he or she shows an interest (art. 4(c) of the RGPTC). As a rule, children (here meaning those under 18 years of age) should be heard in judicial and administrative proceedings concerning them. There is no special moment for the child to be heard, but normally it happens at the begging of the proceedings according to art. 35 (2) (3) (RGPTC):

2. The Judge may also determine that the grandparents or other relatives and persons of special affective reference for the child are present.
3. A child over 12 years of age or younger, capable of understanding the matters under discussion, taking into account his or her age and maturity, shall be heard by the court, under the terms of article 4(c) and article 5, unless the best interests of the child are advised against it.

The child's hearing in order to give his or her opinion (hearing of children capable of understanding the matters in question and provided for in art. 5(1)(2) RGPTC) must not be confused with the 'hearing' to take statements for evidence (which may be determined by the court, of its motion or on the application, where the child's interest so justifies, provided for in art. 5(6) (7 RGPTC)).

It should also be noted that art. 4(2) RGPTC provides for the Judge obligation to assess, on a case-by-case basis, the child's ability to understand and discern the matters under discussion, and to this end, he may avail himself of the support of technical advice. Therefore, it will be necessary to begin by assessing the child's capacity for discernment, which will involve, from the outset, the creation of an environment that fosters a willingness and comfort for the child, allowing a dialoguing relationship to be established between the child and the Judge.

On the other hand, article 5 makes it clear that the fulfilment of the best interest of the child depends on the opportunity given to he/she to be heard and express his/her opinion and will. Before being heard, the child must be informed about the scope and significance of his or her hearing (no. 1, 2 and 3). This is essential for the proper implementation and enforcement of this right, thus ensuring, on the one hand, that the child is expressed freely and in an informed manner and, on the other hand, that the expectations the child may have regarding the weight of his or her intervention are not frustrated. Art. 5(4) RGPTC, lists the procedure to be taken in this endeavour, including the holding of this hearing in a child-friendly, non-intimidatory space appropriate to the child and the need for the intervention of judicial and other appropriately trained personnel. Despite all this care, it is important to always keep in mind that the child's hearing concerning him or her is an extraordinarily intense moment for the child and a very demanding one for the professionals who carry it out.

In turn, in order for «*the child's testimony to be considered as evidence*», the "statements" referred to in paragraph 7 of the art as mentioned earlier. Art. 5 RGPTC should be taken, following the rules set forth therein: it provides that the taking of statements «*shall be carried out in an informal and reserved environment, to ensure, namely, the spontaneity and sincerity of the answers. The child must be assisted during the procedural act by a specially qualified technician, previously appointed for the purpose*»; that «*the Judge enquires. The Public Prosecution Service and the Lawyers may ask additional questions*»; that «*the child's statements are recorded by audio or audiovisual recording. Other suitable technical means may only be used to ensure their full reproduction when those means are not available. Preference is given to au-*

diovisual recording where the nature of the matter to be decided, or the interest of the child so requires", as well as "*wherein civil proceedings the child has made a statement before a judge or public prosecutor, in compliance with the principle of adversarial proceedings, these may be considered as evidence in civil proceedings*».

Finally, it should only be mentioned that the hearing and participation of the child or young person in the scope of the promotion and protection of rights intervention is provided for in art. 4, paragraph j) and 84, LPCJP, by establishing that children and young people are heard by the protection commission or the Judge on the situations that gave rise to the intervention and regarding the application, revision or termination of promotion and protection measures, under the terms provided for in art. 4 and 5 RGPTC.

In turn, also in the context of the adoption process, the adopting party must be heard by the Judge, with the presence of the Public Prosecutor, under the terms and in compliance with the rules provided for the hearing of children in civil protection cases, this hearing must be done separately and in order to safeguard identity secrecy (art. 3 and 54 (1)(c)(2) RJPA).

The information provided depends on the person holding the proceedings. The child is always informed of the duties performed by the person present, the confidentiality of the declaration made, the procedure and its possible outcome. Besides, informations on the object of the proceedings are provided. There are cases where the information provided extends to procedural guarantees and the rights of the child.

5.2. *Parental responsibility proceedings*

There is a common interpretation of the child's rights to participate and be heard. This duty is incumbent upon those who preside over the diligence (normally, the judge), and the corresponding right is incumbent upon those who are mature, and no specific age is fixed.

It has been understood that from the moment children enter primary school (at the age of 6 or 7), this is the framework that allows them to consider that they are minimally endowed with sufficient capacity of understanding and discernment to understand their rights. Depending on each age group, it is necessary to explain the collection of rights in clear and accessible language for the child/young person. The age group defines the child's right to understand his or her rights.

5.3. *Child abduction*

The principles and rules set out in the RGPTC apply to all proceedings aimed at defining the child's situation. There are no special rules of international abduction procedures apart from those prescribed in the 1980 Hague Convention and Brussels IIa Regulation.

As in all other cases, the child is heard at the first instance, at a proper and autonomous procedural stage, following the rules laid down in the RGPTC. This

means, taking into consideration the age and the *de facto* capacity, as laid down in art. 5 and 32(2) RGPTC (*see above*).

5.4. *Maintenance*

As a general rule, it has been understood that the child should not be heard when it is exclusively a matter of defining the amount of maintenance. The reason given is the patrimonial nature of the matter going beyond his or her understanding, and the fact that the hearing does not contribute to the final decision.

The pecuniary nature of the object of the maintenance obligation leads to an interpretation that there is no right of the child to be heard in this kind of procedures. Therefore, the general practice is to disregard child's hearing. If any information is to be provided, it shall be given by the judge or by the court clerks at the beginning of the proceedings; if it is at an earlier time, it shall be given by the lawyer of one of the parties.

In situations where they are heard, only basic information on the subject matter of the proceedings and its purpose is given. Information is not always given on the importance of their opinion and the outcome of the proceedings.

The child is never formally or officially informed about the outcome of the process. If feedback is available, it is usually provided by caregivers, usually by parents.

5.5. *Appointment of a special representative for the child*

Art. 18(1)(2) of the RGPTC states that the proceedings «must be followed by a lawyer at the appeal stage» and also that «*the child must be given a lawyer when his or her interests and those of his or her parents, legal representative or de facto guardian, conflict, and also when the child, with adequate maturity, asks the court to do so*».

For its part, the preceding art. 17, under the heading of «*procedural initiative*», states that «*Unless expressly provided otherwise and without prejudice to the provisions of art. 52 and 58, the procedural initiative shall be the responsibility of the Public Prosecutor, the child over the age of 12, the relatives in the ascending line, the siblings and the child's legal representative*».

However, since the legislator has enshrined in the RGPTC the possibility for the child aged over 12 years to take the procedural initiative for the establishment of a civil guardianship measure (art. 17 RGPTC), this is tantamount to saying that, implicitly, the legislator considers that a child aged over 12 years is already a child with adequate maturity.

Consequently, under art. 18(2) RGPTC, the court is required to consider the request of the child by appointing him a lawyer, and the court cannot condition the granting of the appointment in question on the "relevance" of the ratio invoked by the child.

Furthermore, it is the lawyer's responsibility to act in such a way as to defend the legitimate interests of the child, in compliance with the legal and deontological rules (art. 97, of the EOA). He shall always maintain his independence and shall act free from any pressure (cf. art. 89, of the EOA), or external influences abstaining from neglecting professional deontology in order to please his client, before having to use all

the technical, knowledge and procedures which the legis artis consigns and which are supposed to be in his possession. It is ultimately up to the appointed lawyer to determine the appropriate means to better defend the child's legitimate interests.

Then, by Part I of art. 18(2) of the RGPTC, the appointment of a lawyer to the child, is necessary when his interests and parents, legal representative or de facto guardian, are conflicting. It is clear from the child's application that the request for the appointment of a lawyer presupposes precisely the existence of conflicting interests between the child and his parents. It was also sufficient for his request to be granted, with the appointed lawyer being responsible for assessing and choosing the appropriate means of overcoming the conflict, and for this to be guided solely by the fundamental and decisive criterion of the defence of the child's best interests.

Moreover, the possibility of appointing a lawyer to a child is in art. 103(2) (3) LPCJP, which states that «*The appointment of a child or young person as a legal guardian is compulsory where his or her interests and those of his or her parents are concerned*». The appointment of a lawyer is made «per the law on legal aid» and specially stated in art. 10 (2) LAC.

Precisely in the context of regulating parental responsibilities (art. 35 (3) and art. 5 (1) RGPTC), the law establishes that «a child over the age of 12 years or younger, capable of understanding the matters under discussion, taking into account his or her age and maturity, shall be heard by the court, following the terms of art. 4 (c) and art. 5, unless the defence of his or her best interests advises against it».

If the child wants to appeal against the judicial decision that homologates the parental responsibilities agreement, the court must appoint a lawyer in cases where it is no longer possible. The fact that the child has been appointed a lawyer does not justify the non-appointment of a lawyer, even though it is not possible to do so on the date of an ordinary appeal or complaint, when, because the child has conflicting interests with those of his parents, the legal assistance provided by the appointed lawyer must be strictly construed for the entire proceedings, which are not directed solely towards the practice of a single and isolated procedural act.

Because guardianship proceedings have the nature of voluntary jurisdiction (art. 12 RGPTC), the respective resolutions (handed down according to criteria of convenience or opportunity) prima facie do not "become res judicata", since they may always be altered, without prejudice to the effects already produced, based on supervening circumstances that justify their alteration (art. 988 CPC).

6. *Conclusions*

The child's effective right to be heard embodies the conditions for his or her emancipation as a holder of rights and self-determination as an element that enhances his or her dignity and promotes his or her development. It is therefore vital that the child is allowed to exercise his or her rights to freedom of speech and partici-

pation in all areas of life; rights which the family, the various institutions and the individual must foster and respect, also creating the best conditions, recommended by culture, science, technique and experience.

Despite the path taken by the Portuguese system, it is still imperative to change mentalities and procedures in order to ensure a continuum of information that enables the child to effectively participate in the processes that concern him/her. It requires the adoption of validated procedures and training that require concerted action and not left to *ad hoc* or voluntary approaches. This does not need to be adopted in legislative terms (taking into account the content of the law in force, especially, the art. 5 RGPTC), but as a result of the implementation of common rules commissioned by the judicial authorities (magistrates, academics, experts, lawyers, professional bars, institutions, etc.).

Improvements to the system include an awareness of children's rights, which requires an opening up of the judicial system to a multidisciplinary approach and cooperation between different actors.

Abbreviations

Brussels II-A — Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

CC — Civil Code

CPC — Civil Procedure Code

CFR — Charter of Fundamental Rights of the European Union

ECER — European Convention on the Exercise of Children's Rights

ECHR — European Convention on Human Rights

ECtHR — European Court of Human Rights

EOA — Statute of the Bar Association

HCCH 1980 Child Abduction Convention — Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

LAC — civil custody (fostering) of children (*apadrinhamento civil*, Law 103/2009, 11-09, last modification by the Law 141/2015, 08-09).

LPCJP — Law for Protecting Children and Young People at Risk (Law 147/99, 01-09, last modification by Law 26/2018, 05-07)

LTE — Educational Guardianship Law (Law 166/99, 14-09, last modification by Law 4/2015, 15-01)

OTM — Jurisdictional organisation of children (Law Decree 314/78, 27-10 (last modification by Law 31/2003, 22-08), revoked by Law 141/2015, 08-09)

RJPA — (Law 143/2015, 08-09)

RGPTC — General Regime of Tutelage Procedure (Law 141/2015, 08-09 last modification by Law 24/2017, 24-05)

UNCRC — United Nations Convention on the Rights of the Child

VS — Victim's Statute (Law 130/2015, 04-09).

Chapter 9

CHILDREN'S RIGHT TO INFORMATION IN CIVIL PROCEEDINGS IN SPAIN

Carlos Esplugues Mota, Pablo Quinzá Redondo, María González Marimón

1. *The nature of the right to be heard in Spanish civil procedure*[1]

In Spain, until 2005, the hearing of minors involved in civil proceedings was considered mandatory on the basis of article 9 of the Organic Act 1/1996 (January

[1] Most used abbreviations: Art.: article; BOE: Boletín Oficial del Estado (Spanish Official Journal); CE: Spanish Constitution; CPA: Civil Procedure Act; GM: Gaceta de Madrid (Former name of the Spanish Official Journal); LOPJ: Organic Act of the Judiciary Power; p./pp.: page / pages; STS: Judgment of the Supreme Court.

15, 1996) on legal protection of children and young people, which partially modifies the Civil Code and the Civil Procedure Act[2] in combination with article 12 of the Convention on the Rights of the Child (November 20, 1989)[3] and articles 92(6) and 159 of the Civil Code of July 24, 1889[4], as amended. This mandatory nature was endorsed by the Spanish Constitutional Court in its judgments 221/2005, of November 25, 2002[5], 152/2005, of June 2, 2002[6] and 17/2006, of January 30, 2006[7] which considered the hearing an essential procedural step, whose omission may negatively affect the fundamental right to effective judicial protection embodied in article 24(1) of the Spanish Constitution of 1978.

However, this situation changed in 2005. The Organic Act 15/2005, of July 8, which modifies the Civil Code and the Civil Procedure Act as regards separation and divorce[8], also modified the wording of article 92(6) of the Civil Code and thus the hearing was no longer considered mandatory: "*In any event, before decreeing the care and custody system, the judge shall ask the opinion of the Public Prosecutor and hear the minor who has sufficient maturity, if this is deemed necessary on his own motion or at the request of the Public Prosecutor, the parties or members of the Court Technical Team, or the minor himself, ….*" This provision must be approached in conjunction with article 9 of the Organic Act 1/1996 (January 15) on legal protection of children and young people which also supports this approach. The hearing of the minor is now approached more as a right of the minor (i.e., under 12) to be heard than as an obligation for the judge to hear him or her.[9]

The change in the nature of the hearing was endorsed by the Spanish Constitutional Court in its judgment 163/2009, of June 29, 2009[10] which considers that the "*hearing of the minor is no longer conceived as having an essential nature, because the knowledge of the minor's opinion can be obtained through certain persons (art. 9 of the Organic Law 1/1996) and will only be compulsory when deemed necessary ex officio or at the request of the Public Prosecutor, parties to the*

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[2] *BOE,* 01.17.1996.

[3] *BOE,* 12.31.1990.

[4] *GM*, 07.26.1889.

[5] ECLI:ES:TC:2002:221.

[6] ECLI:ES:TC:2005:152. As regards this Judgment, consider M.J. MARIN LOPEZ, *Tutela judicial efectiva y audiencia del menor en los procesos judiciales que le afecten,* in *Derecho Privado y Constitución*, 2005 (enero-diciembre), no. 19, p. 167 ff.

[7] ECLI:ES:TC:2006:17.

[8] *BOE*, 07.09.2005.

[9] Vid. J.I. ZAERA NAVARRETE, *La audiencia al menor en los procesos de crisis matrimoniales. Comentario a la STS núm. 413/2014, de 20 de octubre (REC. 1229/2013),* in *Actualidad Jurídica Iberoamericana*, 2015, núm. 3, pp. 797 and 802-804; M.J. CALVO SANJOSÉ, *La reforma del sistema de protección a la infancia y a la adolescencia (Ley Orgánica 8/2015, de 22 de junio y Ley 26/2015, de 28 de julio)*, in *Ars Iuris Salmanticensis*, 2016, vol. 4, p. 34; M.J. MARÍN LÓPEZ, *Tutela judicial efectiva y audiencia del menor en los procesos judiciales que le afecten,* cit., pp. 188-190.

[10] ECLI:ES:TC:2009:163.

proceeding or members of the judicial technical team, or the minor himself (art. 92.6 CC)".[11]

The judgment of the Constitutional Court 22/2008 (January 31) takes into account the maturity of the minor, stating that the right of the minor to be heard directly depends on his or her ability to form his or her mind, without providing elements to construct what this actually means.

However, as it will be seen in the following pages, the whole approach to the hearing is affected by the discussion existing in Spain as regards its specific nature in the framework of the Civil procedure.

2. *The children's right to be informed as an essential component of the right to be heard and to participate*

2.1. *The current situation of the right to be heard in the Spanish legal system: national legislative provisions*

Article 39 of the Spanish Constitution of 1978[12] establishes the obligation for the public authorities in Spain to ensure social, economic and legal protection of the family, especially of minors, pursuant to international agreements safeguarding their rights.[13]

Standing on this mandate, the Civil Code of July 24, 1889,[14] as amended, and the Legal Protection of Children and Young People Organic Act 1/1996, of January 15, 1996,[15] as amended, are the two major regulatory bodies for the rights of minors in Spain. Both guarantee a uniform protection of minors throughout the country. They also constitute the two basic references for the legislation enacted by the several Autonomous Communities as regards minors, pursuant to their powers in such matters.

In the specific field of the right of the children to be heard in civil procedures, attention must be also paid to Law 1/2000, of January 7, 2000 on the Civil Procedure Act,[16] as amended, which sets forth specific standards and rules to implement this right in this specific area.

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[11] Legal ground 5.

[12] *BOE*, 12.29.1978.

[13] And it is considered part of the fundamental right to "Access to justice" embodied in art. 24 of the Spanish Constitution. Note, P. Sánchez Martín, *El procedimiento contencioso de crisis matrimonial*, in AA.VV., *Las crisis matrimoniales*, Valencia, Tirant Lo Blanch, 2010, p. 444. Also, C. Nuñez Rivero & A. Alonso Carvajal, *La protección del menor desde un enfoque del Derecho Constitucional*, in *Revista Derecho UNED*, 2011, no. 9, p. 273 ff.

[14] *GM*, 07.26.1889.

[15] *BOE*, 01.17.1996.

[16] *BOE,* 08.01.2000.

The right of the Children to be heard in civil procedures is fully supported by the Spanish legal system. This right is explicitly enshrined in:

A) The Spanish Civil Code which envisages the hearing of the minor as regards different proceedings to be developed in the field of family law.[17] For instance:

a) Marital crisis cases: article 92(6) of the Civil Code as regards, solely, to care and custody proceedings states that, "*In any event, before decreeing the care and custody system, the judge shall ask the opinion of the Public Prosecutor and hear the minor who has sufficient maturity, if this is deemed necessary on his own motion or at the request of the Public Prosecutor, the parties or members of the Court Technical Team, or the minor himself, and evaluate the parties' allegations at the hearing and the evidence practised therein, and the relationship between the parents themselves and with the children thereof to determine the suitability of the custody system*."

The obligation of the judge to hear the minor "*when deemed necessary*" refers only to the care and custody system and is subject to the ascertainment of the sufficient maturity of the minor.[18]

b) As regards parental authority, article 154(III) of the Civil Code states that "*If the children should have sufficient judgment, they must always be heard before adopting decisions that affect them*".

Also article 159 refers to the hearing of the minor when stating that, "*If the parties live separately and are unable to decide by common consent, the judge shall decide, always for the benefit of the children, in the custody of which parent the underage children are to remain. The judge, before taking this measure, shall hear the children who have sufficient judgment and, in any event, those older than twelve*".

c) In relation to the adoption, article 177(3)(3) of the Civil Code states that "*3. The following persons must simply be heard by the judge: … 3. The adoptee who is younger than twelve, if he should have sufficient judgment*".

d) As regards guardianship article 231 of the Code sets forth that "*The judge shall constitute the guardianship, after hearing the nearest relatives, any persons deemed convenient and, in any event, the ward, if he should have sufficient judgment, and always if he should be older than twelve*". This reference to the hearing of the ward is also embodied in articles 237(II), 280 of the Civil Code.

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[17] An analysis of this regulation may be found in M.J. MARÍN LÓPEZ, *Tutela judicial efectiva y audiencia del menor en los procesos judiciales que le afecten,* cit., pp. 173-178.

[18] As regards this notion, see M.J. MARÍN LÓPEZ, *Tutela judicial efectiva y audiencia del menor en los procesos judiciales que le afecten,* cit., pp. 199-201.

e) Reference to the hearing of the minor is also envisaged in the field of child fostership. In fact, article 173 states that the "*Foster care shall be executed in writing, with the consent of… the minor if he should be older than twelve years old*".

B) In addition to this provision, article 777 of the Law 1/2000, of January 7, 2000 on the Civil Procedure Act, sets forth special rules for those cases in which minor children are involved in separation or divorce proceedings concluded by mutual agreement (or consent of one spouse to the request of the other).

In accordance with paragraph 5 of article 777, "*Should there be any minor children or disabled persons be involved, the Court shall seek the Public Prosecution Service's report on the terms of the agreement with regard to the children and it shall hear the minors, should they have sufficient capacity, wherever the court may deem it necessary on an ex officio basis or at the request of the prosecutor, the parties, members of the court's technical team or the minor themselves. Such procedures shall be conducted within the time limit referred to in the preceding paragraph and, should such time limit have not begun, within five days*." Again, the hearing of minors in the framework of the proceedings is subject to the ascertainment of their sufficient maturity (although the provision, in this occasion, uses the term "capacity").

In any case, and in accordance to article 770(I)(4) *in fine* of the Civil Procedure Act, should the judge decide, on his/her own or at the request of third persons or the minor himself/herself, to hear him/her in the course of the proceeding, the judge herself / hiumself "*shall ensure that any questioning of minors in civil proceedings is conducted under suitable conditions to safeguard their interests without interferences from other people, exceptionally making use of the help of specialists wherever necessary*." As we will see later, this reference to the "*exceptional*" intervention of specialists is also embodied in article 18(2)(4) of the Act 15/2015 of July 2, 2015,[19] on non-contentious proceedings, and article 9(1) of the Legal Protection of Children and Young People Organic Act 1/1996, as amended.[20]

In comparison with the previously mentioned article 92(6) of the Civil Code, this provision refers to any civil proceedings in general, not only as regards care and custody proceedings. The same provision requires that in case the "*questioning of minors*" is necessary, this should take place in a manner that fully safeguards "their interests".[21]

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[19] *BOE,* 07.03.2015.

[20] See M. Hernando Vallejo, *La audiencia del menor recabando el auxilio de especialistas*, in X. Abel Lluch, (coord.), *Las audiencias del menor en los procesos de familia*, Madrid, Sepin, 2019, p. 63 ff.

[21] As regards these provisions, consider M.J. Marin lopez, *Tutela judicial efectiva y audiencia del menor en los procesos judiciales que le afecten,* cit., pp. 179-182.

Traditionally, the hearing of the minor in civil cases does not constitute a means of proof, but a judicial activity to enable the minor to exercise a right granted on him/her[22]. However, this issue is growingly under dispute and a discussion between a "rights of the minor approach" and a much more procedural approach to the hearing of the minor is taking place in recent years.[23]

Finally, article 778-*quinquies*(8) of the Civil Procedure Act sets forth a rule specifically as regards International Child Abduction. The provision states that "*8. Prior to passing any decision in relation to the suitability or unsuitability of the reinstatement of the minor or their return to their place of origin, the judge, at any time during the process and in the presence of the Public Prosecution Service, may hear the minor separately, unless this hearing is considered inappropriate given their age or level of maturity, which will be recorded in a grounded decision*

When cross examining the minor it will be ensured that they may be heard in ideal conditions which safeguard their interests, without interference from other people, and, exceptionally, calling on assistance from specialists where this should be necessary. This act may be carried out via video conferencing or another similar system."

C) This general principle is further developed and broadened in the Legal Protection of Children and Young People Organic Act 1/1996, of January 15, 1996.

Article 2(2) of the Act embodies several criteria to be taken into consideration for the purposes of interpreting and applying, in each case, the minor's best interest, without prejudice to those criteria established in the applicable specific legislation, as well as any other that may be deemed appropriate, given the specific circumstances surrounding each case. The provision refers, among some others, to "*b) Taking into consideration the minor's wishes, feelings and opinions, as well as their right to gradually participate -depending on their age, maturity, development and personal growth- in the process to determine their best interest*." In any case, paragraph 3 of this article states that all these criteria shall be weighted taking some general elements into consideration. The first one of these elements is "*a) The minor's age and maturity*".

In addition to that, article 9 of the Organic Act 1/1996, of January 15th, 1996 refers, for the first time, to both the right to be heard and the right to be informed not only in judicial proceedings but also in any administrative or mediation proceedings. This right depends on the age and maturity of the minor.

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[22] M. CASO SEÑAL & E. ATARES GARCÍA, *Naturaleza jurídica*, in X. ABEL LLUCH (coord.), *Las audiencias del menor en los procesos de familia*, cit., pp. 27-28; A.L. CAMPO IZQUIERDO, *La audiencia de menores*, in *Diario de las Audiencias del El Derecho editores*, nº. 496, 6.9.2006, p. 1.

[23] See, J.P. GONZÁLEZ DEL POZO, *Medios de prueba*, in E. HIJAS FERNÁNDEZ (coord.), *Los procesos de familia: Una visión judicial*, Madrid, Colex, 2009, p. 493 ff.; V. LÓPEZ YAGÜES, *La prueba del reconocimiento judicial en el proceso civil*, Madrid, La Ley, 2005, p. 195.

Thus, article 9(1) of the Legal Protection of Children and Young People Organic Act 1/1996 explicitly recognizes that "*Minors have the right to be heard and listened to without any discrimination on grounds of age, disabilities or any other circumstance, both within their family environment and in any administrative proceeding, judicial procedure or mediation proceeding affecting them and leading to a decision impacting their personal, family or social environments, and their opinions will be duly taken into account, depending on their age and maturity*." To that end, the provision states that "*minors must receive information allowing them to exercise this right in a comprehensible language and accessible formats adapted to their circumstances*."

In those cases, in which the hearing of minors directly, or through the person representing them, is denied in administrative or judicial channels, article 9(3) of the Organic Act 1/1996 states that "*the decision shall be motivated by the minor's best interest and communicated to the prosecuting authority, the minor and, where appropriate, their custodian, explicitly detailing any existing appeals against the decision*."

In line with the mandate of the previously mentioned article 770(I)(4) *in fine* of the Civil Procedure Act, article 9(1) of the Legal Protection of Children and Young People Organic Act 1/1996 adds that in any judicial procedure and administrative proceedings "*appearance or hearings of minors shall be preferential and shall be conducted in an appropriate manner given their situation and evolutionary development – with the assistance, where necessary, of qualified professionals and experts –, taking care to preserve their privacy and using a language comprehensible to them, in accessible formats adapted to their circumstances, whereby they are informed both of the question being posed and of the repercussions of their opinion, subject to full compliance with the guarantees of the procedure*."

The Spanish legislator states that this right must be guaranteed and, to this end, the assessment of the maturity of the minor becomes very relevant. In this sense, article 9(2) of the Organic Act 1/1996 sets forth that "*Minors shall be guaranteed the ability to exercise this right by themselves or through the person they may appoint on their behalf provided they are mature enough*". The assessment of the maturity must be made by "*specialised personnel, taking into account both the minor's evolutionary development and their ability to understand and assess the specific issue at hand in each case. At any rate, they shall be deemed to be sufficiently mature at the age of twelve*."

In order to ensure that minors are able to exercise this right by themselves, article 9(2) of the Legal Protection of Children and Young People Organic Act 1/1996 states that the minor "*shall have the assistance, where appropriate, of interpreters*". And adds that "*Minors may express their opinion verbally or through non-verbal forms of communication*." Nevertheless, "*should this not be possible or in the minor's best interest, their opinion may be made known by their legal representatives, provided they have no interest that conflict with the minor's, or*

through other people that, due to their occupation or special relationship of trust with them, are able to deliver it objectively."

In any case, and as article 9(3) of the Organic Act 1/1996 states, in "*decisions on background, the results of the hearing with the minor and their assessment must be mentioned, where appropriate*."

D) In addition to the previous pieces of legislation, obligation to hear the minor is also stressed by the Spanish legislator as regard non-contentious proceedings. Article 18(2)(4)(I) and (II) of the Act 15/2015 of July 2, 2015, on non-contentious proceedings establishes, regarding the appearance in court, that *"(W)here the proceeding affects the interests of a minor or an individual whose capacity has been modified by a court, any formalities relating to those interests which are ordered ex officio or at the request of the public prosecution service shall also be carried out at the time or, where that is not possible, within then days*". To this respect, *"(T)he judge or the court clerk may decide to hear the minor or individual whose capacity has been modified by a court in a separate session, without the interference of other individuals, by with the public prosecution service being able to attend. In any event, guarantees are provided regarding their ability to be heard under ideal conditions, in terms which are accessible and comprehensive to them and suited to their age, maturity and circumstances, receiving help from specialists where necessary*".

Based on that examination, article 18(2)(4)(III) of the Act on non-contentious states that "*a detailed report shall be issued and, wherever possible, an audio-visual recording shall be made. If the examination takes place after the appearance, the relevant report shall be passed to the parties to enable them to make statements within five days*".

The reference embodied in article 18(2)(4)(III) of the Act to the issuance of "*a detailed report… and wherever possible, an audio-visual recording shall be made"* that *"shall be passed to the parties to enable them to make statements*" is in contradiction with the reference to the request made by article 9(1) of the Legal Protection of Children and Young People Organic Act 1/1996 to ensure that the appearance of the minor in any judicial procedure and administrative proceeding, "*shall be preferential and shall be conducted in an appropriate manner given their situation and evolutionary development … taking care to preserve their privacy*" and with the philosophy underlying article 770(I)(4) *in fine* of the Civil Procedure Act that oblige the judge to ensure that during the hearing "*any questioning of minors in civil proceedings is conducted under suitable conditions to safeguard their interests without interferences from other people"*. This difference has fuelled the debate as regards the nature of the hearing and has led to some procedurally orthodox solutions that, however, may be harmful for the minor, the exercise of her or his right to be heard and the preservation of her or his superior interests.

The outcome of the proceedings that affect the interests of the minor, according to article 19(2) of the Act, "*may be based on any of the facts contained in the*

statements by the parties or the evidence, or which came to the light at the court appearance…", for example, by the minor.

All these provisions stand on two basic principles: minors must be heard but only when the judge considers that he or she has enough "maturity" (or age). This notion of "maturity" is vague and must be interpreted by the judge and assessed, in every case, in accordance with the circumstances surrounding the specific case. In Spain, the most explicit reference to the meaning of "maturity" can be found in article 9(3)(c) of the Act 41/2002, of November 14, 2002, on the fundamental regulation of patient's autonomy, rights and obligations regarding information and clinical documentation.[24] The provision states that "3. *Consent by proxy will be granted in the following cases: … c) When the minor patient is not intellectually or emotionally capable of understanding the scope of the intervention. In this case, consent will be given by the minor's legal representative, after having heard his or her opinion, in accordance with the provisions of article 9 of Organic Law 1/1996, of January 15, on the Legal Protection of Minors*."

2.2. *Relevant supranational provisions on minors for the Spanish legal system*

Spanish authorities are also bound by several international agreements and instruments which Spain is a party, that include different obligations, and levels of obligations, regarding minors. Reference can be made to:[25]

A) Article 24 – "*The rights of the child*" – of the Charter of Fundamental Rights of the European Union.[26] The provision declares that: "*1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.*
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
…"

B) Convention on the Rights of the Child, of November 20, 1989 whose article 12 makes an explicit reference to the right of the minor to be heard in any procedure that affects her / him: "*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,

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[24] *BOE*, 11.15.2020.
[25] All italics in the provisions are by the authors.
[26] *DO* C 326, 10.26.2012.

either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

C) Article 7 – "*Children with disabilities*" – of the Convention on the Rights of Persons with Disabilities, of December 13, 2006[27] clearly states that:[28] "*1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.*
2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.
3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right."

D) The Hague Convention on Civil Aspects of International Child Abduction, of October 25h, 1980,[29] stresses in article 13, that "*The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views*".

E) The Hague Convention regarding Protection of Children and Co-operation in Respect of Intercountry Adoption, of May 29, 1993.[30] Article 4 states that "*An adoption within the scope of the Convention shall take place only if the competent authorities of the state of origin - … d) have ensured, having regard to the age and degree of maturity of the child, that (1) he or she has been counselled and duly informed of the effects of the adoption and of his or her consent to the adoption, where such consent is required, 2) consideration has been given to the child's wishes and opinions, …*".

F) The European Convention on the Adoption of Children of November 27, 2008[31] states in its article 6 – "*Consultation of the child*" – that "*If the child's consent is not necessary according to article 5, paragraphs 1 and 3, he or she shall, as far as possible, be consulted and his or her views and wishes shall be taken into account having regard to his or her degree of maturity. Such consultation may be dispensed with if it would be manifestly contrary to the child's best interests*."

G) Article 31 – "*General measures of Protection*" – of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and

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[27] *BOE*, 04.21.2008.
[28] Also consider, art. 23.
[29] *BOE*, 10.24.1987.
[30] *BOE*, 08.01.1995.
[31] *BOE*, 07.12.2011.

Sexual Abuse, October 25, 2007[32] mentions that"*6. Each Party shall ensure that the information given to victims in conformity with the provisions of this article is provided in a manner adapted to their age and maturity and in a language that they can understand*."

H) Article 6 – "*Decision-making process*" – of the European Convention on Exercise of the Rights of Children, January 25, 1996[33] stresses that "*In proceedings affecting a child, the judicial authority, before taking a decision, shall: … b) in a case where the child is considered by internal law as having sufficient understanding:*
   – *ensure that the child has received all relevant information;*
   – *consult the child in person in appropriate cases, if necessary privately, itself or*
   – *through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child;*
   – *allow the child to express his or her views;*

   c) give due weight to the views expressed by the child."

And, also to

I) The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, of November 23, 2007[34] and its Protocol[35]

J) The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of parental authority and measures to protect children, of May 28, 2010.[36]

K) Reference must be also made to the Council Regulation (EC) no. 2201/2003, of November 27, 2003, concerning jurisdiction and the recognition of judgments in matrimonial matters and in matters of parental authority, repealing Regulation (EC) no. 1347/2000.[37] That will soon be replaced –August 1, 2022 – by Council Regulation (EU) 2019/1111 of June 25, 2019 on jurisdiction, recognition and enforcement of decisions on matrimonial matters, on matters of parental responsibility, and on international child abduction.[38]

As well as to the

[32] *BOE*, 11.12.2010.
[33] *BOE*, 02.21.2015.
[34] *OJ* L 93, 04.07.2011.
[35] *BOE*, 12.16.2009.
[36] *BOE*, 12.02.2010.
[37] *OJ* L 299, 11.18.2003.
[38] *OJ* L 178, 07.02.2019.

L) European Charter of Rights of the Child – Resolution on a European Charter of Rights of the Child (A3-0 172/92)[39] which states in no. 8.14 that: "*Any decision regarding a child taken by its family, the administrative authorities or the courts must have as its prime aim the protection and safeguarding of the child's interests. To this end, provided that it involves no risk or prejudice to him, the child must be heard as soon as he is old enough and reaches sufficient intellectual maturity, regarding all decisions affecting him. So as to assist the competent persons to reach a decision, the child must in particular be heard in all proceedings and decisions involving a change in the exercise of parental authority, the allocation of care or custody, the appointment of a legal guardian, his adoption or placing in a home, educational institution or reintegration into society. For this purpose, the Attorney-General 's office shall be party to all proceedings and its chief role shall be to safeguard the child's rights and interests*".

3. *National case law*

The Supreme Court has stressed in many occasions the need for the minor to be heard in cases regarding Family law, in accordance with the Civil Code, the Civil Procedure Code and the Legal Protection of Children and Young People Organic Act 1/1996. This right is subject to the assessment of their maturity. In any case, this maturity is deemed to exist when they are of the age of twelve in accordance to article 9(2) of the Organic Act 1/1996.

Nevertheless, many authors consider that between 12 and 18 there are many different levels of maturity and this should be taken into account by the judge. Because of that, the notion of "mature minor" is used to refer to those who are aged 16-18.[40]

Spanish case law has dealt with several issues relating to the hearing of the minor and provides for responses to them. Although many issues are still open. Especially as regards the specific way to actually implement it.

3.1. *The need to hear the minor*

The judgment of the Supreme Court (STS) 4032/2020, of November 30, 2020,[41] reiterates once again the position maintained by the Court for long time

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[39] *OJ* C 241, 09.21.1992.

[40] See M. CARTIÉ JULIÀ, T. JOUNOU BARNAUS & M. ORTÍ LLORET, *La audiencia del menor y la audiencia del 'menor maduro'*, in X. ABEL LLUCH (coord.), *Las audiencias del menor en los procesos de familia*, cit., p. 43.

[41] ECLI: ES:TS:2020:4032.

– e.g. STS 157/2017, of March 7, 2017[42] or STS 18/2018 of January 15, 2018[43] – stressing that "*this Chamber has repeatedly ruled on the need to be heard by the minor in the procedures that directly affect them*".[44] However, as we will see in the following pages, the analysis of the existing Spanish case law fosters the understanding of the right of the minor to be heard in all proceedings affecting him or her to be still "under construction" needing further interpretation and development of its exact meaning and scope.[45]

3.2. *But this "need" to hear the minor does not constitute a duty for the judge but a possibility for him / her to listen to the minor*

The Spanish Constitutional Court in its judgment 163/2009, of June 29, 2009 declares that the hearing of the minor has no longer an essential – in the sense of mandatory – character and that although very relevant, it is for the judge to decide, taking into account the situation, age and maturity of the minor and the circumstances of the case, whether to carry it out. The Court states that, taking into account the legislation in force in this area, "*the courts deduce that the hearing of the minor is no longer conceived as having an essential nature, being thus that the knowledge of the minor's opinion can be substantiated through certain persons (art. 9 of Organic Law 1/1996) and will only be required when it is deemed necessary ex officio or at the request of the Prosecutor, parts or members of the judicial technical team, or the minor himself (art. 92.6 CC)*".[46]

In relation to this obligation, the STS 413/2014 of October 20, 2014[47] declares, in line with other judgments of the Supreme Court like STS 157/2017, of March 7, 2017;[48] STS 578/2017, of October 25, 2017;[49] STS 18/2018 of January 15, 2018[50] or STS 4032/2020, of November 30, 2020,[51] that "*The apparent contradiction between the Civil Code and the Civil Procedure Act has been clarified by the Law of the Minor and by the Convention on the Rights of the Child, in the sense that when the minor's age and maturity presume that they have sufficient judgment and, in any case, those over 12 years of age, must be heard in the legal proceedings in which it is resolved on their custody and custody, without the party*

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[42] https://supremo.vlex.es/vid/672187541, legal ground Second, no. 5.

[43] ECLI: ES:TS:2018:41, legal ground Second, no. 2.

[44] Legal ground Two.

[45] To this respect, note C. Nuñez Rivero & A. Alonso Carvajal, *La protección del menor desde un enfoque del Derecho Constitucional,* cit., pp. 275-275.

[46] Legal ground 5.

[47] https://supremo.vlex.es/vid/543432634. As regards this Judgment, note J.I. Zaera navarrete, *La audiencia al menor en los procesos de crisis matrimoniales. Comentario a la STS núm. 413/2014, de 20 de octubre (REC. 1229/2013),* cit., p. 793.

[48] Legal ground Second, no. 5.

[49] https://supremo.vlex.es/vid/696139157, legal ground Second, no. 2.

[50] Legal ground Second, no. 2.

[51] Legal ground Second.

being able to renounce to the proposition of said test, having to agree on it, where appropriate, the judge ex officio".[52]

3.3. *The rejection to hear the minor is for the judge to be decided, but his / her decision must be always grounded*

Article 9(1) of the Legal Protection of Children and Young People Organic Act 1/1996 sets forth that in any judicial procedure and administrative proceeding, "*appearance or hearings of minors shall be preferential and shall be conducted in an appropriate manner given their situation and evolutionary development…*". In line with that principle, number (2) of this provision states that "*Minors shall be guaranteed the ability to exercise this right by themselves or through the person they may appoint on their behalf provided they are mature enough… At any rate, they shall be deemed to be sufficiently mature at the age of twelve*". And adds that "*Minors may express their opinion verbally or through non-verbal forms of communication*." Nevertheless, "*should this not be possible or in the minor's best interest, their opinion may be made known by their legal representatives, provided they have no interest that conflict with the minor's, or through other people that, due to their occupation or special relationship of trust with them, are able to deliver it objectively*".

This reference to the best interests of the minor constitutes a public policy principle binding for all Spanish courts,[53] and has been interpreted by the Provincial Court (Court of Appeal) of Valladolid in its judgment 175/2006, of May 24th, 2006.[54] According to the Court, article 9 of the Act must be interpreted in "*terms of great breadth and flexibility*" and taking into account all its numbers which are related among themselves and serve the essential goal of the "*protection of the interests of the minor that are satisfied, not only when he is heard but also when hearing is not granted in those cases in which the judge does not consider it necessary (…) or it is not in the interest of the minor (…). The interests of the minor that are protected in art. 9 contemplate the right to be heard, that can be exercised directly (section 2 first paragraph) or through its legal representatives when it is not possible or does not suit their interest (section 2 paragraph second), such as the possibility of not being it when the judge denies such right in resolution motivated, which obviously must respond to a possible damage to the minor who could derive from the hearing and that must be resolved in each case according to the circumstances concurrent*".[55]

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[52] Legal ground Five.

[53] In accordance to M.A. PARRA LUCÁN, *El principio del interés del menor en la jurisprudencia*, in J. PICÓ I JUNOY & X. ABEL LLUCH (dirs), *Problemática actual de los procesos de familia. Especial atención a la prueba*, Barcelona, JMBosch, 2018, pp. 34-44.

[54] ES:APVA:2006:568.

[55] Legal ground One.

3.4. *The rejection of the hearing "in the minor's best interest"*

The Supreme Court, following the judgment of the Spanish Constitutional Court of June 6, 2005,[56] repeatedly manifests – STS 18/2018 of January 15, 2018[57] or STS 413/2014 of October 20, 2014[58] – that this kind of decisions needs to be grounded in order to be valid: "*In order for the judge or court to decide not to implement the hearing, in the interest of the minor, it will be necessary to resolve it in a reasoned manner*". As previously stated, the best interest of the minor constitutes a public policy principle to be always taken into account by Spanish courts.[59]

The Supreme Court – e.g. STS 18/2018, of January 15, 2018 – admits the possibility for the judge to reject hearing the minor, with the obligation of rendering a grounded decision, "*due to the lack of maturity of the minor or because the interest of the minor is put at risk… The goal is to avoid that the direct hearing of the minor causes to him or her a worse damage than the one intended to conjure. But for this to be implemented, it will be necessary for the court to motivate it, or that, in response to that interest, it could be considered to be more appropriate for the examination to be carried out by an expert or to take into account the one already carried out*".[60]

3.5. *The procedural stage to hear the minor*

The special nature of the hearing makes more flexible the specific moment of its implementation, although it must always take place before any decision is taken by the judge. For instance this is stressed by the judgment of the High Court of Cataluña 39/2015 of May 25th, 2015[61] when stating that it "*must be practiced prior to the decision-making*".[62]

In fact, the hearing can also take place when enforcing a judgment even *ex officio* as the Order of the Provincial Court of La Rioja, 23/2018, of February 16, 2018[63] admits on the basis of article 560 of the Civil Procedure Act, which "*does not regulate the hearing as an imperative step of the proceeding to be followed in case of opposition to the enforcement for substantive reasons. The decision on its celebration corresponds to the judge, who may, in any case, not consider appropriate its celebration*".[64]

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[56] ECLI:ES:TC:2005:153.

[57] Legal ground Second, no. 2.

[58] Legal Ground Five.

[59] M.A. Parra Lucán, *El principio del interés del menor en la jurisprudencia*, cit., p. 34 ff.

[60] Legal ground Four, no. 1.

[61] ES:TSJCAT:2015:8099.

[62] Legal ground One, no. 3. Note J.A. García González, *La confidencialidad de la audiencia del menor*, in X. Abel Lluch (coord.), *Las audiencias del menor en los procesos de familia*, cit., pp. 86-87.

[63] ES:APLO:2018:125A.

[64] Legal ground Two.

3.6. *The legal nature of the "hearing of the minor"*

3.6.1. *Standpoint: traditionally the hearing of the minor has been approached as not –properly- constituting a procedural means of proof*

The Supreme Court in its judgment 18/2018 of January 15, 2018, states "*that the purpose of the examination of the minor is to inquire about his or her interest, its due protection, and, therefore, it is not properly a means proof, so that his or her interest does not necessarily coincide with his or her will, it is for the judge to assess their maturity and if their wishes are consequence of his or her caprice or due to external influences*".[65] In fact, as the judgments of the High Court of Catalonia 18/2012, of February 23, 2012[66] or of Provincial Court of Almería 5/2015, of January 7, 2015[67] declare, "*it can hardly* (be) *consider*(ed) *a means of proof on which to base a resolution but the instrument by which the minor affected by a procedure can make his or her opinion known to the judge*". The judgment of the Provincial Court of Barcelona 98/2013, of February 11, 2013, in the hearing of the minor, adds that the "*minor is not the object but the subject who exercises a right*".[68] The fact that the judicial examination of the minor cannot be considered as a means of evidence but as a diligence intended to satisfy and to fulfil the minor's right to be heard explains, as the judgment of the Provincial Court of Barcelona 516/2015, of July 7th, 2015,[69] "*why the procedural requirements of the evidence are not of application*"[70] to them.

Although this approach is broadly supported, some discussion has taken place in the lasts years. Thus, for instance, the judgment of the Provincial Court of Cádiz of October 22, 2012[71] admits the existence of this debate: "*Certainly some sector has maintained the character of full proof of this hearing, embodying it in the framework of the recognition of persons provided for in articles 355 ff. of the Civil Procedure Act but we cannot agree with this approach because in the hearing of the minor, the right to be heard is materializing, while these recognitions are not considered as a right of the person to be appreciated, but as a means available to the judge to reach a conviction about certain points relevant to the rendering of the judgment*".[72]

This debate has led to the existence of some isolated judgments from lower instances which grant to this obligation to hear the minor the double nature of

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[65] Legal ground Four, no. 1.
[66] Id Cendoj: 08019310012012100019, legal ground Five.
[67] TOL 5.186.374, legal ground Eleven.
[68] TOL 3.415.824.
[69] ES:APB:2015:6823.
[70] Legal ground Two.
[71] TOL 3.020.058.
[72] Legal ground Two.

being a procedural means of proof *stricto sensu* and a way to assess the opinion of the minor. This discussion has increased since the enactment of the Act 15/2015 of July 2, 2015, on non-contentious proceedings, whose article 18(2)(4)(III) seems to stress the idea of means of proof[73]. The provision, which refers to all non-contentious proceedings in general, sets forth that once the hearing takes place, "*a detailed report shall be issued and, wherever possible, an audio-visual recording shall be made. If the examination takes place after the appearance, the relevant report shall be passed to the parties to enable them to make statements within five days*".

Standing on this article, the judgment of the Provincial Court of Tenerife 153/2018 of March 19, 2018[74] stresses the idea that, although the hearing constitutes a way to assess the real will of the minor, it is also a means of proof aimed to protect the minor.[75] As we will see in the next pages, the consideration of the hearing in one or another way has relevant consequences in its practical implementation and may also affect its development and the achievement of its goals. Technically, it may not be included in article 299 of the Civil Procedure Act and lacks the specific condition of "means of proof" but it does have an evidential relevance.[76]

3.6.2. *The development of the hearing must be recorded*

Setting aside the potential controversies that exist in relation to the nature of the hearing of the minor, it is accepted that it must be documented. Thus, the judgment of the Provincial Court of Cádiz 554/2012 of October 22, 2012: "*it must be documented by the court clerk, although not literally, but by means of a document in which the allegations and statements that are relevant for the adoption of any measures that may affect the minor, however for reasons of privacy, dignity and in order to pressures and conflicts of fidelity to one or another parent, it should not be tape-recorded*".[77] In this same direction, the judgment of the Provincial Court of Tenerife of March 19, 2018 considers that, although this has been controversial, "*this Chamber has been considering that the exploration of minors must be documented due to the mandatory nature of the court clerk, who attests to the fact of the hearing and the declarations*".[78]

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[73] See M.J. Costa Lamenca & C. Carretero Peña, *La confidencialidad de la audiencia del menor*, in X. Abel Lluch (coord.), *Las audiencias del menor en los procesos de familia*, cit., pp. 76-77.

[74] TOL 6.680.127.

[75] See M. Hernando Vallejo, *La audiencia del menor recabando el auxilio de especialistas*, cit., p. 64.

[76] Consider to this respect, J.I. Zaera navarrete, *La audiencia al menor en los procesos de crisis matrimoniales. Comentario a la STS núm. 413/2014, de 20 de octubre (REC. 1229/2013),* cit., pp. 799.780.

[77] Legal ground Two.

[78] Legal ground Two.

3.6.3. *Content of the record of the hearing*

Controversies exist as regards the content of the record. In contrast with the silence of the Civil Procedure Act or the Legal Protection of Children and Young People Organic Act 1/1996 as regards the content of the record, article 18(2)(4)(III) of the Act 15/2015 of July 2, 2015, on non-contentious proceedings states that "*a detailed report shall be issued and, wherever possible, an audio-visual recording shall be made*".

Certainly, this provision does not refers to contentious proceedings, which, in principle, will be governed by the Civil Procedure Act[79] but, in any case the plain reference to "*detailed*" does not fully fit with the narrow interpretation of this article provided by the Spanish Constitutional Court in its judgment of May 9, 2019.[80]

The court stresses that the "*content of the record shall only detail those manifestations of the minor that are essential as significant, and therefore strictly relevant, for the decision of the case*".[81] This idea of including in the record the "minimum content of exploration" of the minor, fore the parties to be aware of it and being able to make any relevant assessments they may wish is stressed by the judgment of the Provincial Court of Barcelona 516/2015, of July 7, 2015.[82]

3.6.4. *The special nature of the hearing has not –traditionally- obliged the judge to forward the minutes of the hearing to the parties involved in the proceeding*

The fact that the hearing of the minor is broadly understood as not being a means of proof *stricto sensu* has a direct impact on its treatment in the procedure. A relevant one is that the judge has no obligation to forward to the parties the outcome of the hearing of the minor for them to have the opportunity to make allegations. The judgment of the Provincial Court of Alicante 369/2015, of October 14, 2015[83] or that of the Provincial Court of Guipúzcoa 250/2016, of October 21th, 2016[84] plainly declare that, "*there is no specific provision on the practice of this examination of the minor in the procedural text albeit in practice, to avoid the additional pressure that may be placed on the minor subject to exploration, it is usually carried out behind closed doors and with the exclusive intervention of the judge and the prosecutor, and it is debatable that its content can be transferred to the parties once it has been carried out*".

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[79] In favour to the extrapolation of the doctrine of the Constitutional Court also to contentious proceedings, see X. ABEL LLUCH, *La confidencialidad de la audiencia del menor*, in X. ABEL LLUCH (coord.), *Las audiencias del menor en los procesos de familia*, cit., p. 85.

[80] ECLI:ES:TC:2019:64.

[81] Legal ground 8. Consider, X. ABEL LLUCH, *La confidencialidad de la audiencia del menor,* cit., pp. 84-85.

[82] Legal ground Two.

[83] TOL 5.585.505, legal ground Two.

[84] TOL 5.911.450, legal ground Two.

The absence of any obligation to forward the minutes of the hearing to the parties is also supported by the judgment of the Provincial Court of Barcelona 98/2013, of February 11, 2013 in the sense that "*In any case, it should be noted that not being a means of proof, it is not necessary for it to be assess it by the litigating parties, and this leads to the conclusion that this they have not been produced any defencelessness by such action*".[85]

And this is not only due to the fact that the hearing does not constitute a procedural means of proof but also because of the content of the hearing and the impact that its outcome may have in the future relationship between the minor and his or her parents. As the judgments of the Provincial Court of Alicante 369/2015, of October 14, 2015[86] or that of the Provincial Court of Guipúzcoa 250/2016, of October 21, 2016[87] recognize: "*we are in the realm of a family process where publicity remains limited by the need to protect the minor, as the basic criterion for the activity of the courts, and there is no doubt that the knowledge of what the minor has said by their parents may have a direct or indirect impact on his or her relationships with them, therefore it is an act of prudence and protection of the minor to deny the content of the examination*".

In fact, as regards the aim of the hearing of the minor, the judgment of the Provincial Court of La Coruña 295/2009, of July 3, 2009[88] states that: "*It should not be forgotten that the purpose is to create an environment conducive to the minor to expand, to show his feelings, his ideas and sensitivities. If you are being asked about the ins and outs of your life and relationship with his parents, it is very dangerous to "betray" him later by giving a copy of the recording to the parties. Involuntarily, the risk may be generated that one of the parents, before comments that are not to his or her liking, reprimand the minor, or adopt positions contrary to him… Their interests are not guaranteed if what was restricted to the knowledge of the judge and the public prosecutor only, is subsequently disclosed to the parties*".[89]

However, this has been an issue under debate whose solution very much depends on the position adopted by the court as regards the legal nature of the hearing of the minor. The afore mentioned judgment of the Provincial Court of Tenerife 153/2018 of March 19, 2018, which accepts the special nature of the hearing – a way for the minor to exercise his or her right to be heard and, also, means of proof- refers to article 18(2)(4)(III) of the Act 15/2015 of July 2, 2015, on non-conten-

[85] Legal ground One.
[86] Legal ground Two.
[87] Legal ground Two.
[88] ES:APC:2009:1788.
[89] Legal ground Two.

tious proceedings[90] when stressing this last nature.[91] The provision, which covers all non-contentious proceedings in general, sets forth that: "*a detailed report shall be issued and, wherever possible, an audio-visual recording shall be made. If the examination takes place after the appearance, the relevant report shall be passed to the parties to enable them to make statements within five days*".

Consequently, the judgment stresses that, should the hearing of the minor be considered strictly as a means of proof, the judge can decide to implement it behind closed doors on the basis of article 138(2) of the Civil Procedure Act which states that the public oral proceedings "*may be heard in closed session when this is necessary for the protection of public order, or national security in a democratic society, or when the interests of minors, or the protection the private lives of the parties and other rights and liberties require this or, insofar as the court deems this to be strictly necessary when, due to the occurrence of special circumstances, being heard publicly might damage the interests of justice*".[92] In line with this provision, article 140(3)(II) of the Civil Procedure Act says that "*Proceedings classified as restricted may only come to the knowledge of the parties involved and their representatives and defenders, without prejudice to the provisions regarding events and data of a criminal or tax or other nature*".

Therefore, according to the mentioned judgment of the Provincial Court of Tenerife 153/2018 of March 19, 2018 denying the transfer of the record of the hearing to the parties would lead to "*an infringement of the procedural norm and generator of defencelessness to the parties when a decision on a minor (custody, visitation regime, etc.) is adopted bearing in mind the result of an examination that the parties are unaware of*".[93] Something that is also stressed by the judgment of the Superior Court of Cataluña 39/2015 of May 25, 2015 that states that one thing is to develop the hearing of the minor without the presence of the parents and their representatives, as a way to foster the freedom and independence of the minor and his or her right to intimacy and, "*a different issue is that the said hearing of minors developed behind closed doors and in a reserved manner and recorded, does not receive, regardless of its content, any publicity even for the parties, something that violates both the procedural regulations contained in articles. 138. 1, 140.3 CPA and 234 LOPJ as fundamental rights of effective judicial protection in accordance to article 24. 2 CE*".[94]

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[90] Legal ground Three.

[91] See M.J. COSTA LAMENCA & C. CARRETERO PEÑA, *La confidencialidad de la audiencia del menor*, cit., pp. 76-77.

[92] Art. 138.3 CPA: "*Before agreeing to holding proceedings in closed session, the court shall hear the parties who are present at the act. The decision shall take the form of a court order and no appeal shall be allowed against it, without prejudice to any protests and raising the question, if admissible, in the applicable appeal against the final judgment*".

[93] Legal ground Four.

[94] Legal ground One, no. 3. See J.A. GARCÍA GONZÁLEZ, *La confidencialidad de la audiencia del*

Irrespective of this discussion, some authors, taking into account the special nature of the hearing, consider that in no case the record of the hearing – whatever the way it has actually been done – should be provided to the parents of the minor. Only to their representatives.[95]

The debate goes a step further with the judgment of the Constitutional Court of May 9, 2019. The case specifically refers to the obligation to forward the minutes of the hearing to the parties in accordance to article 18(2)(4)(III) of the Act 15/2015 of July 2, 2015, on non-contentious proceedings. The Constitutional Court considers that "*the impact that the minor's right to confidentiality may have in a non-contentious proceeding, that is, the protection of the information relating to his or her person or that of his family, as well as the limits of this by the concurrence of others fundamental rights and constitutionally protected legal principles, especially those mentioned that are specific to art. 24.1 CE*"[96] devoted to the access to justice.

The court states that "*The best interests of the minor is the primary consideration to which all measures concerning minors 'taken by public or private social welfare institutions, courts, administrative authorities or legislative bodies*' must attend in accordance with article 3(1) of the Convention on the Rights of the Child, of November 20, 1989.[97] The court admits that article 18(2)(4) of the Act 15/2015 develops this principle and affirms that the "*record of the judicial examination of the minor constitutes the procedural, documented reflection of the minor's right to be "heard and heard", among other areas, in all the judicial procedures in which they are affected and that lead to a decision that affects their personal, family or social sphere*".[98]

However, the recognition and preservation of this right may affect another fundamental right granted to minors: his or her right to privacy, protected by article 18.1 CE, and embodied in articles 16(1) of the Convention on the Rights of the Child and 4(1) of the Organic Law 1/1996. The right to privacy, as the judgment of the Constitutional Court 58/2018, of June 4, 2018[99] affirms, "*is intended to 'guarantee the individual a reserved area of his life, linked to the respect of his dignity as a person (art. 10.1 CE), against the action and knowledge of others, irrespective of whether these powers are public or simple individuals. Thus, the right to privacy attributes to its owner the power to protect this reserved area, not only personal but also family …, against its disclosure by third parties and unwan-*

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menor, cit., p. 89.

[95] M.J. Costa Lamenca & C. Carretero Peña, *La confidencialidad de la audiencia del menor*, cit., p. 77.

[96] Legal ground 3.

[97] Legal ground 4.

[98] Legal ground 4.

[99] ECLI:ES:TC:2018:58.

ted publicity…' The interrelationship between both rights is clearly seen in article 9.1.II of the Organic Law 1/1996, when establishing as a general rule, applicable to all appearance or hearing of minors in judicial proceedings, that it must be carried out taking care of the necessary preservation of their privacy".[100]

The need to balance both rights must be always done taking into account the necessary preservation of the best interests of the minor.[101] However, and despite standing on this principle, the court adopts a solution that seems to favour the procedural approach to the record of the hearing.[102] The court considers that it is not when the record is actually implemented when the right of privacy of the minor must be preserved but, as a general principle, in a previous moment to the actual implementation of the hearing. And this must be done by selecting the questions and limiting the areas of the interrogation to the minor: "*ensuring at all times that the statements of the minor are limited to those necessary for the investigation of the disputed facts and circumstances, so that the examination only deals with those issues that are strictly related to the object of the case*".[103]

Should "*these rules and precautions*" be strictly observed "*as it is required in attention to the best interests of the minor, the impact on his or her privacy is reduced to a minimum: as a reflection of a judicial examination in which the appropriate measures have already been adopted to preserve the privacy of the minor, the content of the record should only detail those statements of the minor that are essential as significant, and therefore strictly relevant, for the decision of the case*".[104] And, consequently, the record "*must be made forwarded to the parties so that they can make their allegations*" because it does not entail "*a disproportionate sacrifice of the minor's right to privacy*".[105]

Despite the limited scope of the judgment, related to non-contentious proceedings that involve minors[106], the procedural approach to the hearing followed by the Spanish Constitutional Court supports the understanding of the hearing as a truly means of proof. In addition to that, it rises new issues related to the need to specify which is the meaning of "*issues that are strictly related to the object of the case*"[107] and who is in charge of determining which is the information that must be documented and, consequently, forwarded to the parties.[108] Those authors who are

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[100] Legal ground 4.

[101] Legal ground 5.

[102] See, X. ABEL LLUCH, *La confidencialidad de la audiencia del menor,* cit., p. 84.

[103] Legal ground 8.

[104] Legal ground 8.

[105] Legal ground 8.

[106] Therefore, contentious proceedings would not be affected by this rule. See X. ABEL LLUCH, *La confidencialidad de la audiencia del menor,* cit., p. 81. Also, consider, L. ZARRALUQUI SÁNCHEZ-EZNARRIAGA, *La audiencia del menor en el Proyecto de Ley de la Jurisdicción voluntaria*, in *Actualidad Jurídica Aranzadi*, no. 895, 2014, p. 2.

[107] Legal ground 8.

[108] To this respect, consider, M.J. COSTA LAMENCA & C. CARRETERO PEÑA, *La confidencialidad de la*

willing to accommodate the necessary preservation of the intimacy of the minor and confidentiality of the hearing with the right of the parties to have access to the minutes of the hearing itself support the possibility to forward general information about the hearing without reproducing the specific responses provided by the minor,[109] especially in those cases in which the minor shows rejection towards one of the parents or clear preference for one of them as a way to avoid future controversies with the parents.[110]

Perhaps, a solution to this issue may be found in the judgment of the Provincial Court of Tenerife 523/2012, of December 4, 2012.[111] according to which, and due to lack of information embodied in the CPA to this respect, it is enough for the judge to inform the parties about the hearing and the result arising out of it to prevent them from claiming defencelessness. This could be a way to solve the existing legal puzzle[112]. And, in any case, the judgment of the Provincial Court of Badajoz (Mérida) 131/2018, of June 26, 2018,[113] considers that for the defencelessness to exist, the absence of information by the judge must have been denounced by the parties in the proper procedural stage.[114]

3.7. *The meaning of "hearing of the minor" and the way it is implemented*

3.7.1. *The flexible –and variable- meaning provided to the "hearing of the minor"*

No rules exist in Spain as regards the way the hearing must be actually implemented[115]. Article 770(I)(4) *in fine* of the Civil Procedure Act only states that, should the judge decide, on his/her own or at the request of third persons or of the minor himself/herself, to hear him/her in the course of the proceeding, the judge herself / himself "*shall ensure that any questioning of minors in civil proceedings is conducted under suitable conditions to safeguard their interests without interferences from other people, exceptionally making use of the help of specialists wherever necessary*". And article 9(1) of the Legal Protection of Children and Young People Organic Act 1/1996 recognizes that "*Minors have the right to be heard and listened to without any discriminations on grounds of age, disabilities or any other circumstance, both within their family environment and in any administrative proceeding, judicial procedure or mediation proceeding affecting them and leading*

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audiencia del menor, cit., p. 78.

[109] See X. Abel Lluch, *La confidencialidad de la audiencia del menor,* cit., pp. 80-81.

[110] X. Abel Lluch, *La confidencialidad de la audiencia del menor,* cit., p. 86.

[111] TOL 3.961.206.

[112] Legal ground Four.

[113] ES:APBA:2018:552.

[114] Legal ground Three.

[115] See, M.J. Costa Lamenca & C. Carretero Peña, *La confidencialidad de la audiencia del menor*, cit., p. 75.

to a decision impacting their personal, family or social environments, and their opinions will be duly taken into account, depending on their age and maturity". To that end, the provision states that "*minors must receive information allowing them to exercise this right in a comprehensible language and accessible formats adapted to their circumstances*".

Generally speaking, the hearing must be implemented in a manner adequate to his or her situation and personal evolution, and preserving his or her right to intimacy. However, the absence of clear rules as regards the content of the hearing has favoured differences in the way the hearing is actually implemented by courts in Spain.[116] In fact, the Spanish Defensor del Pueblo – ombudsman – has stressed both the existence of these differences and the quest for harmonization.[117]

According to the judgment of the Provincial Court of Almería 5/2015, of January 7, 2015[118] the rules on the hearing of the minor are "*excessively evanescent or ethereal, without specifying the concrete way in which diligence is practiced*" or what it actually means. Different words are mentioned in the applicable legislation "audiencia" – hearing –, "exploración" – exploration – … all these terms lack clear "*legal contours rather, they suggest a direct and personal contact of the judge, the one who at the end is going to adopt the decision, with the minor. The laxity of the terms used by the legislation have led to some judgment to refer to this procedural act* (of hearing the minor) *as an "interview*".[119]

In any case, it is accepted, as the judgment of the Provincial Court of Granada 100/2017 of March 17, 2017[120] states, that this hearing "*is conducted exclusively for the formation of the criteria of the court, and of the Public Prosecutor's Office, the only addressees of the necessary immediacy required, about what is the most convenient for the interest of the minor based on the perceptions that comes out from his or her manifestations without the interference that may cause to him or her the presence of the parties involved in the process*".[121]

3.7.2. *It does not exist a single way to implement the hearing of the minor*

No legal provision and no single way to implement the hearing of the minor exits in Spain. The fact that the hearing of the minor has not been traditionally considered a procedural means of proof *stricto sensu* permits to implement it without following the rules and principles about the means of proof embodied in the Civil Procedure Act, that is, as the judgment of the Provincial Court of Palencia

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[116] J.I. ZAERA NAVARRETE, *La audiencia al menor en los procesos de crisis matrimoniales. Comentario a la STS núm. 413/2014, de 20 de octubre (REC. 1229/2013),* cit., pp. 804-805.

[117] DEFENSOR DEL PUEBLO: *Estudio sobre la escucha y el interés superior del menor. Revisión judicial de medidas de protección y procesos de familia,* Madrid, 2014, p. 17.

[118] Legal ground Eleven.

[119] Legal ground Five.

[120] TOL 6.189.923.

[121] Legal ground One.

30/2015, of April 4, 2015 states, "*publicity and … the contradictory intervention of the parties in its development*".[122]

The judgment of the Provincial Court of Tenerife 153/2018 of March 19, 2018 – following the judgment of the Provincial Court of Cádiz 554/2012 of October 22, 2012 – plainly admits that because of that, in Spain, "*in practice there are multiple and diverse forensic practices: a) with regard to the persons involved in the hearing, some judges implement it by way of intervening alone and the minor, others allow the intervention of the court clerk (acting as a notary), others also to the Public Prosecutor and exceptionally some of them perform it in the presence of the parties; b) regarding the documentation of the same, they are from those who record them in full, in some other cases, a simple summary of the allegations of the minor, collecting the essence and fundamental aspects of it is made, there are also those who perform a written record, where they literally collect the statements of the minor, and the minor must sign it*".[123]

Article 778 *quinquies*(8) of the Civil Procedure Act, which sets forth a rule specifically as regards International Child Abduction, admits *in fine* that the "*act may be carried out via video conferencing or another similar system*".[124]

3.7.3. *This lack of uniformity affects legal certainty and the bests interests of the minor*

This lack of uniformity as regards this relevant issue is considered very negative for minors and for the system itself. The judgment of the Provincial Court of Cádiz 554/2012 of October 22, 2012 admits that "*throughout the national territory a great disparity exists in terms of the form and persons who can intervene in this judicial proceeding, a situation that does not favour legal security and even less the interests of minors*".[125]

3.7.4. *Some ideas and principles for the implementation of the hearing of the minor are provided by Spanish case law*

In order to overcome this very negative situation, Spanish courts have attempted to harmonize the situation and have provided some ideas and principles on which the implementation of the hearing of the minor should stand. Particularly, the judgment of the Provincial Court of Cádiz 554/2012 of October 22, 2012[126] states that when implementing the hearing of the minor, several basic principles should be taken into account and honoured:

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[122] TOL 4.800.566, legal ground Five.

[123] Legal ground Two of the Judgment of the Provincial Court of Tenerife and of the judgment of the Provincial Court of Cádiz.

[124] See X. Abel Lluch, *La confidencialidad de la audiencia del menor,* cit., p. 79.

[125] Legal ground Two.

[126] Legal ground Two. Also, consider, Legal ground Two of the judgment of the Provincial Court of Tenerife 153/2018 of 03.19.2018.

1) Before starting the hearing, the minor "*must be offered informed truthful, complete and according to the conditions of age and maturity of the minor about what is being decided in the process and the extent it may affect him or her*".
2) The hearing of the minor "*must be carried out respecting the necessary conditions of discretion, privacy, safety and absence of pressure, to safeguard the minor's dignity and personality as much as possible*" with the goal, as the judgment of the Superior Court of Cataluña 39/2015 of May 25, 2015 mentions, of allowing the minor to express herself / himself "*with the highest degree of autonomy and without restricting their opinions, avoiding the dreaded 'conflict of loyalties'*".[127]
3) It is necessary to avoid "*as much as possible the feeling of betraying one or the other parent, or having to choose between one parent and another*".
4) The hearing must take place "*in a suitable place and comfortable, which usually will be the office of the judge or the courtroom itself*." But also, as the judgment of the Provincial Court of Madrid 24/2017, of January 13, 2017[128] states, "*behind closed doors or outside the venue of the court*".[129] Some examples of "Good Practices" for the development of the hearing have been developed in Spain, either by the Central Government – for instance, by the Spanish Defensor del Pueblo – ombudsman – "*Study on listening and the best interests of the minor. Judicial review of protection measures and family proceedings*"[130] – or by certain Regions of Spain – for instances, in the País Vasco, also by the Arateko – ombudsman – the document "*Good Practices in considering the rights of boys and girls in the judicial system*".[131] Also from a doctrinal perspective, some authors also provide ideas about a kind of Protocol for the reception of the minor at the hearing.[132]
5) The hearing must be carried out "*in a language and wording adapted to the*" minor and his or her ability to understand.
6) The hearing should be done, preferably, "*without the presence of parents, guardians or lawyers, as provided for in article 770.4 of the Civil Procedure Act*". This idea is ratified by the judgment of the Superior Court of Cataluña 39/2015 of May 25, 2015[133] which plainly recognizes that this fact "*does not*

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[127] Legal ground One, no. 3.
[128] ES:APM:2017:619.
[129] Legal ground Two.
[130] DEFENSOR DEL PUEBLO: *Estudio sobre la escucha y el interés superior del menor. Revisión judicial de medidas de protección y procesos de familia*, cit.
[131] J. TAPIA, *Buenas prácticas en la consideración de los derechos de niños y niñas en el sistema judicial,* Bilbao, 2014.
[132] See, M. ARCH MARIN, *Protocolo de acogida del menor en la audiencia*, in X. ABEL LLUCH (coord.), *Las audiencias del menor en los procesos de familia*, cit., p. 31-36.
[133] Legal ground One, no. 3.

violate fundamental rights, but quite the opposite, since the presence of the parties … would imply an undesirable lack of freedom for minors, who can already be affected by the mere fact of appearing in court".[134]

7) And, at the same time, it should be developed with "*the presence of the Public Prosecutor*" in so far it collaborates with the judge and promotes justice in defence of the interests and rights of minors and disabled. This intervention is mandatory. The intervention of the Public Prosecutor in cases involving minors is stressed by the judgment of the Spanish Constitutional Court 17/2006 of January 30, 2006[135] which refers to the role granted by Spanish law to the Public Prosecutor[136] to protect minors and their bests interests.[137] Such intervention is mandatory, impartial and aimed to defend the legality and rights of any minor affected. The Public prosecutor will ensure the primacy of his or her best interests. The participation in the hearing will allow the Public Prosecutor to directly know the opinion of the minor and whether it is expressed freely, and: with this information the Prosecutor can request the measures it deems appropriate in the interest of the minor. Nevertheless, some judgments – e.g. judgment of the Provincial Court of Tenerife 153/2018 of March 19, 2018[138] – consider that, more than the physical presence of the Public Prosecutor – "*as the maximum defender of the rights and interests of minors*" – in the hearing, the real relevant fact is that the Prosecutor has been duly summoned. In this case, his or her absence cannot be considered as breaching the law.

8) Also it is said that although the hearing does not constitute a means of proof *stricto sensu* "*it must be documented by the court clerk"* adding that this must be done "*not literally, but by means of a documentation in which the allegations and statements that are relevant for the adoption of any measures that may affect the minor, …*". Among others, the appearance of the court clerk is based on, and must be developed in accordance to, articles 138, 141-*bis*, 145-146 and 754 CPA[139].

9) However, "*for reasons of privacy, dignity and in order to pressures and conflicts of fidelity to one or another parent, it should not be tape-recorded*". This is stressed by many authors who argue the negative effect that the knowledge by the minor that his or her declaration is recorded may have in his or her declaration.[140] This rejection of the tape-recording of the hearing would be in

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[134] Legal ground One, no. 3.

[135] ECLI:ES:TC:2006:17.

[136] See Act 50/1981, of 12.30.1981, on the Organic Statute of the Prosecution Service, *BOE*, 01.13.1982, art. 3(7).

[137] Legal ground 4.

[138] Legal ground Four.

[139] Among others legal provisions. See, M.J. Costa Lamenca & C. Carretero Peña, *La confidencialidad de la audiencia del menor*, cit., pp. 70-74.

[140] For instance, note M. Cartié Julià, T. Jounou Barnaus & M. Ortí Lloret, *La audiencia del me-*

line with article 9(1) of the Legal Protection of Children and Young People Organic Act 1/1996 that stresses the understanding of the hearing as a way for the minor to exercise his or her right to be heard. This means that, in any judicial procedure and administrative proceeding, "*appearance or hearings of minors shall be preferential and shall be conducted in an appropriate manner … taking care to preserve their privacy"*[141]. And it is endorsed by Spanish case law. The judgment of the Provincial Court of Cádiz of October 22, 2012 plainly states that the hearing "for reasons of privacy, dignity and in order to avoid pressures and conflicts of fidelities to one or the other parent, should not be recorded".[142] However, certain isolated courts that consider that the hearing of the minor as a means of proof support the possibility to record it. This is the case of the judgment of the Provincial Court of Tenerife 153/2018 of March 19, 2018 which states that "*the examination should preferably be documented through its recording in audio-visual support, in which case the general rules on documentation of the hearings established by arts. 146, 147 and concordant of the Civil Procedure Act*" should be taken into account.[143]

10) In addition to this, some other judgments support the immediacy of the hearing, in the sense of direct relation with the minor: the judgments of the Superior Court of Catalonia 18/2012, of February 23, 2012[144] or of the Provincial Court of Almería 5/2015, of January 7, 2015.[145] Both judgments stress that in the hearing of the minor, "*the principle of immediacy acquires its highest relevance because, regardless of what it is actually recorded in the minutes… it is very difficult to record the perception, impressions, etc. that the court had during the interview with the minor*".

Other Spanish authors have added some additional principles on which the hearing of the minor should stand. In this case, authors[146] speak of:

11) The hearing must stand on the principle of the protection of the minor.
12) It must be adapted and adequate to the circumstances of each minor.
13) It must take into account the principle of privacy of the minor.
14) And also the exceptional participation of third persons.

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nor y la audiencia del 'menor maduro', cit., p. 91.

[141] To this respect, M.J. COSTA LAMENCA & C. CARRETERO PEÑA, *La confidencialidad de la audiencia del menor*, cit., p. 74.

[142] Legal ground Two.

[143] Legal ground Four. Note, J.A. GARCÍA GONZÁLEZ, *La confidencialidad de la audiencia del menor*, cit., p. 88.

[144] Legal ground Five.

[145] Legal ground Eleven.

[146] See M.J. COSTA LAMENCA & C. CARRETERO PEÑA, *La confidencialidad de la audiencia del menor*, cit., p. 69.

15) And it must be confidential, taking into account all the discussion that exists as regards the forwarding of the record of the hearing to the parties in order to shape the meaning of this notion.

3.7.5. *The exceptional intervention of a specialist in the hearing of the minor*

The Spanish legislator envisages the intervention of a specialist in the hearing of the minor as "exceptional". This is stressed by article 770(I)(4) *in fine* of the Civil Procedure Act, that plainly sets forth that should the judge decide, on his/her own or at the request of third persons or the minor himself/herself, to hear him/her in the course of the proceeding affecting him or her, the judge "*shall ensure that any questioning of minors in civil proceedings is conducted under suitable conditions to safeguard their interests without interferences from other people, exceptionally making use of the help of specialists wherever necessary*." The "exceptional" intervention of specialists is also referred to in article 18(2)(4) of the Act 15/2015 of July 2, 2015, on non-contentious proceedings and article 9(1) of the Legal Protection of Children and Young People Organic Act 1/1996, as amended.

According to the Spanish legal doctrine, this intervention may be necessary in those cases in which the minor suffer from some kind of illness, disability or disorder, when the psycho-emotional situation of the minor is not clear, when the minor himself requests to be heard, when the minor suffers a situation of special vulnerability, or when the judge does not want to expose the minor to an overvaluation or similar.[147] No specific rule as regards who will be the one who actually will be selected by the judge and on what grounds,[148] or who actually will direct the conversation with the minor exists in Spanish law: opinions in favour of a case by case approach there are.[149]

The "exceptional" nature of the intervention of a specialist in the hearing of the minor is supported by Spanish case law. Thus, the judgment of the Provincial Court of Asturias 325/2009, of October 19, 2009[150] – as many others, e.g. judgment of the Provincial Court of Madrid 24/2017, of January 13, 2017[151] – accepts that "*in the explorations of minors in civil proceedings the judge will guarantee that the minor can be heard in a suitable conditions in order to safeguard their interests,*

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[147] To this respect, note M. Hernando Vallejo, *La audiencia del menor recabando el auxilio de especialistas*, cit., p. 64.

[148] M. Cartié Julià, T. Jounou Barnaus & M. Ortí Lloret, *La audiencia del menor recabando el auxilio de especialistas*, in X. Abel Lluch (coord.), *Las audiencias del menor en los procesos de familia*, cit., p. 66. Also M. Cartié Julià, *El dictamen de especialistas en los procesos de familia*, in J. Picó i Junoy & X. Abel Lluch (dirs), *Problemática actual de los procesos de familia. Especial atención a la prueba*, cit. p. 289 ff.

[149] To this respect, consider M. Hernando Vallejo, *La audiencia del menor recabando el auxilio de especialistas*, cit., p. 64.

[150] TOL 1.649.327.

[151] Legal ground Two.

without interference from other people, and exceptionally seeking the support of specialists when necessary".[152] Also the judgment of the Provincial Court of Tenerife 153/2018 of March 19, 2018 stresses that "*if the judge deems it appropriate, he or she can and should seek advice from specialists in the field to ensure that the examination is adapted to the circumstances of each minor*".[153]

3.8. *The value given to the opinion of the minor by the court*

The court is compelled to evaluate the opinion of the minor in addition to the other elements and facts that have been accredited during the proceedings. Obviously, the more mature the minor is, the more relevant his/her opinion will be and will have a higher impact in the prospective judicial resolution. At the same time, this creates the need for the judge to balance the opinion of the minor with the need to ensure his/her best interest. This is a task for the judge to be done and in some cases this quest for the best interest of the minor may not coincide with his/her will, thus making the enforcement of the prospective resolution more difficult[154]. As the judgment of the Provincial Court of Badajoz (Mérida) 131/2018, of June 26, 2018 states, "*This court considers that the interest of the minor does not mean compliance with his will*".[155]

Spanish case law is rather clear to this respect. The judgment of the High Court of Justice of Cataluña of January 9, 2014[156] plainly states that the opinion of the minor is not decisive and that it is for the judge to actually decide: "… *However, the right of the minor to be heard before any decision that may affect him is taken, does not mean, that his opinion or will must be determinant in the resolution to be adopted. His criterion must be taken into account but cannot become a decision-making element. Otherwise we would incur in the risk of converting minors in subjects and objects of the dispute of the parents. … In this way, the courts will assess the content of the minor's hearing together with other factors, since sometimes the will expressed by the minors does not coincide with the real will or with what is most beneficial to them.*

Naturally, the wishes of minors cannot be ignored, without considering the other criteria contemplated in the rule, with the due justification or special motivation, when, as it is the case, they have enough judgment.

However, for the wish of the minor with sufficient judgment to be attended to, it will always be necessary: a) that his opinion is freely expressed and is will correctly formed not mediated or interfered with by the conduct or influence of either parent; b) that his reasons are understandable for not being inspired by short-term

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[152] Legal ground Two.
[153] Legal ground Three.
[154] See, M. CASO SEÑAL & E. ATARES GARCÍA, *Naturaleza jurídica,* cit., p. 29.
[155] Legal ground Three.
[156] ECLI:ES:TSJCAT:2014:5.

comfort or well-being criteria; c) that he is not discouraged due to the special incidence of other criteria with which, according to the norm, the opinion of minors must be weighed together".[157]

3.9. *Transnational cases involving the issue of the hearing of the minor before Spanish courts*

Practice as regards the hearing of the minor in transnational cases before Spanish courts is very rare. Maybe, one of the most significant cases is the judgment of the Supreme Court 469/2018 of July 19, 2018.[158] The judgment refers to the recognition and enforcement of a Hungarian judgment on the basis of Regulation 2201/2003. The Supreme Court, in line with the decision of the Provincial Court of Palma,[159] rejects the opposition to the recognition and enforcement of the judgment on the basis of its contradiction with public policy. The court supports the non-mandatory condition granted to the hearing of the minor in Spain since 2005 and states that, "*It is therefore not possible to invoke the public order clause of article 23, as it affects the interest superior of the minor when the state that decided on the measure, standing on the criterion of proximity, has already evaluated that interest with all the guarantees and the law of the requested state has not been manifestly violated, for undermining fundamental principles in procedures on parental responsibility, such as the hearing of the minor, which is not considered essential in cases such as this one due to the age of the minor*".[160]

4. *International case law related to Spain*

International case law as regards Spain is not very broad: some isolated cases are found both before the European Court of Human Rights and the Court of Justice of the European Union.

4.1. *European Court of Human Rights*

The case of the judgment of the European Court of Human Rights of October 11, 2016[161] on the case *Iglesias Casarrubios and Cantalapiedra Iglesias vs Spain* (no. 23298/12)[162] refers to application lodged by Ms María Paz Iglesias Casarrubios

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[157] Legal ground Five.

[158] ECLI: ES:TS:2018:2832. As regards this judgment, note I. Otaegui Aizpurua, *La alegación de la falta de audiencia de una menor como causa de denegación del reconocimiento y ejecución de una orden de retorno: comentario a la STS 469/2018, Sala de los Civil, de 19 de julio de 2018*, in *Revista electrónica de estudios internacionales*, 2018, vol. 36, p. 31 ff.

[159] Judgment of the Provincial Court of Palma 266/2017, of July 17, 2017, ECLI:ES:APIB:2017:1344

[160] Legal ground 4.

[161] Final 01.11.2017, http://hudoc.echr.coe.int/eng?i=001-167113, last accessed 7.6.2021.

[162] http://hudoc.echr.coe.int/eng?i=001-196867, last accessed 07.06.2021.

and two of her children, Alba Sabine Cantalapiedra Iglesias and Sonia Cantalapiedra Iglesias, who are Spanish (born in 1993, and 1996 respectively). All of them lived in Madrid. The case concerned the refusal of a judge to hear the children, who were minors at the relevant time, during the proceedings for their parents' divorce.[163]

The European Court considered as regards the right of the minor to be heard in any procedure involving him or her that there is no need to hear the minor in any single case. This right must be in accordance with the situation of the minor and of the case. Thus, the court states that: "*36. Concernant notamment l'audition des enfants par un tribunal, la Cour a estimé que ce serait aller trop loin que de dire que les tribunaux internes sont toujours tenus d'entendre un enfant en audience lorsqu'est en jeu le droit de visite d'un parent n'exerçant pas la garde. En effet, cela dépend des circonstances particulières de chaque cause et compte dûment tenu de l'âge et de la maturité de l'enfant concerné (Sahin c. Allemagne [GC], no 30943/96, § 73, CEDH 2003-VIII. Elle observe toutefois qu'en droit espagnol (paragraphes 18 et 19 ci-dessus) en cas de procédure contentieuse de divorce, et si cela est estimé nécessaire, les enfants mineurs doivent être entendus par le juge s'ils sont capables de discernement et, dans tous les cas, les mineurs âgés de 12 ans et plus. En tout cas, lorsque le mineur demande à être entendu, le refus d'audition sera motivé*."

In this case, Ms. Casarrubios asked the court to hear her daughters without success. The request was actually presented to the court, and "*Elle n'aperçoit aucune raison justifiant que l'avis de la fille aînée de la requérante, une mineure alors âgée de plus de 12 ans, ne fût pas directement recueilli par le juge de première instance dans le cadre de la procédure de divorce, ainsi que la loi interne l'exigeait (paragraphe 18 ci-dessus). La Cour ne voit pas non plus de raison justifiant que le juge de première instance ne se prononçât pas, dans le cadre de la même procédure, de façon motivée sur la demande de la fille cadette de la requérante d'être entendue par lui, comme la loi le lui exigeait*".[164]

Therefore, it concludes that a violation of article 6.1 of the European Convention of Human Rights has taken place: "*Le refus d'entendre au moins l'aînée*

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[163] The facts of the case are available in EUROPEAN COURT OF HUMAN RIGHTS, *Press Release issued by the Registrar of the Court*, ECHR 322 (2016), 11.10.2016, judgment of 10.11.2016, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjphqbGk_HtAhXIMMAKHQfKDcUQFjAAegQIBRAC&url=http%3A%2F%2Fhudoc.echr.coe.int%2Fapp%2Fconversion%2Fpdf%3Flibrary%3DECHR%26id%3D003-5514573-6935022%26file-name%3DJudgments%2520of%252011.10.16.pdf.63&usg=AOvVaw1esPeorSrx-RAXqnnURX4n, last access, 12.28.2020. Subsequent to the decision, the Spanish Government adopted several decisions, consider to this respect, DH-DD(2019)332 26/03/2019 - 1348th meeting (June 2019) (DH) - *Action report (20/03/2019) - Communication from Spain concerning the case of Iglesias Casarrubios and Cantalapiedra Iglesias vs Spain* (Application No. 23298/12), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=090000168093ae67, last access, 12.28.2020.

[164] Legal ground 42.

ainsi que l'absence de toute motivation pour rejeter les prétentions des mineures d'être entendues directement par le juge qui devait décider du régime de visites de leur père (paragraphe 13 ci-dessus) amène la Cour à conclure que Mme Iglesias Casarrubios s'est vue indûment priver de son droit à ce que ses enfants mineures soient entendues personnellement par le juge, nonobstant les dispositions légales applicables, sans qu'aucun remède à une telle privation n'eût été apporté par les juridictions supérieures ayant examiné les recours qu'elle avait formés".[165]

4.2. *Court of Justice of the European Union*

The issue of the hearing of the minor in relation to Spain has also been dealt before the European Court of Justice in its Judgment of December 22, 2010 in the case C-491/10 PPU, *Aguirre Zárraga*[166] involving expeditious return of a child. In the case, the issue of the recognition and enforcement of a Spanish Judgment in Germany on the grounds that the minor was not granted the opportunity to be heard by the Spanish judge raised.

The European Court of Justice considers that article 42(2) of Regulation No 2201/2003, "*provides that the court of the member state of origin is to issue the certificate referred to in paragraph 1 of that article only if the child was given the opportunity to be heard, unless a hearing has been considered inappropriate having regard to the child's age or degree of maturity (article 42(2)(a)), if the parties were given the opportunity to be heard (article 42(2)(b)) and if that court in handing down its judgment has taken into account the reasons for and evidence underlying the order issued pursuant to Article 13 of the 1980 Hague Convention (article 42(2)(c))*".[167]

The court adds that "*It must be observed at the outset that the first subparagraph of article 42(2) of that regulation has no purpose other than to inform the courts of the member state of origin of the minimum content required in the judgment on the basis of which the certificate provided for in article 42(1) is to be issued*".[168] And, adds, that having regard to the case-law of the court, "*it must be held that the first subparagraph of article 42(2) in no way empowers the court of the member state of enforcement to review the conditions for the issue of that certificate as stated therein*.[169]" Such power could undermine the effectiveness of the whole system of the Regulation[170] and, consequently, "*It follows that, where a court of a member state issues the certificate referred to in article 42, the court of the member state of enforcement is obliged to enforce the judgment which is so*

[165] Legal ground 42.
[166] ECLI:EU:C:2010:828.
[167] Legal ground 52.
[168] Legal ground 53.
[169] Legal ground 54.
[170] Legal ground 55.

certified, and it has no power to oppose either the recognition or the enforceability of that judgment".[171]

In this case, this means that "*in circumstances such as those of the main proceedings, the court with jurisdiction in the member state of enforcement cannot oppose the enforcement of a certified judgment, ordering the return of a child who has been wrongfully removed, on the ground that the court of the member state of origin which handed down that judgment may have infringed article 42 of Regulation No 2201/2003, interpreted in accordance with article 24 of the Charter of Fundamental Rights, since the assessment of whether there is such an infringement falls exclusively within the jurisdiction of the courts of the member state of origin*".[172]

5. *Questionnaires*

The questionnaire has been prepared under the supervision of the University of Genoa's team and is very much in line with the other questionnaires used by the other members involved in the project.

The questionnaire has been broadly disseminated around Spain. The team of the University of Valencia has been in direct touch with several Colegios Oficiales (Ilustre Colegio de Abogados de Valencia, Ilustre Colegio de Procuradores de Valencia) and with the General Directorate for Justice of the Valencian Government and through the former, it has been sent to the President of the High Court of the Valencian Community, to the Dean of the First Instance Courts of Valencia, the Director of the Medical Legal Institute as well as the Chief of the Public Prosecutor of the Valencian Community. All of them have sent the questionnaire to their affiliates. The questionnaire has also been delivered to several National Associations (Asociación Española de Abogados de Familia (AEAFA), to the General Council of the Order of Advocates of Spain as well as to some national law Firms (Broseta, Uria y Menéndez, Garrigues, Cuatrecasas, Gómez Acebo y Pombo…) and local law Firms. Some lawyers, judges, psychologists and other members of the judiciary have also received the document.

We have got 12 questionnaires answered by different legal operators from several places of Spain:

- Judges: 6 (2 Catalonia, 2 Madrid, 1 Valencia, 1 Aragón)
- Court Clerk: 1 (1 Madrid)
- Lawyers: 5 (2 Valencia, 1 Galicia, 1 Balearic Islands, 1 Catalonia)

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[171] Legal ground 56.
[172] Legal ground 75.

The right of the minor to be informed and its implementation, in general:

- Most questionnaires acknowledge the existence of a general obligation in Spain to provide information to the minor as regards disputes involving him or her. On the contrary, there are some of them denying the existence of such a right. Additionally, no unanimity exists as regards the dependence of the right on the age or the level of maturity of the minor. Also, some questionnaires consider that the existing right is to be heard during any procedure involving minors and not to be informed as regards any procedure involving them.
- Some questionnaires, mostly issued by judges, consider that minors are always informed about their right to be heard before and during any proceeding affecting them takes place. However, some others consider that minors are either very seldom or never informed before or after the procedure takes place. Other questionnaires extend this absence of information to the moment in which the procedure is pending.
- Almost all questionnaires consider that no specific legal operator is in charge of informing the minor about any proceeding. On the contrary, other questionnaires recognize that certain specialists may intervene as regards specific issues (e.g. exploration of the minor). Also it is usually accepted, with some exceptions, that parents or people in charge of minors do not receive any information as regards procedures affecting them.
- Generally, but not unanimously, it is said that no adapted and understandable documentation is provided to the minor as regards his/her right to be informed of any proceeding involving him/her, even in case of minor with special needs. Also, the availability of translators for minors who do not speak Spanish or any other official Spanish language is questioned; some accept their availability whereas other questionnaires plainly deny it.

The right of the minor to be heard in parental responsibility proceedings:

- Most questionnaires support the existence of a right of the minor to be heard before the procedure starts.
- No unanimity exists as regards the person involved in the hearing of the minor. Some questionnaires state that the minor is considered to be heard, alone, by the judge. However, some questionnaires stress the possibility for other people to attend the hearing (psychologist[s] or social servant[s]).
- It is the judge, also, who provides the minor with information. And, sometimes, he or she is informed about the relevance that information may have for the outcome of the procedure. Also, it is broadly accepted that before the procedure involving the minor starts, he/she is informed about the procedure. On the contrary, some questionnaires refer to the judge, as well as a social servant and a psychologist as attending the hearing and providing information to the minor.

- Again, no unanimity exists as regards the content of the information provided. References to the reasons for the hearing, the presence of other people, minor's substantive and procedural rights, the degree of confidentiality provided, the case or the potential outcomes of the hearing are also referred to.
- Once the judgment has been rendered, no unanimity exists –again- as regards the existence of a procedural stage for informing the minor about future activities, although the opinion mostly supported is its non-existence. In any case, it is broadly accepted that once the judgment has been rendered, it is up to the representative of the minor, the lawyer, a psychologist or a social servant to inform him/her of the content and consequences of the judgment. Even reference to the parents is made. However, some questionnaires consider that the minor does not receive any information about the judgment, its content and consequences.

The right of the minor to be heard in International Child Abduction:

- Questionnaires accept that minors have the right to be (always, sometimes) heard in cases of international child abduction before the decision on the return is adopted. Some questionnaires stress the fact that the exercise of this right depends on the age of the minor.
- As a general rule, the minor is heard by the judge alone and no previous meeting with the minor is envisaged. Parents never attend the hearing.
- It is broadly accepted that minors are informed about the proceeding by the judge and no consensus on the content of the information provided exist (reasons for the hearing, degree of confidentiality, presence of other people in the hearing, steps to be taken, rights of the minor, prospective outcome of the hearing). It is also said that minors are informed of the relevance of the hearing but also that its outcome does not depend on them, although it is considered that this does not always happen.
- There is lack of unanimity as regards the existence of a procedural stage after the hearing in which the minor receives information on future steps to be taken by the judge and, it is also said, by the lawyer.
- Minors are said not to be informed about the resolution denying or granting the return of the minor to his/her country of origin. And the minor is not usually prepared for the return.

Right of the minor to have a special representative:

- Most questionnaires accept that minor has the right to be represented on her/his own in procedures affecting him/her. On the contrary, some other questionnaires deny this possibility.
- The possibility to appoint as curator ad litem is said to be available for the minor.

6. *Overall comments*

The right of the minor to be heard in procedures involving him/her is well enshrined in Spanish legislation. The principle is fully accepted and the obligation for legal operators to be aware of it is perfectly drafted. However, the principle lacks a straightforward implementation in Spanish legal practice. The principle lacks a clear, uniform and unanimous understanding and several issues relating to its practice are growingly under controversy. This may directly limit the effectivity of the principle and affect the minor and the necessary preservation of his or her best interest.

The several questionnaires received fully support this convoluted situation. Differences on basic principles and ideas stress the need to develop a clear and easily understanding set of good practices to be offered to those involved in procedures affecting minors both with and without foreign elements.

Chapter 10

THE RIGHT OF THE CHILD TO INFORMATION IN CROSS-BORDER CIVIL PROCEEDINGS: GUIDELINES ON CROSS-BORDER BEST PRACTICES

One of the goals of the research project "*Minor's Right to Information in civil actions* (MiRI) – *Improving children's right to information in cross-border civil cases*" (coordinator: University of Genoa, Italy) was to develop a set of Guidelines on best practices to improve the right of the child to receive adequate information within the civil proceedings in which she or he is involved. The present Guidelines – which are the main outcome of the MiRI project and have been drafted based on the main criticalities examined – are aimed at improving the situation of children involved in cross-border family proceedings, in order to enhance and protect their fundamental rights as enshrined in international instruments on children's rights and as part of the EU *aquis* on the rights of the child.

The efforts of the international community towards a global recognition of the fundamental rights of the child has allowed a greater acknowledgment of the necessity to provide a special protection for children. This necessity is well acknowledged in the context of the European Union, that recognizes the need to protect human rights in general and the rights of children in particular, and where the creation of a child-friendly justice represents an important element of the EU action in the field. In this context, the international and regional legal framework on children's rights inspires, guides and influences the EU instruments adopted in the field of family law, with particular reference to the field of judicial cooperation in civil matters, where there has been a growing interest in enhancing the protection of the rights of the child, which may be at higher risk of violation in cross-border situations.

In particular, the right of the child to be heard and participate in any judicial proceedings in which his or her rights or interests are at stake is one of the cornerstones of the creation of a child-friendly justice. However, a meaningful and safe participation of the child in the civil proceedings in which she or he is involved is not possible if he or she does not receive adequate information. A child-friendly justice system cannot be effectively implemented if the provision of information to children is disregarded: this aspect is critical in order to ensure that children have a correct perception of the judicial proceedings. Children cannot realize their rights without receiving reliable and comprehensible information before, during and after the proceedings.

To the extent possible, and with the goal to keep this instrument accessible, transparent and flexible, each guideline is accompanied by a comment, offering a direct succinct explanation from a theoretical and practical perspective that grounds the corresponding suggestion, and by an indication of a possible action to be adopted by the relevant targeted group to settle the main criticalities encountered.

The present document is included in the final publication of the MiRI Project. The hope is that those Guidelines will be disseminated and made available for practitioners in the European Union with the aim to contribute to building and consolidating a child-friendly justice.

Guideline 1

Children involved in judicial proceedings in civil matters have the right to receive adequate information during any stage of the proceedings. In particular, they shall receive information before, during and after the judicial proceedings, in a manner and a language that they understand**.** The information shall be aimed at facilitating the understanding of the proceedings and at pursuing the participation rights of the child.

Comment:

The right to receive adequate information is a fundamental right of the child involved in civil proceedings, as stated, *inter alia*, by Articles 12 and 13 of the 1989 United Nations Convention on the Rights of the Child (hereinafter, UNCRC), as well as by Article 3 of the 1996 European Convention on the Exercise of Children's Rights. Since the focus of the present Guidelines are civil proceedings in family law, the meaning of the term «involved» shall be considered broadly, since it is likely that a proceeding addressing the future of the family relationships or any other issue that may arise deriving from family bond will affect the child. As it will be further explored in the present Guidelines, the right to information includes a wide range of elements on which the child should be informed, at different stages of the proceedings (before, during and after). In fact, the right to information is part of the so-called *participation rights* of the child, according to which the child's involvement in proceedings affecting him or her is perceived as a continuous process of active involvement.

The right of the child to information is a component of child-friendly justice: this term identifies the action of the international community aimed at making justice systems more oriented towards the respect and the effective implementation of all children's rights, focusing on their needs.

Guideline 2

Children should always have the possibility to choose the way in which they are involved in judicial proceedings and whether or not to receive (certain) information.

Comment:

Children are considered active participants in any issue (or proceedings) concerning them. This should imply that they should be able to have a voice as concerns the modalities of their involvement. As a form of their participation, this opportunity should nevertheless be conveyed by the assistance of adults, who should guide children in the expression of their needs.

Since the provision of information is a right of the child, the latter should be able to choose whether or not to take advantage of this right, if he or she has the capacity of understanding, as well as the age and maturity to formulate this choice. Children should be able to withdraw from any court-related activity at any time.

This also implies that children should be given enough time to consider their involvement and whether and how they want to receive information.

Guideline 3

The best interests of the child shall be the guiding principle in determining whether the child shall be effectively receive information about the civil proceedings in which he or she is involved. In particular, the opportunity to provide information to the child shall be evaluated in the light of his or her capacity of discernment. Children shall not receive information on the proceedings if this may be dangerous or prejudicial to the child. The information shall always be adapted to children with special needs.

Comment:

The best interests of the child is one of the fundamental pillars of the UNCRC and applies to any situation involving children (Article 3 UNCRC). The best interests of the child shall always be paramount and is relevant in relation with any other principle and provision stated by the Convention. The right of the child to information shall therefore be implemented in conjunction and accordingly with the best interests of the child. This means that even the opportunity to provide information to the child shall be evaluated in the light of the child's best interests: there are situations in which – according to the circumstances of the case at hand – it is in the best interests of the child *not* to receive information (or certain information) about the judicial proceedings.

At the same time, the opportunity to inform the child shall be evaluated in the light of his or her capacity of understanding. However, the latter should not justify any automatism or rigid limit (for instance, on the basis of age) imposed by States for excluding the provision of information to the child. It should be presumed that any child has the capacity to understand the provided information, if the latter is adapted according to his or her age, maturity, gender, culture, and language.

Guideline 4

For the purpose of implementing the right of the child to information, Member States shall pursue a clear allocation of responsibilities among competent authorities and practitioners dealing with civil proceedings in family law that affect children. In particular, national legislation and practice shall pursue a correct definition of roles among judges, lawyers, social services and other professionals involved in those proceedings. Cooperation mechanisms among those actors shall be laid down, promoted and disseminated.

Comment:

According to national civil procedure, judicial proceedings involving children may provide the involvement of different professionals and competent authorities. The judicial authority may have the possibility to involve other professionals such as service providers and psychologists. However – as shown by relevant research – the coordination between those subjects is not always performed in the most efficient way. The uncertainty as concerns the role, the competences and the duties of the judicial authorities as well as service providers may consist in jeopardized protection for children involved in judicial proceedings. This field requires more attention, in order to support the development of child-sensitive cooperation protocols and make them fully operational in practice, strengthening the knowledge of service providers in this field and providing joint transdisciplinary and multi-professional training to this end.

Therefore, Member States shall be invited to take care of this aspect through all possible means: legislative initiatives, as well as the promotion of protocols between courts and service providers, shall introduce cooperation mechanisms in order to better fulfil the best interests of the child. This, in order to attribute specific competences according to the expertise and the resources of different professional figures.

Guideline 5

Member States shall implement instruments and methods of preparation for parents, other holders of parental responsibility or legal representatives of children

involved in civil proceedings in family matters, in order to ensure that children can enjoy their right to be informed about the proceedings.

Comment:

Contracting States to the UNCRC are bound to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the UNCRC (Article 4 UNCRC), and in order to make its principles and provisions widely known, by appropriate and active means, to adults as well as to children (Article 42 UNCRC).

Article 5 UNCRC provides that the direction and guidance from parents, legal representatives or guardians are important to support a child in exercising their rights with gradually increasing autonomy, as the child grows up and develops his or her capacities. Moreover, although with specific reference to the child's right to be heard (Article 12 UNCRC), the Committee on the Rights of the Child has indicated in its General Comment No. 12 that the duty to provide information to the child also falls on the child's parents or guardian.

Parents, legal representatives and/or guardians – where present – are likely to be the subjects with which the child interacts on a daily basis. Moreover, they are likely to be the intermediaries between the child and the judicial authorities in the course of judicial proceedings. Therefore, their role cannot be disregarded when implementing children's right to receive adequate, relevant and reliant information about the proceedings. A meaningful child participation also goes through a correct awareness raising, preparation and knowledge of those subjects on the rights and needs of the child. They should be enabled to collaborate and act in synergy with judicial authorities and service providers in this regard.

Guideline 6

Judges, lawyers and service providers (social workers, psychosocial practitioners, and other child-care staff) shall provide support to parents or legal representatives of children involved in civil proceedings in family matters, explaining to them the reasons underlying the proceedings and the matters at stake, and how to inform the children on the outcomes of the proceedings.

However, the fact that the parents will receive information should not mean that direct provision of information to the child is not necessary.

Comment:

As already mentioned above (Guideline No. 5), the role of parents and legal representatives of children is of crucial importance, because they are likely to be the subjects with which the child interacts on a daily basis. When a judicial (or administrative) proceeding is ongoing, a meaningful child participation also includes

correct preparation of parents and legal representatives, in order to make sure that they collaborate and act in synergy with judicial authorities and service providers.

It may be necessary to explain to parents and legal representatives that consulting children within the proceedings can be essential to understand how services can become meaningful for them, how to support them so that they trust and collaborate with service providers and in proceedings. Judicial authorities and service providers should be sensitive about the fact that parents/legal representatives may not understand why children have to be involved in the proceedings and to be informed about them. It is the role of public authorities to provide parents/legal representatives with the adequate knowledge and tools to involve children. Moreover, since parents/legal representatives have a direct contact with children, they may be the best persons to convey information to them in certain situations. Therefore, parents/legal representatives may be seen as a resource for meaningful child participation, if the context allows this.

In any event, judicial authorities and service providers shall make sure that the child is informed (if the conditions for child information occur): providing information to parents/legal representatives does not automatically mean that the child is informed as well. Children enjoy an autonomous right to information that shall not be substituted by the provision of information to their parents/legal representatives.

Guideline 7

When the national law of Member States provides for the appointment of a special curator/guardian *ad litem*/representative of the child, to represent the views and interests of the child within the proceedings, those subjects shall be clearly appointed with the duty to provide information to the child before, during and after the civil proceedings in which he or she is involved.

Comment:

The national law of the Member States provides for the opportunity, the conditions and modalities for the appointment of a special curator/guardian *ad litem* or representative of the child. This, of course, also applies when the child is involved in a civil proceeding in family matters.

Research has shown that the role and the duties of those subjects are not always well defined by national law. Moreover, a specific and clear duty to provide information to the child is rarely provided by the law, as it often depends on the sensitivity of the legal professional on a case-by-case basis.

There is an opportunity to strengthen the role of the special curator/guardian *ad litem* /representative of the child in this regard. Those professionals shall be aware that a direct contact and interaction with the child is crucial for the pro-

motion of his or her well-being and best interests, and that they are in an optimal position in order to make children more (and correctly) involved in judicial proceedings.

Guideline 8

Member States should promote the creation of protocols containing specific guidelines for practitioners on how to deal with children involved in civil proceedings in family matters. Such protocols should be practical in nature and be adapted to the local rules and practice existing in national courts. They should also provide for practical forms of collaboration among judges, lawyers, social workers and all other professionals working for and with children in the context of civil proceedings in family matters.

Comment:

The present Guidelines are aimed at constituting a practical tool for judicial authorities and legal practitioners dealing with children involved in civil proceedings. However, child participation in all its different implications is broadly disciplined by national procedural law – taking into account the specificity of each national legal system and local rules and practice. Therefore, the Guidelines – other than subject to direct implementation – may constitute a starting point for the creation and strengthening of local best practices on child participation in general, and on children's right to information in particular.

Local protocols shall take into account, *inter alia*:

- The responsibility and role of judicial authorities, service providers and other professionals involved in civil proceedings in family matters that affect children, through an effective allocation of competences (see also Guideline No. 4);
- The availability of child-friendly tools and materials to provide information to children (see also Guideline No. 16);
- The limits to children's right to information, stressing the importance for justice professionals to carefully evaluate whether and how the information provided is respectful of the child's best interests;
- The need to provide children with information before, during and after the judicial proceedings;
- The modalities of preparation of the child before his or her hearing by the judicial authority or other competent professional, in order to make sure that the child is enabled to freely express his or her views with full understanding (see also Guideline No. 20 ff.);
- The modalities in which the final decision can be communicated to children;

- The need to prepare children before the enforcement of any decision – especially if the displacement of the child abroad is needed, with the determination of the justice professional or service provider that will be responsible to provide information to children in this regard (see also Guideline No. 15).

Guideline 9

Member States should promote adequate training for judges, lawyers, social workers and all other professionals dealing with children in the context of civil proceedings in family matters.

Comment:

The importance of a specific and multidisciplinary training for justice professionals and service providers has been recognized since a long time (see also the latest EU 2021 Strategy on the Rights of the Child, in which the Commission committed to «*contribute to training of justice professionals on the rights of the child and child friendly justice*»). Dealing with children, as well as respecting their rights and promoting their best interests, requires specialist training and high-quality preparation.

Justice professionals and service providers should be sensitized to child participation and to the importance of the provision of information. They should be able to assess whether the information serves the best interests of the child, and they should be able to modulate the content and modality of the information to the age, maturity, gender and culture of the child. They should be sensitive to different cultures and backgrounds.

When providing information to children, it is essential to communicate well and to understand the feedbacks that the child gives back (with verbal and non-verbal communication). In this, multidisciplinary training is especially useful when justice professionals have received a purely legal education.

Guideline 10

The content of the information provided to the child shall be adapted to the age and degree of maturity of the child. The information shall be reliable and relevant and shall always correspond to the best interests of the child.

Comment:

The provision of information is fundamental for the promotion and implementation of the procedural rights of the child, but at the same time not all information necessarily has to be shared with children: some information may be harmful to their wellbeing and it may not be in the child's best interests to receive

it. Therefore, legal practitioners and judicial authorities should be able to evaluate when there is a genuine opportunity to provide information to the child, being the provision not in contrast with his or her best interests.

At the same time, making the information compatible with the best interests of the child means that the information shall be adapted to the age and degree of maturity of the child. For this reason, the provision of information shall not be standardized, but shall be adapted to each child. Moreover, adapting the content and modality of information to the age or maturity of the child ensures that the child will be able to effectively comprehend the information.

The need to adapt the information to the age and degree of maturity of the child is expressly stated by the 1996 European Convention on the Exercise of Children's Rights, that has been ratified by 20 Member States of the Council of Europe so far and constitutes an initiative for the implementation of the UNCRC. The Convention states the right of each child affected by a judicial proceeding in family matters to receive information (Article 3), qualifying the latter as any "information which is appropriate to the age and understanding of the child, and which will be given to enable the child to exercise his or her rights fully unless the provision of such information were contrary to the welfare of the child".

Guideline 11

Children should always be able to ask for clarification on the information provided. For this purpose, children shall always be able to identify the person responsible to provide such clarifications.

Comment:

An effective provision of information to the child, given in the context of a judicial proceeding, should include the possibility for the child to ask for clarifications at any stage of the proceeding. For this purpose, national judicial systems should provide an institutionalized modality for children to ask for clarifications, *e.g.* by clearly allocating this responsibility to a specific subject or institution, or by providing a call center or any other means aimed at facilitating children in their dialogue with the judicial system.

Guideline 12

Before the beginning of civil proceedings in family matters that will affect his or her life, the child has the right to receive reliable, relevant and clear information on:

- the reasons underlying the proceedings;
- the nature, scope and purpose of the proceedings;

- the location of the proceedings;
- the expected duration of the proceedings;
- the possible outcomes of the proceedings;
- who is(are) the person(s) who will be involved in the proceedings and will adopt the final decision;
- his or her rights (or duties) within the proceedings (e.g. the right to be heard);
- how to access the documentation and legal reasoning of the proceedings;
- how to access available legal remedies;
- the possibility and the modalities of expression of his or her views.

Comment:

Children involved in civil proceedings in family matters must be properly provided with all the information that is relevant to their status. Information should be provided on various issues and elements, of which the present Guideline represent an open-ended list. In particular, when it is in their best interests, children shall receive information about the reasons why a judicial proceeding will be opened, what are the scope and purpose of the proceedings, who are the persons involved in the proceedings (the judge(s), the service providers and other relevant actors), the role that the child may have within the proceedings – with particular reference to the exercise of his or her right and the possibility to be heard within the proceedings, how to access information and ask for clarifications, the expected duration of the proceedings and the possible outcomes. The time factor is essential in this regard: it is advisable that children receive information well in advance before the beginning of the proceedings, when the circumstances allow for it, in order to be adequately prepared.

The provision of relevant and adequate information is particularly important for children involved in cross-border civil proceedings, especially in the hypothesis that the proceedings are ongoing in a State other than the State of habitual residence of the child (see also Guideline No. 17). In that case, providing the child with the abovementioned information contributes to increasing the trust of the child in the judicial authority that will take a decision about his or her life.

Guideline 13

During the course of civil proceedings in family matters that will affect his or her life, the child has the right to receive reliable, relevant and clear information on the developments of the proceedings in all their different stages.

Comment:

The concept of child participation encompasses the involvement of children in the decision-making process that affects their life. This is a process of *active*

involvement, which should not be limited to the mere acquisition of the child's opinion, but should be taken into consideration in all stages of the proceedings.

The child must be provided with reliable, relevant and clear information during all the stages of the judicial proceedings, being properly updated on its progress. Accordingly, providing information to children should not be limited to the preparation that children may receive before an audition before the judicial authority (or other delegated professional). It represents a fundamental component of child participation and a way to pursue the child's best interests. The delivery of child-friendly information has the advantage to make the judicial environment less intimidating for the child and increases the chances that the final decision will be accepted by the child and will have less impact on his or her life.

Guideline 14

Children involved in judicial proceedings should be freely assisted by an interpreter if they cannot understand or speak the language used.

Comment:

If the child involved in a civil proceeding cannot understand or speak the language used by judicial authorities (orally and in the legal documents of the proceedings), the provision of quality interpretation is directly connected to the right to information and to be heard as a procedural safeguard. As a consequence, interpretation shall be offered and provided in a systematic way and free of charge for the users.

Language shall never constitute a barrier between the child and the judicial authority that is asked to take a decision about his or her life. This is particularly evident in the context of cross-border proceedings, where judicial authorities shall have special sensitivity about possible language barriers.

Guideline 15

After the end of a civil proceeding in family matters, the child shall be informed about its outcome in a language and in a modality that he or she understands. Judgments affecting children should be duly reasoned and explained to the child in child-friendly language. This is particularly important for those decisions in which the child's views and opinions have not been followed.

Comment:

It is not uncommon that judgments are drafted in a language that is incomprehensible to children. This may be due to legal requirements as concerns the

formal and substantial aspects of the judgment. However, when a child is the final recipient of the judicial measure, he or she should be put in the condition to understand its content and consequences.

A legal decision affecting his or her future is likely to be a critical milestone in the child's life. The way a judgment is communicated to the child contributes to his or her sense of procedural justice and influences the legitimacy of the decision in the child's eyes. Moreover, the judgment stresses the way in which the child's wishes and views have been accorded (or not) a certain weight. In this sense, the judgment may represent a way to show the child that the obligation stated by Article 12 UNCRC (to give due weight to the child's views) has been respected. This increases the likelihood that the child will accept the decision and comply with it.

There are many ways to communicate a judgment or other legal decision to the child. Those modalities can be tailored to the circumstances of the case at hand and to the age or particular needs of the child. For example, judges may write the judgment in a child-friendly language and format, or a specific document explaining the decision may be written specifically for the child (for instance, in the format of a letter or a video-recording addressed to the child). Another option is to develop child-friendly materials and make them available to courts when specific situations need to be explained to the child (for instance, videos or comics). Making this written or oral documentation/information accessible to the child (and his or her representatives), explaining whether and how the opinion of the child has been used within the decision, is a safeguard against tokenistic hearings of children that are merely conducted as a formality.

Moreover, it is on the basis of this information that the child may consider to challenge decisions or court rulings, launch a formal complaint or access legal remedies according to the opportunities offered by the applicable law of civil procedure. To be able to exercise this right, children have to be informed about how to access child-sensitive complaint mechanisms and how to appeal against a court ruling.

Guideline 16

When the enforcement of a decision given in family matters involves a child, the enforcement shall be preceded by adequate preparation of the child. The child shall receive accurate, relevant and reliable information on the circumstances of the case, the reasons of the enforcement, the persons that will be involved in the enforcement and any other relevant circumstances. The child shall also be able to ask for clarification at any moment of the enforcement procedure. The information shall be given to the child in due time before the enforcement, in order for the child to be adequately prepared and in order to avoid trauma and possible harm to the child. The information shall be given by a competent professional who has recei-

ved adequate training in communicating with children. The information shall be given in a language and modality that the child will be able to understand.

Comment:

The enforcement of a decision on parental responsibility, visiting rights, international child abduction, placement or other matters of family law may impact children's life considerably. It may consist in the relocation of the child to another State, or in the handover of a child to a person other than the person with whom the child is residing. Enforcement may even constitute a traumatic event for the child, if not conducted properly and if not preceded by adequate preparation. In this context, the application of coercive measures should always constitute the last resort and those measures should be applied only when they cannot be avoided (see, for instance, the recommendations stated in Recital No. 65 of Regulation (EU) No. 2019/1111). It is up to the national authorities competent for the enforcement to assess what are the instruments to be applied in each individual case – according to the modalities established by national law – and whether the application of coercive measures is necessary.

On the other hand, adequate preparation of the child before the enforcement takes place is considered necessary and appropriate in order to avoid (or to reduce at the minimum) the trauma to which the child may be exposed because of the enforcement. For this reason, the child must receive accurate, relevant and reliable information on the circumstances of the case, the reasons of the enforcement, the persons that will be involved in the enforcement and any other relevant circumstances. The information shall be given in a language and modality that the child understands. The child should also be able to ask for clarifications.

The provision of information to the child in this stage of the proceedings – having regard to the correct timing and modality – favors the achievement of a voluntary compliance by the child and reduces the risk of failure of coercive enforcement due to the objection of the child (*e.g.* if the child strongly opposes to travel). The involvement of service providers and experts from the psycho-social professions may result in more effective preparation of the child and may contribute to reaching an amicable solution.

Guideline 17

Child-friendly information tools and materials shall be consistently available to competent authorities and practitioners, in courts and in any other setting providing for child participation in judicial proceedings. Those materials shall be adapted to the age, maturity, gender and culture of each child and presented in a language that the child will be able to understand. For this purpose, Member States shall use any instrument at their disposal to make sure that these tools are correctly

implemented and widely distributed. Those materials should be available in different languages and should be adaptable for children with special needs.

Comment:

Enabling the child to exercise their rights (such as the right to be heard) in the context of civil proceedings requires the relevant service providers and judicial authorities to communicate information in a language that the child understands, with due regard to the age, abilities, health and evolving capacities of the child.

The main objective of child-friendly materials is to convey information in a simple and direct language that is immediately understandable for children.

Child-friendly information can be delivered in different forms: in written form, in brochures handed out to children, through illustrations, pictures, drawings, videos, through social media presence of service providers, drop-in centres or others, in a face-to-face conversation, through the use of videos, as well as through internet-based and digital communication tools or applications.

Since each situation involving children is different, and each child has a different background and needs, more than one modality to convey information should be developed and put at disposal in the judicial setting. In this way, judicial authorities and service providers will be able to choose what is the best tool in each situation.

Child-friendly information tools are materials that are adapted to the child's age, maturity, gender, culture and language. All those elements are essential to be sure that the information (and the correct amount of information) is effectively conveyed to the child according to his or her best interests. In cases of children belonging to minority groups and non-national children, quality interpretation and cultural mediation may be required to prevent discrimination. The Committee on the Rights of the Child (General Comment No. 12) underlines the need to ensure that younger children and children belonging to particularly marginalised and disadvantaged groups require targeted support to overcome any communication barriers and have effective access to information.

Guideline 18

When involved in civil proceedings in family matters having cross-border implications, children shall be able to receive adequate information even if they are not physically present in the Member State where the proceedings are taking place. For this purpose, Member States shall implement adequate instruments in their legislation and practice, in order to ensure that children receive adequate information abroad, in a language that they will be able to understand.

Judges, lawyers, social workers and all other professionals shall be aware of the importance of providing information to children at a distance and shall activate

any mechanism at their disposal for ensuring that the child receives information if it corresponds to his or her best interests and in accordance with his or her age and maturity.

Comment:

The provision of relevant and adequate information is particularly important for children involved in cross-border civil proceedings, especially in the hypothesis that the proceedings are ongoing in a State other than the State of habitual residence of the child. In that case, children may experience a higher degree of uncertainty, because decisions about their lives are taken by a judge / a court which is physically far away from them and unknown. For this reason, the judicial authority and service providers shall ensure that the child is provided with all the relevant information. This can be done through the activation of already existing cooperation mechanisms, such as the European Judicial Network in Civil and Criminal Matters established by Council Decision 2001/470/EC of May 28, 2001, and the system of Central Authorities already established by EU Regulations (such as Regulation No. 2201/2003, Article 53) or by the relevant conventions adopted under the auspices of the Hague Conference on Private International Law (such as the 1996 Hague Convention on parental responsibility and measures for the protection of children).

Guideline 19

The right of the child to information in civil proceedings shall receive adequate acknowledgment in the Member State's legislation. When the applicable rules of civil procedure or the applicable EU legislation establish that the child shall have the opportunity to be heard, the law should also expressly state that the child shall be given relevant and reliable information.

Comment:

The present Guideline does not contain practical indications for practitioners, but rather a recommendation for Member States. It is aimed at shedding some light on the need for institutional recognition of the need to make judicial systems more child-friendly. Adequate acknowledgement of children's right to information in national legal systems should lead to an increased awareness of legal professionals and judicial authorities on the topic.

Guideline 20

When the child is heard within the proceedings, he or she shall receive adequate preparation. The child shall be provided with reliable and relevant information about the proceedings and about his or her right to be heard and express his or

her views. Being informed is a precondition for the child's ability to make appropriate decisions. This information is also essential for the child to decide whether or not to be heard within the proceedings.

Comment:

Child participation in judicial or administrative proceedings, as developed from the UNCRC onwards, has been based on the evolving concept of children's agency, viewing children not only as persons with limited legal capacity and in need of special protection, but also as informed decision-makers and active members of society – and as rights holders. Children are taught to acquire, seek and reflect on information and are expected to form an opinion, and to participate in matters concerning them. Children are encouraged to take responsibility for their actions and to judge what is good for them and others. This means that children are expected to make appropriate decisions, or at least to have a say in a decision that will be taken by adults. The fundamental precondition to formulate an opinion is to receive adequate information about the situation. This is true in the context of civil proceedings, where the hearing of the child by the judge or other professionals is aimed at acquiring the position of children having an active role in their own life.

In order for children to be responsible of their own decisions, they should know that they have the right to be heard in the first place. Moreover, the exact knowledge about the situation that is the object of the judicial proceedings is a fundamental precondition for children to express a coherent opinion – although with the necessary safeguards deriving from the specific context, the capacity of understanding, the age and maturity of the child.

This autonomous dignity given to the child's opinion also means that the child should be able to decide whether or not to share his or her views with the judge or others.

Guideline 21

Before the child is heard within the proceedings, he or she should receive information about:

- the identity, role and expertise of the person(s) who will conduct the hearing;
- the possible participation of other persons in the hearing (also through mirrored glasses or video transmissions from another room);
- the date and time, the place and the modalities of the hearing;
- that fact that the hearing should be recorded either through minutes, recording or video-recording;
- the fact that his or her opinion will be made available to the adults who will adopt the final decision;

- the fact that his or her opinion will be shared (through minutes, recordings, video-recordings or other means), with his or her parents and /or the other parties to the proceedings;
- the possible impact of his or her views on the final decision: in particular, the fact that those views may not be followed;
- the fact that even if his or her opinion is important, he or she will not be considered responsible for the final decision.

Comment:

The Committee on the Rights of the Child (in its General Comment No. 12) has noted that, in preparation for the hearing of a child in court proceedings, the competent authorities have to ensure that the child is informed about his or her right to be heard, the modalities of the hearing and the way in which the views expressed by the child will be used and taken into consideration. The child has to be informed about the possibility to be heard either directly or through a representative, about the practical aspects of the hearing, such as the date and time, the location, the modalities of the hearing and any participants who are present (or following the hearing through video transmission from another room). The child also has to be informed about the possible consequences of the choices he or she makes and the impact that his or her views may have on decisions and outcomes of the proceedings. Children should understand how much impact they are able to have on decision-making.

Guideline 22

The hearing of the child shall take place in an adequate setting, in order for the child to feel free to express his or her opinions.

Comment:

According to Article 12 UNCRC, children shall be able to express their views "freely".

The Committee on the Rights of the Child (General Comment No. 12) stated that «*a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms*».

The child's capability to narrate in free recall and to resist suggestive questions by an interviewer, however, evolves significantly with age. The capability of children to provide accurate information and disclose what they remember de-

pends on several factors. The location and environment of the place where the interview or hearing takes place are fundamental. A child-friendly place with as little distractions as possible offers the most conducive conditions for interviewing or hearing children in the context of administrative or judicial proceedings. Support services should be available for the child before, during and after the hearing, in accordance with the child's needs and best interests.

Guideline 23

At the beginning of the hearing, the judge or other professional that will conduct the hearing shall make sure that the child has received adequate preparation before the hearing, and that he or she has received all necessary information.

Comment:

When the allocation of competences between justice professionals provides for children to be informed/prepared about the hearing in advance before the hearing takes place, it is advisable that the judge (or other professional conducting the hearing) verifies that the provision of information has effectively taken place. This preliminary phase of the hearing should also be an opportunity for the child to ask for clarification on the information provided.

Guideline 24

During the hearing of the child, his or her views should be recorded or written. At the end of the hearing, the judge or other professional conducting the hearing shall examine the recording or read the minutes to the child for his or her approval.

Comment:

The recording of the views of the child, expressed during the hearing by the judicial authority or other delegated professional, is advisable because it gives the child the impression that his or her declarations are taken seriously. Moreover, the child has the possibility to verify that the recorded declarations correspond to his or her views. This increases the trust of the child in the judicial authority. The practice to ask children to approve or to sign their declarations has also the effect to make them feel considered and empowered.

Guideline 25

After the hearing, the child should receive a feedback about it and about the next steps of the proceedings. This shall be done by the person that has conducted

the hearing or by adequately trained professionals (e.g. childcare staff or a psychologist), when it is in the best interests of the child.

Comment:

The hearing should not constitute an isolated event for the child. Conceiving child participation as a process of active involvement of the child implies that the child should be able to know the effects and consequences of his participation in the proceedings. For this reason, the hearing of the child by the judicial authority or other delegated professionals shall be followed by a feedback, in which the next steps of the proceedings should also be clarified. In this stage, it could also be explained to the child that his or her opinion will be taken into adequate consideration, but that he or she will not be responsible for the final decision, since the latter will be taken by adults without necessarily follow the wish expressed by the child.

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Finito di stampare anno 2021
presso le Industrie Grafiche della Pacini Editore S.r.l.
Via A. Gherardesca • 56121 Pisa
Tel. 050 313011 • Fax 050 3130300
www.pacinieditore.it