

**Themis Competition 2016 Semi - Final B 2: International Judicial Cooperation
in Civil Matters - European Family Law**



**THE RIGHT OF THE CHILD TO BE HEARD: CHALLENGE FOR
AN HARMONIZATION**

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I. THE RIGHT OF THE CHILD TO BE HEARD

Modern sociology emphasizes the ability of a child, regardless his age or mental development, to express his specific point of view and manifest his needs. Children's participation is an ongoing process of their expression and active involvement in decision-making at different levels in matters that concern them. It requires information-sharing and dialogue between children and adults based on mutual respect, as well as a full consideration of their views, taking into account the child's age and maturity.

The Committee on the Rights of the Child¹, indicated that recognising the right of the child to express his views and to participate in various activities, according to his evolving capacities, would be beneficial for the child, the family, the community, the school, the state and democracy. Participation contributes to personal development, thus helping children to improve their abilities. There is a growing body of evidence to the effect that routinely taking children's views and experiences into account – within the family, at school and in other settings – helps to develop

¹ The Committee on the Rights of the Child is a body of independent experts that monitors and reports on implementation of the Convention on the Rights of the Child by governments that ratify the Convention.

children's self-esteem, cognitive abilities, social skills and respect for others.

Effectively, adults do not always have sufficient insight into children's lives to be able to make informed and effective decisions on the legislation, policies and programmes designed for children. Children have a unique body of knowledge about their lives, needs and concerns, together with ideas and views which derive from their direct experience. Decisions that are fully informed by children's own perspectives will be more relevant, more effective and more sustainable.

Despite recognition that child's participation is a fundamental human right in European and international law, there is still considerable resistance to its realisation.

The purpose of this paper is to analyse the current national and international law framework, to consider if this discipline is ultimately effective in terms of consideration of a minor's will, and convey different proposals for a general reform of the legal system concerning the child's right to be heard.

II. LEGAL SOURCES

The right for the child to be heard has different legal sources, both international and at the level of member states, disciplining cases in which children have the chance to express their opinion towards measures they are concerned in. The comparison between international and national sources is a good starting point to appreciate the differences existing among different European law systems.

2.1. INTERNATIONAL AND EUROPEAN UNION LAW SOURCES

A) UNITED NATION CONVENTION ON THE RIGHTS OF THE CHILD

The Convention on the Rights of the Child has been adopted by the General Assembly of the United Nations considering that the need to extend particular care to the child has been stated in numerous declarations on children rights².

The Convention aims at pursuing the best interest of the child by providing States Parties with instruments to protect children rights. Among these instruments a primary consideration has to be given to the right of the child to be heard. Article 12 lays down fundamental principles with regard to the hearing of the child. First of all States Parties shall assure to the child the right to express his or her views freely in all matters affecting his or her interests; secondarily the exercise of this right requires an assessment on the child's age and maturity; lastly the hearing of the child can be direct

² The Geneva Declaration of the Rights of the Child of 1924; the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children.

or indirect (through a representative or an appropriate body), in accordance with the national procedural law. Article 12 has also been the subject of the UN Committee on the rights of the child General Comment n. 12, *The right of the child to be heard*, which analyses single aspects taken in consideration by article 12 of the UN Convention of NY and gives States Parties important directives in order to assure this right as we will see in the following part of the paper.

B) CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION AND EU LEGISLATION

The introduction of the Charter of fundamental rights, and the entry into force of the Treaty of Lisbon in 2009 which recognizes the Charter the same legal status of the EU Treaties, represents a good propeller for the promotion and the protection of children rights. In this contest article 24, after having recognized that the children “*have the right to such protection and care as is necessary for their well-being*”, contains three key children’s rights principles: 1) the right to express their views freely in all matters concerning their rights, in accordance with their age and maturity; 2) the child’s best interest, which has to be taken in consideration in all actions relating to children; 3) the right for every child to maintain on a regular basis a personal relationship with both parents, unless that is contrary to his or her interests.

This article is relevant because according to the Treaty of Lisbon, every European country has to protect the rights previously recognized to children when implementing EU law. The Treaty of Lisbon has also strengthened children’s rights by identifying the protection of these rights as one of the general objective of the EU (article 3 par. 3 of the TEU). In accordance to this objective, the EU legislator has adopted several directives that aim to fight against children sexual abuse, children sexual exploitation, child pornography, trafficking of human beings as well as to protect the victims of these crimes.

This objective could also represent a good propeller to implement children’s rights in civil matters: as we will see in the following sections of this paper, EU countries discipline in different ways, among the others, children’s right to be heard. These differences could prejudice the child’s best interest which is a key principle when it comes to children’s right.

Since 2007, children’s rights protection entered the EU agenda: the Council of the European Union adopted “*EU guidelines for the promoting and the protection of the right of the child*” (Brussels, 10 December 2007) and the European Commission adopted a Communication on “*A special place for children in EU external action*” (Brussels, 5 February 2008) and the *EU Agenda for the rights of the child* (2011). The European Union can legislate only when it has been given competence under the Treaties: children’s rights is a cross-sectorial field so it is necessary to identify case by case when EU legislator can adopt acts concerning this field. There are two areas which can involve

children's rights protection: a) asylum and migration; b) cooperation in civil and criminal matters. That is the aim of this paper: to focus on children's right to be heard in civil matters.

C) ECHR AND EUROPEAN COUNCIL GUIDE LINES

European Convention on human rights gives great importance to children's rights and protection. Article 8, in particular, provides that everyone has the right to respect for private and family life: the European Court of human rights states that this right represents the legal basis of the child's best interest³. In order to promote the child's best interest, the European Council has devoted great attention to the problem of creating a child friendly justice. The most important Treaties addressing to children's rights are the following: a) *European Social Charter* (revised on 3 May 1996), which focuses on children's protection from any kind of abuse or exploitation; b) *Convention on the exercise of children's rights* (adopted on 25 January 1996), which promotes children's best interest in family proceedings and, under article 3, recognizes children right to express their view in any of these proceedings involving their interests; c) *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* adopted on 17 November 2010, which is the result of a program launched in 2006 named "*Building a Europe for and with children*". The guidelines directly address the right of the child to be heard as one of the instruments to use to improve justice when children are involved in civil (and criminal) proceedings. The right of the child to be heard is highlighted under three main profiles: 1. it is a right and not a duty of the child; 2. the child must have the opportunity to be heard when he or she has a sufficient understanding of the matters in question, but this understanding does not have to be valued solely on the basis of age; 3. children should be provided with information about how to use their right to be heard and, especially, about the fact that the exercise of this right does not determine the final decision on their case.

2.2. MEMBER STATES LAW: AN OVERVIEW

ITALY

Italian law has only recently shown a proper consideration of children's views in the judicial proceedings affecting them. In the past, the Committee on the Rights of the Child issued two warnings regarding Italian law non-compliance with terms of Article 12 of the Convention on the Rights of the Child (CRC), with special regards to cases of separation of parents, divorce, adoption or foster care, or within education, recommending that "*legislation governing procedure in courts and administrative proceedings ensure that a child capable of forming his or her own views has the right to express those views and that they should be given due weight*"⁴.

³ *M. and M. v. Croatia*, n. 10161/13, ECHR 2015.

⁴ Concluding observations of the Second periodic report of Italy (CRC/C/70/Add.13), submitted on 21 March 2000, at its 840th and 841st meetings (see CRC/C/SR. 840 and 841), held on 16 January 2003, and at its 862nd meeting

Law No. 149/2001 established that judges have to listen to children of sufficient maturity in adoption and foster care proceedings and the Italian Constitutional Court⁵ held that the CRC, including Article 12, is a self executing treaty under Italian law. For this reason the Italian legislator has introduced within the civil code a general provision on the child's right to be heard (Law No. 54/2006, who has been recently modified by the legislative decree No. 154/2013). The original provision (article 155 *sexies* civil code) only considered separation and divorce proceedings, while the one which has been recently introduced (article 336 *bis* civil code) includes every proceeding related to the exercise of parental responsibility, providing that “*before the issuance (...) of the provisions*” concerning children, the judge proceeds to the hearing of the child of twelve years old and even younger who is capable of forming his or her own views. The hearing must be conducted by the judge, who may request the support of experts (judicial hearing). Parents and lawyers can take part to the hearing only if authorized by the Court. The Italian Court of Cassation has pointed out that the child's right to be heard, provided he is twelve or, otherwise, still capable of discernment, does not represent in any way a restriction of his personal freedom; it is, on the contrary, an expansion of the right to participate in proceedings concerning his interests, as a specific moment dedicated to collect his views and its actual needs⁶.

Unfortunately, like in many other European countries, Italian law does not dictate a proper procedure to be followed by Courts, thus leaving the enforcement of the rule to the personal sensibility of judges.

As pointed out by experts, Italy's reluctance to comply with the recommendations expressed by the Committee on the Rights of the Child, seems to stem from the enduring paternalistic orientation of Italy's professional legal culture, which rests on the conviction that children are fragile and vulnerable subjects who require protection from themselves and from the world⁷.

ROMANIA, CZECH REPUBLIC AND POLAND

In 2009, the Romanian National Institute of Magistracy, with the help of UNICEF, published a book⁸ including information on the psychological aspects of interviewing children involved in judicial proceedings (both civil and criminal), with a special focus on the case of child-victims. This text provides a detailed description of each stage of the interview process.

(CRC/C/SR.862), held on 31 January 2003 to the Committee.

⁵ Constitutional Court, decision n. 1, issued on the 16th January 2002.

⁶ Court of Cassation, Section I, decision n. 5097 issued on the 5th of March, 2014.

⁷ Roberta Bosisio, “*Children's Right to Be Heard. What Children Think*”, “*International Journal of Children's Rights*” 20, 2012, pp. 141-154.

⁸ “*Guide for interviewing children in judicial proceedings*”. Coordinators: Pivniceru M.-M., Luca C., co-authors: Luca S., Haralambe S., Susanu C.-A., Horodniceanu D.-C., “*Ghid de audiere a copilului în proceduri judiciare*” (“*Guide for interviewing the children in judicial proceedings*”), Hamangiu Editions 2009. Nevertheless, the Guide has no binding legal force, therefore it is not compulsory for the judiciary. There is no information available regarding its circulation among judicial authorities.

Nevertheless, this document is not binding for judicial authorities.

The 1998 Family Law reform, introduced a similar provision into the Czech Family Code, stating that a child who is able to hold an opinion on his or her own and to appreciate the consequences of a specific measure related to him or to her, has the right to be heard in every proceeding in which such matters are decided (Sec. 31 paragraph 3 Czech Family Code).

The opinions expressed by the child shall be duly taken into consideration according to its age and intellectual maturity wherever matters concerning its personality are dealt with (Sec. 8 para. 2 Czech Act on Social and Legal Protection).

Unfortunately, the extent to which the child's opinion is taken in consideration in a judicial procedure depends considerably on the particular case and judge's specific ability. Court practices still differs, but the child is usually heard before the court if he is more than twelve years old.

In a similar way, the Constitution of Poland of 1997 provides that: "*Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child.*"

With special regards to judicial proceedings, in case of decisions concerning a child's residence, a child should have the right to express his or her opinion and this opinion should be taken into consideration, provided that a child has reached a sufficient level of development. Unfortunately there is no distinct obligation of a guardianship court to hear a child in Polish law. That means that hearing a child depends on three factors: age (thirteen years old), maturity and court decision. Polish law treats declarations by the child not as evidence, but as statement of knowledge.

AUSTRIA AND FRANCE

The Austrian system officially ensures that the child's opinions will be taken into account (Sec. 146 c. Austrian CC), corresponding to the child's age and maturity, in all matters that concern the life of child such as the family, school, any other child care, proceedings at court or with authorities, and the formulation of political goals and decisions. Children must also be heard in any court proceedings concerning their care and upbringing. Minors are usually heard by a guardianship court, or the youth welfare authority, a court expert or existing institutions of the Juvenile Court Assistance, or in any other appropriate way if the minor is not yet ten years of age, if this is required by his development or health, or if a serious or uninfluenced expression of opinion cannot be expected. Children under ten years old are to be heard by the child psychologists of the Youth Welfare Office or in some other suitable way. The appointment of a psychologist for the minor during proceedings is a discretionary decision of the judge.

The hearing may be neglected or delayed in order to protect the well-being of the child or if, in view

of the age and capability of the child to understand the matter on hand, a well-founded opinion cannot be expected. The law does not specify in what form psychologists or other agents should communicate a child's statements to the court or what criteria should be used to determine that no well-founded opinion can be expected from a child.

In a similar way, Article 388-1 of the French Civil Code, generally provides that in all civil proceedings relating to him, a minor capable of discernment may be heard by the judge or, where the interests of the child requires it, the person appointed by the judge for that purpose; a child who so requests must be heard.

Where a tutelary assistance procedure has been set under way, the juvenile court judge must hear the father, mother, legal guardian, the person or representative of the service in whose care a minor capable of discernment has been placed (article 1182 of the Code of Civil Procedure). The judge may also hear any other person whom he or she considers may make a useful contribution. A juvenile capable of discernment may consult the case file, but must then be accompanied by father, mother or lawyer. At the hearing, the judge must hear the minor, who has the right to appeal the decision.

In addition, any child who considers that his or her rights are not being respected can take the case to the Children's Ombudsperson who works with the Defender of Rights.

III. WHEN THE CHILD SHOULD BE HEARD

Children can form and express views from the earliest age, but the nature of their participation will necessarily increase in accordance with their age and evolving capacities. Young children's participation will be largely limited to issues relating their immediate environment within the family, care facilities and their local community. However, as they grow older and their capacities develop, their horizons broaden and they are entitled to be involved in the wide range of issues that affect them from the immediate family to the international level.

This is why the UN General Assembly Omnibus Resolution in November 2009 encouraged governments to *“assure that children are given the opportunity to be heard in all matters affecting them, without discrimination of any grounds, by adopting and/or continuing to implement regulations and arrangements that provide for and encourage, as appropriate, children's participation in all settings, including within the family, in school and in their communities, and that are firmly anchored in laws and institutional codes and that are regularly evaluated with regard to their effectiveness.”*

Making justice systems more child-friendly improves the protection of children, enhances their meaningful participation and, at the same time, improves the operation of justice. A child friendly

justice, therefore, must provide the right of the child to be heard. Starting from this assumption it has to be considered when the minor should be heard. General requirements are the level of understanding of the child and, above all, the best interests of the same. There are, then, different proceedings which particularly involves the right for the child to be heard. Below we are going to consider the most significant.

3.1. SEPARATION AND DIVORCE PROCEEDINGS

The provision of a compulsory child's hearing within separation and divorce proceedings, has been debated because of the so called "*divided loyalties*" that could prejudice children freedom in expressing their opinion⁹. UN Committee on the rights of the child General Comment n. 12, provides that any legislation on separation and divorce has to include the right of the child to be heard in order to assure the child's best interest. Children, indeed, are affected by decisions of Courts towards maintenance for the child, custody and access. Council Regulation Brussels II *bis*, No. 2201/2003, concerning jurisdiction and the recognition and enforcement of judgements in matrimonial and parental responsibility matters, provides that the violation of the child's right to be heard is one of the grounds for non recognition of a judicial statement.

International law sources, therefore, seem to force States to provide for the compulsory of the hearing of the minor.

The Court of Justice of European Union has stated in many decisions that the hearing of the child should be granted in family proceedings, among which separation and divorce ones have a primary consideration, except for the cases in which it could be contrary to the child's best interest. When the judge states that the child has to be given the right to be heard, this right must be effective¹⁰.

The alleged "divided loyalties" should not represent itself a good reason to avoid the hearing of the child. Under article 12 of the UN Convention on the Rights of the Child 1989 and article 8 of the European Convention, in any judicial or administrative proceedings involving children's rights (especially within custody proceedings) "*it cannot be said that 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*"¹¹. In conclusion, the Court has stated that

⁹ The "divided loyalties" is a plight that involves children of divorce who think that if they have to express their views within divorce proceedings they should choose between the parents.

¹⁰ The ECJ reasoned that hearing a child "*is not an absolute right, but that if a court decides it is necessary, it must offer the child a genuine and effective opportunity to express his or her 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 in-dividual case*" (69 CJEU, C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, 22 December 2010).

¹¹ *M. and M. v. Croatia*, n. 10161/13, ECHR 2015. The Court noted that the daughter was nine and a half years old at the time of the institution of the custody proceedings and was now thirteen and a half. It would thus be difficult to argue that, given her age and maturity, she was not capable of forming her own views and expressing them freely. For the Court, not respecting her wishes would, in the specific circumstances of the case, constitute an infringement of her right to respect for private and family life.

the right to respect for private and family life concerning separation and divorce proceedings, is violated when the length of proceedings is excessive and when a minor is not given the right to express his or her view freely on which parent should take care of him or her.

3.2. CHILD ABDUCTION PROCEEDINGS

In child abduction proceeding objections have been raised to the compulsory hearing of the child. It seems that the opportunity to hear the child and the consequences of possible objections of the child, requires a case-by-case approach.

Moreover, the compulsory hearing of the child in genuine and brutal kidnappings, where the circumstances of the case appear sufficient to the judge to order expedite and urgent return, interferes negatively and uselessly with the timeline of the procedure.

The principle that emerges from the Regulation Brussels II *Bis* is that the child shall be given an opportunity to be heard except when the hearing is considered inappropriate, taking into account the child's age and maturity (Articles 11, 41 and 42).

In Case C-491/10 PPU, concerning a judgment ordering the return of a child following abduction, the Court of Justice underscored that the provisions of Article 24 of the Charter of Fundamental Rights of the European Union and of Article 41 of the Regulation does not refer to the hearing of the child *per se*, but to the child's having the opportunity to be heard.

The court in charge of ruling on the return of a child has, therefore, "*to assess whether such a hearing is appropriate, since the conflicts which make necessary a judgment awarding custody of a child to one of the parents, and the associated tensions, create situations in which the hearing of the child, particularly when, as may be the case, the physical presence of the child before the court is required, may prove to be inappropriate, and even harmful to the psychological health of the child, who is often exposed to such tensions and adversely affected by them.*"

Consequently, although a right of the child, "*hearing the child cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case, in accordance with Article 24 of the Charter of Fundamental Rights*".

3.3. THE RIGHT OF THE PARENT TO VISIT HIS OR HER CHILD (RIGHT OF ACCESS).

The minor participation to the judicial proceeding can also be an effective tool to evaluate when or how visit rights should be granted to divorced parents. If one considers how painful a divorce can be, especially when ex spouses are being hostile to one another, granting the child the possibility to raise its voice becomes an essential tool to make the whole experience less traumatic to the minor.

In a well known case, the European Court of Human Rights condemned Italian authorities for not

taking in proper consideration the minor interest to meet his own father¹², having the Court delegated the management of the meetings to social services, without evaluating a specific expertise stating that reconnecting with the father was, indeed, in the interest of the minor. The authorities have so disregarded their duty to adopt any concrete measures aimed at promoting better cooperation between interested parties, consolidating a *de facto* situation created by failure of judicial decisions, and the simple passage of time had the more serious consequences for the applicant, deprived of contact with his son. Thus, the minor was left to the sole influence of the mother in a hostile environment, and that situation lasted more than four years without adequate contacts between the applicant and his son. This is just one example of how not paying proper attention to the voice of child during the process can lead to dramatic and traumatizing results of justice malfunctioning.

3.4 ADOPTION PROCEEDINGS

The minor right to be heard also plays a fundamental role in adoption procedures. Article 21 of the Convention on the Rights of the Child, states that in any adoption proceedings persons concerned must have given their informed consent, being the child clearly a concerned person. Some of the States that ratifies the Convention have introduced an age limit, above which the child is required to give formal consent to an adoption, or decisions relating to custody and access. However, wherever possible, it is important to introduce the necessary mechanisms to ensure that no child capable of forming a view is adopted against their express wishes, at whatever age, and to ensure that no age limit applies to the right to express a view in these proceedings.

The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption requires that, in adoption proceedings, the child must be provided with appropriate information and counselling, and give consent to the adoption where this is required. Any consent must be given freely, without inducements.

According to Italian law, in order to be adopted, the minor who has biological parents needs to be previously declared by the Tribunal a suitable subject for adoption, being this declaration based on the assumption that those biological parents cannot take care of their own child.

In a recent case¹³, it was brought to the attention of the European Court of Human Rights that the aforementioned procedure needs to be based, like in many other judicial proceedings, on the minor best interest evaluation. Such evaluation cannot be based on the sole declarations of the parents, but must be built upon the child own freedom to express its will.

In this occasion, The Court recalls that, beyond the protection against arbitrary interference, Article 8 of the Convention imposes on the State the positive obligations inherent effective respect for

¹² ECHR, *Piazzini v. Italy* (No. 36168/09).

¹³ ECHR, *Akinnibosun v. Italy* (No. 9056/14).

family life. In this way, whether it is established the existence of a family bond, the State must in principle act in a way to permit such a link to develop. In particular, a specific attention must be paid to the fair balance between the different interests, taking into account, however, that the best interests of the child shall be the paramount consideration and, depending on its nature and severity, can prevail that of the parent.

IV. RECOGNITION OF JUDGMENTS: THE *EXEQUATUR* PROBLEM

The privileged legislative tool to pursue judicial cooperation in civil matters is Regulation, since it is binding, mandatory, general, and directly applicable to national legal systems. Regulation No. 2201/2003 (Brussels II *Bis*) aims to create a genuine judicial area according to the Tampere European Council, which promoted the principle of mutual recognition of judicial decisions.

The Regulation takes in consideration the right of the child to be heard as one of the ground for the recognition of decisions and, in some cases, also the ground to avoid the *exequatur*, unless a hearing is considered inappropriate having regard to his or her age or degree of maturity (art 11 par 2). Regulation does not apply to every proceeding the child is involved in. We will consider, first, the proceedings affected by the Regulation and, secondarily, we will try to find a solution for those which are still excluded.

In particular, the decision on the return of the minor following abduction does not need a decision on the rights of custody to be enforced, because of the procedural autonomy of child abduction cases. Thus, according to the Court of Justice of the European Union: “*the need to deter child abduction, and the child’s right to maintain on a regular basis a personal relationship and direct contact with both parents, take precedence over any disadvantages*”, such as those caused to a child being “moved needlessly”. In the context of the Regulation, any possibility of avoiding the enforcement of the foreign decision on return of a child is excluded.

The “*clear repartition of jurisdiction*” prevails even in case of an infringement of Article 24 of the European Charter of Fundamental Rights, since even an infringement of the Charter may only be heard in the “*Court of origin*”¹⁴.

¹⁴ “*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 and that a genuine and effective opportunity to express those views was offered to the child, taking into account the procedural means of national law and the instruments of international judicial cooperation. However, [...], it is solely for the national courts of the Member State of origin to examine the lawfulness of that judgment with reference to the requirements imposed, in particular, by Article 24 of the Charter of Fundamental Rights and Article 42 of Regulation No 2201/2003*”, C-491/10 PPU, ECJ.

In this case, enforcement was ordered, notwithstanding the circumstance that the German judge had evidence that the child was refusing to return to the country of origin and that the child’s right to be freely heard had not been guaranteed due to a lack of judicial co-operation between Member States.

In summary, the mechanism of the Regulation is based on the pursuit of deterrence. It stipulates that child abduction may only be counteracted by the rigid, systematic and rapid reaction of the States involved, in order to make “child abduction” totally useless.

In case of new removal of the child to another Member State it must be emphasised that the decision of the Court of origin is automatically enforceable in all the Member States and not only in the Member State in which the decision of non- return was pronounced. This results clearly from the wording of Article 42 and corresponds to the objective and spirit of the Regulation. A removal of the child to another Member State has therefore no effect on the decision of the court of origin. It is not necessary to start a new procedure for the return of the child pursuant to the 1980 Hague Convention, but merely to enforce the decision of the court of origin.

The guiding principle of the regulation is the conviction that the freedom on movement consecrated by the treaty is not proven to be fully effective until people are legitimised to assert their *status* in all member State systems besides their own. This is why some authors have observed that the integrative effect of the free movement of people, in view of the European legislatures, is even more important than the value of stability and continuity of the family. With this same idea, the principle of effectiveness and the related interpretative useful policy tends to give value to the discipline of domestic law suitable for integrating itself, in terms of compatibility, with the regulations in question, and favouring the uniform implementation of it in the whole European judicial forum, excluding, however, the relevance of the provisions which are likely to affect this uniformity. With regard to specific matters, the complete elimination of any type of *exequatur* procedure has been reached. This is the solution set by Article 40 of Regulation no. 2201/2003, regarding the decision to return the child and of its interpretation of the community case-law according to the criterion of the so called “*useful effect*”.

Concerning the rights of access referred to in Article 40 granted in an enforceable judgment given in a Member State shall be recognised and enforceable in another Member State without the need for a declaration of enforceability (no need of *exequatur*) and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin.

Even if domestic law does not provide for enforceability by operation of law of a judgment granting access rights, the Court of origin may declare that the judgment shall be enforceable, notwithstanding any appeal.

The judge of origin shall issue the certificate only if 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. The considerations mentioned above imply that member States are powerless in exercising a compatibility check on their own cultural, ethnical, and social assets when it comes to decisions

made on such matters by foreign judges. The community legislation in question, however, does not preclude the possibility to object, within the executive proceedings, any serious vices of foreign order that were not taken into account by the foreign judge. Certain fundamental rights could otherwise result as sacrificed by the abolition of the *exequatur* procedure.

Nevertheless, safeguarding the state identity remains protected by the public order clause that judges are legitimated to call upon when foreign solutions are in conflict with the relative fundamental state legislations.

The Regulation does not apply to the establishment or contesting of a parent-child relationship; decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption; the name and forenames of the child; emancipation; maintenance obligations; trusts or succession; measures taken as a result of criminal offences committed by children. Nonetheless these fields should require minimum standards within European Union: the hearing of the child should be a ground for recognition for every decisions toward family matters.

V. A CHILD FRIENDLY JUSTICE

As we have seen discussing about international law sources, the right of the child to be heard has a fundamental role in creating a child friendly justice. Children, indeed, will never trust justice unless they will be given the chance to express their view freely in a context in which they could see this right as an opportunity and not as a duty. The Council of Europe Guidelines of 2010 identify five key points of a child friendly justice before and during proceedings:

1- participation, which means that before the proceeding the child has the right to be informed and during the proceeding he or she has right to be heard; 2- best interests of the child, which has to be assured through the right to be heard, by training of professionals and by a multidisciplinary approach; 3- dignity; 4- protection from discrimination; 5- rule of law, which means that in proceedings involving children must be respected elements of the due process, among which a primary consideration has to be given to the avoiding undue delay.

All European Union Member States have a duty to ensure children's best interests. That's why *Council of Europe Guidelines on child-friendly justice* (paragraphs 70 to 72 of the General comments) requires member states to ensure close cooperation between different professionals to assure a child friendly justice. The various aspects of the child's situation, such as legal, psychological and cognitive issues, should be assessed by different professionals (lawyers, psychologists, police, immigration officials, social workers and mediators) working in close cooperation with each other, and thus based on a common framework.

Multi and interdisciplinary cooperation helps facilitate proceedings and decision making. It can take

many forms. It can refer to general forms of cooperation that are part of a fundamental approach to proceedings or that relate to specific cases. It can also exist across many axes: within one professional group or between different professions (such as teamwork between social and legal professionals), within or across different justice fields (such as civil/criminal procedural harmonisation), or a combination of both (such as judges and social workers exchanging good practices or working on cases with children that are involved in both criminal and civil proceedings).

Professionals often have different or even opposing viewpoints, requiring that a delicate balance be struck when protecting children's best interests. Disagreement centres principally on whether or not a child is heard and if so how many times, the amount and form of parental involvement and the number of people/professionals who should be involved and in which roles and functions. The debate reflects the need to balance children's right to participation with their need for protection, the latter a requirement for effective and child-friendly participation.

VI. HOW THE CHILD SHOULD BE HEARD

6.1. THE JUDICIAL HEARING OF THE CHILD

Child's best interests requires to ensure children the most favourable conditions in order to exercise their right to be heard. These conditions include: 1) the existence of specialised courts; 2) the compulsory of the hearing of the child, provided by national law systems; 3) the most favourable settings to exercise this right; 4) a multidisciplinary approach in order to let different subjects of proceedings cooperate.

In the light of this object, judicial hearing should be given a primary consideration. Training judges in order to develop their skills in children's hearings would reduce the costs and the lengths of civil proceedings, because it would help to reduce the use of experts.

The first problem to solve is whether to provide for specialised courts or not. Some EU Countries include a requirement for specialised courts (Italy, France, Scotland), whether other Countries provide for specialised divisions within ordinary courts (Germany, Spain, Poland, United Kingdom, Bulgaria). Training judges in order to create specialised courts would help the widespread of the judicial hearing, which should represent the major form of child's hearing, at least when the child is more than twelve years old: through a direct hearing, indeed, judges can form their opinion about the case and give the children all the information about the procedure. France, Germany and Poland specifically train judges to work with children.

It is discussed whether to allow other persons to take part to the hearing. There is agreement that the parents, except in exceptional cases, should not participate to the hearing in order not to

influence the child. It is discussed if the presence of the lawyers could adversely affect the child or could implement guarantees within the procedure. It is even more discussed if the minor's hearing should be direct or could be indirect, through a legal representative. Indirect hearing should be a residual way of hearing but could be useful when the child does not have a sufficient maturity to express his or her view freely by him or her self.

The second step is to provide for the compulsory of children's hearing within family proceedings. In many EU Countries, child's hearing is avoided when the procedure is consensual, as if the agreement between the parents allowed not to take into account the views of the child. Children's judicial hearing, indeed, regardless of the consensual nature of the procedure, should be avoided only when contrary to the child's best interests. Here are some indications emerging from the judicial practice: 1. within consensual procedure before avoiding child's judicial hearing it would be necessary to find out whether the child has been heard through his or her legal representatives; 2. when the child, informed about his or her right to be heard, refuses to express his or her views the judge should avoid the hearing; 3. when the child is particularly fragile or has experienced trauma, his hearing should not be avoided but it could be proceeded through the aid of an expert.

Some EU Countries have instituted measures in order to provide for the most favourable settings for child's hearing (Bulgaria, France, Poland, United Kingdom). Even if the child is heard by a judge, and not by an expert, it would be appropriate in many cases, in order to ensure the child the right to express his or her views freely, to identify a different place from courtrooms where the hearings could take place. The environment is very important to let the child feel free to speak. It would also be useful to provide evidence through video recording: that is common within criminal proceedings and not widespread within civil and family proceedings (only Croatia, Poland, Estonia, United Kingdom ensure this procedure). Guidelines of European Council on a child friendly justice (point 66) encourage audio-visual hearings, but it is discussed if this way of hearing – as also the use of a way mirror - disrupts the familiarity of the interview with the child. Anyway it has always to be ensured an adequate verbalization.

Even when the hearing is directed by the judge, a multidisciplinary cooperation between legal, social and psychology professionals should be ensured, even if not in the presence of the child.

6.2. PSYCHOLOGISTS AND OTHER EXPERTS

As previously pointed out, the judge always has to find out what solution meets the best interest of the child in a judicial proceeding. The best way to seek this solution is to let the child raise its voice during the trial. Unfortunately, the judge's ability to interview the minor and communicate with him, especially when the child is under the age of twelve, may not be at his best, considered that a

judge knowledge and skills are usually based on a mere juridical experience. This is why psychologists and social services play a very important role.

A juridical psychologist, in particular, is someone that has a multifaceted knowledge background. He usually needs to have a thorough knowledge of the individual psychological development theory both normal and pathological, as well as a specific knowledge of group dynamics and family structures. He also needs to have a non-superficial knowledge of the laws and judicial procedures (at least knowledge of the family law, the laws on the protection of the child, the penitentiary and its references to the Criminal Code and the Criminal Procedure). This knowledge can be obtained, except in rare cases of double psychological and legal competence, only through a specific training conducted by lawyers or judges.

The experience required are so extensive and complex that can hardly be held by individual professionals; but almost inevitably require a team effort.

Social workers also have a duty in promoting children's participation. Even very young children can be helped to express their views and perceptions of circumstances and people through drawing, talking and play. Young disabled people who are not able to speak can be supported to express their views through non-verbal ways, using computers and illustration boards for example.

As pointed out by the Council of Europe with Recommendation CM/Rec (2011)12, Social services in their work should ensure that the child is heard and taken seriously. Children should be considered and treated as full bearers of rights, as active subjects in the planning, delivery and evaluation of social services. Children should be empowered to exercise their rights in accordance with their capacity, given due weight to their age, development and individual circumstances.

Participation in social services delivery for children and families can be on different levels, both individually and as a group, through a consultative participation, recognising that children have expertise and perspectives which need to inform and affect adult decision making; and a collaborative participation, offering children the opportunity to be actively involved at any stage of decision making, initiatives, projects or services; as well as a child-led participation, facilitating the initiative of children and their own advocacy in relation to the various activities and services established to meet their needs.

Partnership with parents and parental involvement in the delivery of personal social services for children and families should be ensured without diminishing the child's right to be heard and taken seriously.

VII. REFORM PROSPECT: PROJECT PROPOSAL

1. The compulsory nature of the child's hearing is discussed: the establishment of minimum standards about minor's right to be heard would increasingly improve family law proceedings within European Union.

The project has lightened the advantages of the child's hearing within civil proceedings, showing that this hearing should be granted in every matter which affects the child's rights. Nonetheless, the compulsory nature of the hearing does not mean that judges or experts have to provide for the hearing in any cases; it means that the judge has to consider the opportunity to listen to the child and, in that case, the child has to be given the chance to express his or her view freely. In conclusion, national law systems (in accordance to European minimum standards) should provide for the right of the child to be heard, but leaves this duty on the choices, often shared, of the judge and the child about whether the listening could take place.

It should also be considered the possibility of establishing a minimum age for the hearing, as required by most of the Member States. A minimum age for the hearing should not be required: the judge should examine case by case the maturity of the child despite of his or her age. If the child does not have a sufficient grade of maturity in order to express his or her views freely, the hearing should not be excluded and the judge would have to carefully consider the chance of resorting to indirect hearing.

2. The study of different national legislations concerning children right to be heard has shown that most of the State parties of the UNCRC have adopted a formal approach to the latter. In other words, every single discipline claims the need to respect the child's point of view, but does not specify how and where the child should be heard, neither considers what consequences should arise in case of a total disinterest of the minor perspective in the judge decision making process.

This is why a more specific and complete procedure should be enacted on both national and international levels through the definition of uniform standards by European Union legislator. This discipline, in order to be suited to the child's needs, should contain the following key points.

First of all, a specific attention should be paid to the will of the minor, but the decision should not necessarily correspond to its expectations and desires, which aren't the sole criterion of the decision, but must be assessed taking into account all the other issues raised in the proceedings.

It is also important for the judge, before his hearing, to have insights on the minor, in order to decide eventually not to listen to the child if he lacks the power of discernment or when the listening could result in a decision opposed to his interests; to decide whether to proceed to the hearing directly or indirectly and to establish a better relationship with him during the hearing.

Before the hearing, the child should be given some important information, such as the fact that the hearing process is a right and not an obligation; that his point of view will be considered, but not

necessarily determine the content of the decision. The child should also be allowed to indicate how he would like to be heard.

All of these information should be given in an appropriate time frame before the listening because they constitute the fundamental premise to the concrete exercise of the right of the child. The written form is not a suitable means, because the information should be given in a personal way, and age-adjusted to the characteristics of the child. All of these information should also be confirmed by the judge within the direct listening.

The nature of the hearing of the minor is discussed: it is not a proof nor a deposition nor an interrogatory. The ambiguous nature of the listening is one of the causes of the difficulty of the choice between direct and indirect hearing.

In some cases it may be appropriate to listen to the child in a non direct form (for example if the child has a particular disease and needs neuropsychiatric assistance) and the hearing will be led through the trustee or the guardian (especially if the child requests so) or even through social service agents. In any case it is essential for the child to be aware of what he is talking about, even indirectly, and that the whole procedure is happening before the judge and concerns its interests.

The contents of the hearing should be recorded in a written paper, after the judge has made sure that he has understood the child point of view. A good recording allows the child to understand that his interests are being taken in consideration and reassures him.

At the end of the hearing, it should be explained to the child that his participation to the process is not completed and that, if he wants, he may be heard again by the judge.

The judge should also ensure that any decision, especially when it does not meet the expectations of the minor, is properly communicated and explained, delegating this function preferably to a legal representative.

In some cases, especially for measures that have a greater importance in the lifestyle of the child, it is appropriate for the same judge to communicate directly the content and meaning of the decision to the child during the course of a new meeting.

It is also discussed if the hearing should be judicial or have to be conducted by experts. In many Member States the hearing is conducted by experts because there is the belief that experts are more skilled than judges in listening to the child. Nonetheless, judicial hearing could also help in reducing the length of proceedings and the costs of justice: experts can take a lot of time to observe and listen to the child, first, and refer to judges the results of child's hearing, secondarily. To avoid the lack of expertise, judges should be trained and specialised Courts or sections of existing Courts should be encouraged. In special cases experts should intervene only to support the judge, but should never listen to the child without the participation of the judge.

3. It is necessary, because of the right of citizens of the Union and of their family members to move and reside freely within the territory of the member States, to improve the principle of mutual trust in recognition and execution of the decisions (art. 2 Regulation Brussels II *Bis*), keeping grounds of non-recognition to minimal. As a matter of fact, decisions concerning parental responsibility are non recognised only if, keeping in mind the best interest of the child, the recognition is manifestly contrary to the public policy of the requested member state (art 23 Brussels II *Bis*).

Moreover, with the abolition of the exequatur in cases of child abduction and right of access (art. 41 and 42 of Regulation Brussels II *Bis*), if 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, it's even more important to guarantee equality and non discrimination during the proceedings participation. In this way decisions will be felt as correctly adopted by the requested state for the execution.

To accomplish this, it could be necessary to encourage member States to centralize child abduction cases in specialised courts and, at the same time, to promote specific training for mediators and judges dealing with transnational proceedings involving children and the hearing of their voices; to ensure the protection of the best interests of the child through an enhanced cooperation between European judges with the aim of reducing the length of proceedings involving children and assuring their equal and complete participation.

Moreover, to avoid discrimination and specifically that social heritage of the single State could influences ruling and, even before, the way the child is being heard, the recognizing of the child's right to be heard should be a ground for non recognition of any judicial decisions in family law matters, as we know that Regulation Brussels II *Bis* does not apply to every family proceedings. Such practise constitutes a clear example of discrimination and is thus contrary to the constitutional principles of the European Union.

It could also be allowed a joint or bi-national decision whenever the dispute involves, at the same time, two opposing European legal orders. For the same reason, even a bi-national task force of mediators could be actively engaged, encouraging an amicable settlement of the dispute, hearing like that children in an equal and more easy way.

In a future perspective it could also be considered the creation of a specialised section within the Court of Justice of the European Union composed by judges and other experts in order to guarantee within the European Union a multidisciplinary approach to family matters.