

Child's Rights to Participate in Particular EU Legal Sources

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ABSTRACT

This chapter of the book will analyse the most important European Union legal sources in which the child's right to participate appears. The chapter will primarily and intensively analyse EU legal sources concerned with family law cases with cross-border implications in the field of judicial cooperation in civil matters from the 1998 Brussels II Convention to the Brussels IIb Regulation, which entered into force on August 1st 2022. This chapter will also present the development of the regulation on the expression of the child's views in these legal sources and the relevant jurisprudence of the Court of Justice of the European Union. In addition to the secondary sources of EU law, this part of the book also deals in detail with the relevant provisions of the Charter of Fundamental Rights of the European Union and the EU Strategy on the Rights of the Child, as well as the joint project of the Council of Europe and the European Commission on child-friendly justice, launched in January 2024.

KEYWORDS

participation rights, judicial cooperation in civil matters, family law cases with cross-border implications, Charter of Fundamental Rights of the European Union, Brussels IIb Regulation, hearing of the child, child who is capable of forming views, genuine and effective opportunity to express views

1. Introduction – Definition of the Topic

The previous chapters of the book analysed in detail the child's right to participate based on the relevant provisions of the UN Convention on the Rights of the Child (hereinafter: CRC), in international conventions, guidelines and recommendations adopted within the framework of the Council of Europe and the Hague Conference on Private International Law.

The subject of this chapter is to analyse the relevant European Union's regulations on the child's right to participate. Two preliminary remarks should be made.

Firstly, that all Member States of the European Union are State Parties of the CRC, and all Member States of the European Union are members of the Council of Europe

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because after all, the EU itself joined the Hague Conference on Private International Law in 2007. So, in this chapter the provisions and its comments of the above-mentioned international legal conventions and European Council's guideline¹ and recommendations will only be referred to as required, given that these legal instruments are also the part of EU law.

Secondly that in this chapter the Charter of Fundamental Rights of the European Union as a primary EU legal legislation will be examined. Among the secondary sources of EU law, only those provisions of relevant EU regulations on the child's right to participate, which were adopted in the framework of judicial cooperation in civil matters will be analysed.

2. Defining a Child's Right to Participate in the Light of International Law Standards

A child's right to participate is multifaceted.² This means that children's participation in all matters affecting them, such as in family decisions, in school and community affairs, and in addition in civil court proceedings. The latter is otherwise known as "*the child's right to be heard*". This is crucial for the realisation of children's rights and one of the basic principles of the CRC.

The UN Committee on the Rights of the Child (hereinafter: Committee) has identified Article 12 as *one of the four general principles* of the CRC. The others being the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests,³ which highlights the fact that the Article 12 establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.⁴ A child's right to participate in the procedures affecting them can be derived from the principle of the right to a fair trial under Article 6 of the European Convention on Human Rights.

In the relevant literature, most authors consider the child's right to be heard in Article 12 of the CRC to be the *most significant participation right*.⁵ The CRC itself does not use the word "participation" in this Article. Its use is explained by the Committee in its General Comment in Article 12.⁶

In its general comment the Committee found that, Article 12 of the CRC is a unique provision in a human rights treaty; it addresses the legal and social status of children who, on the one hand lack the full autonomy of adults but, on the other, are subjects of rights. Paragraph 1 of Art 12 of CRC assures, to every *child capable of forming his or*

1 Council of Europe, 2010.

2 See more about the participation's rights: Percy-Smith and Thomas, 2010; Lundy, 2007, pp. 927–942; McMellon and Tisdall, 2020.

3 See more: UN Committee on the Rights of the Child, 2013, p. 11.

4 UN Committee on the Rights of the Child, 2009, para. 2.

5 Cf.: Tóth, 2021, pp. 178–205.

6 McMellon and Tisdall, 2020, p. 160.

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 age and maturity. Paragraph 2 of Art 12 of CRC states in particular, that the child shall be afforded the right to be heard in any judicial or administrative proceedings affecting him or her.⁷ In this study, only the participation of children in civil proceedings will be analysed.⁸

It is important to emphasise that the CRC ensures the right to be heard for all children *capable of forming views*.⁹ According to the General comment of No 12. (2009) on the rights of the child to be heard, Article 12 *does not set any lower age limit on children's right to express views freely*. Some countries reported that they had set a minimum age for the right of the child to be heard, for example in custody proceedings following the separation or divorce of parents, but the Convention provides no support for this, and states cannot quote the best interests principle to prevent children from having an opportunity to express their views.¹⁰

The link between the paragraphs of Article 12 indicates that the second paragraph of Article 12 applies to children “capable of forming views,” again emphasising that *very young children should have the formal right to be heard*. As previously noted, the Convention provides no support for a set minimum age. For the child to be “provided the opportunity” implies an active obligation on the State to offer the child the opportunity to be heard, although, again, it is important to emphasise that *there is no requirement that the child express views*.¹¹

The *European Convention on the Exercise of Children's Rights* (hereinafter: ECCR) is a major instrument – adopted by the Council of Europe in 1996 – containing provisions aimed at protecting the best interests of children and promoting their rights, in particular in family proceedings (e.g. custody, access, questions of parentage, adoption, legal guardianship). The ECCR entered into force in 2000 and has been ratified by twenty European countries.¹² It provides a number of measures to allow children to exercise their procedural rights.

The ECCR essentially complements the CRC. While the CRC establishes the fundamental rights of children, the ECCR *detailed the procedural rights of children*, including the right to express views in Article 3 of the ECCR.

It is worth noting that while the CRC mentions “*child capable of forming views*” in Article 12, the ECCR refers to a “*child with sufficient understanding*” in Article 3. These are not the same legal categories. It is even more interesting that, while according to the CRC general comments, the child’s capable of forming his or her views is not linked to age, the Explanatory report of the ECCR indicates that states parties can

7 UN Committee on the Rights of the Child, 2009, para. 1.

8 Ibid.

9 See more: Wopera, 2023b, pp. 341–355.

10 UNICEF, 2007, p. 153.

11 Wopera, 2023, p. 4.

12 Council of Europe, 1996.

define an age limit¹³ above which a child can be considered as having a *sufficient level of understanding*.

3. The Charter of Fundamental Rights of the European Union

From the point of view of this chapter the Charter of Fundamental Rights of the European Union¹⁴ (hereinafter: Charter) is of outstanding importance.

The Charter comprises rights derived from the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), both recognised as general principles of the EU by the Court of Justice of the European Union (hereinafter: CJEU), in addition to so-called second generation fundamental rights, i.e. economic, social and cultural rights, and also third generation rights that are not thoroughly secured by other relevant international treaties. Among the most innovative statutes are the rights to protection of personal data (Article 8), *the rights of the child* (Article 24), the rights of the elderly to lead a life of dignity and independence (Article 25), the full integration of persons with disabilities (Article 26), environmental protection (Article 37), and consumer protection (Article 38).¹⁵

Article 24 on the ‘Rights of the child’ is included in Chapter III of the Charter entitled ‘Equality’. According to Article 24 (1) of Charter “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.” Article 24 of the Charter – in accordance with Article 12 of the CRC - ensures the right of the child to express their views freely. Nevertheless, it is worth mentioning, that paragraph 1 of Article 24 of the Charter ensures this right not only for children capable of forming a view, but for all children.

This provision is of general applicability and is not restricted to any particular proceedings. The Court of Justice of the European Union (hereinafter: CJEU) has interpreted the meaning of this provision in connection with the Council Regulation (EC) No 2201/2003 of 27th 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 (hereinafter: Brussels IIa regulation).¹⁶

13 Cf. Council of Europe, 1996, para. 6.

14 In accordance with Article 6 of the Treaty on European Union, the Charter has the same legal value as the EU treaties. It applies to EU institutions in all their actions and to EU countries when they are implementing EU law. See: <https://eur-lex.europa.eu/EN/legal-content/glossary/charter-of-fundamental-rights.html> (Accessed: 5 January 2024).

15 Bojarski, Schindlauer and Wladasch, 2014, p. 17.

16 See later in detail.

The CJEU in C-491/10. PPU. case *Joseba Andoni Aguirre Zarraga v Simone Pelz* interpreted the provisions of Article 24 (1) of the Charter.¹⁷ The CJEU found that since the Brussels IIa Regulation may not be contrary to the Charter the provisions of which give effect to the child's right to be heard, it must be interpreted in the light of Article 24 of that Charter. Moreover, recital 19 in the preamble of that regulation states that the *hearing of the child plays an important role in the application of the regulation* and recital 33 emphasises, more generally, that the regulation recognises the fundamental rights and observes the principles of the Charter ensuring, in particular, respect for the fundamental rights of the child as set out in Article 24 of the Charter. In that regard, it must first be observed that it is clear from Article 24 of that Charter and from Brussels IIa Regulation that *those provisions refer not to the hearing of the child, but to the child's having the opportunity to be heard*. First, it is a requirement of Article 24(1) of the Charter that children should be able to express their views freely and that the views expressed should be taken into consideration on matters which concern the children, solely 'in accordance with their age and maturity', and of Article 24(2) of the Charter that, in all actions relating to children, account be taken of the best interests of the child, since those interests may then justify a decision not to hear the child. (...) Accordingly, while remaining a right of the child, *hearing the child cannot constitute an absolute obligation*, but must be assessed as having regard to what is required in the best interests of the child in each individual case, in accordance with Article 24(2) of the Charter.¹⁸

The CJEU in C-490/20. case *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* stated, that the right to respect for family life, as stated in Article 7 of the Charter, must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter. Since Article 24 of the Charter, as the Explanations relating to the Charter of Fundamental Rights note, *represents the integration into EU law of the principal rights of the child referred to in the CRC* on the rights of the child, which has been ratified by all the Member States, it is necessary, when interpreting that article, to take due account of the provisions of that CRC.¹⁹

The right of a child to express their views freely is a fundamental right of the Charter and as such can be invoked directly before both international and national courts.²⁰ The significance of the Charter is further developed, in that the secondary sources of EU law must be created in accordance with Article 24 of the Charter.

17 See more: Raffai, 2016, pp. 76–86.

18 CJEU, C-491/10, *Joseba Andoni Aguirre Zarraga v Simone Pelz* 22. December 2010. paras. 60–63.

19 CJEU, C-490/20. *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* 14 December 2021. para 63.

20 The Charter introduced different kinds of provisions: rights, freedoms and principles. All of them are equally recognised in the Preamble, yet Article 51(1) provides that while "rights" should be respected, "principles" should be observed and the application of both should be promoted (freedoms are not mentioned in the article, but it is understood that freedoms are part of the broader category of rights. There are two types of rights and freedoms. The first group of rights and freedoms can be directly invoked in front of the institutions bound by the Charter. See more: Bojarski, Schindlauer and Wladasch, 2014, p. 20.

In the following, we examine how the child's right to express their views appears in secondary sources adopted in the field of judicial cooperation in civil matters. But before that, a few thoughts about the EU's children's rights strategy.

4. The EU Strategy on the Rights of the Child

The EU Strategy on the Rights of the Child (hereinafter: EU Strategy) was adopted in 2021.²¹ It is a *new comprehensive EU policy framework* to ensure the protection of rights of all children.²²

In the EU Strategy, the Commission addresses persisting and emerging challenges and proposes concrete actions to protect, promote and fulfil children's rights in today's ever-changing world. No policy regarding children should be designed without their voices. Thanks to the efforts of leading child rights agencies, the Strategy on the Rights of the Child benefitted from the input of more than 10,000 children. Their views were collected through an online questionnaire and other forms of consultation.²³

The fourth thematic area of the Strategy is the 'Child friendly justice'. This thematic area of EU Strategy acts to support a national justice system that uphold the rights and needs of children.

EU Strategy describes that children can be involved in judicial proceedings, either directly, as a defendant, victim, or witness, or indirectly when decisions would have a considerable impact on their lives. This can be the case in divorce, or custody proceedings, or in migration and status determination procedures.

Under the new EU Strategy, the Commission is for example, committed to: propose in 2022 a horizontal legislative initiative to support the mutual recognition of parenthood between Member States;²⁴ contribute to the training of justice professionals on the rights of the child and child friendly justice, in line with the European judicial training strategy for 2021-2024, and through the European Judicial Training Network (EJTN), the Justice and CERV programmes, as well as the European Training Platform of the EU e-justice portal; strengthen the implementation of the 2010 Guidelines on Child-friendly Justice with the Council of Europe.²⁵

21 See more: Benyusz, 2021, pp. 149–162.

22 European Commission, 2021a.

23 Ibid.

24 See: European Commission, 2022.

25 See: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/rights-child/child-friendly-justice_en (Accessed: 12 January 2024).

5. The Joint Council of Europe and European Commission Project on Child-Friendly Justice

This project started in January 2024 and is closely related to EU Strategy. The project objective is to contribute to improved protection of children in contact with the law – as offenders, victims or witnesses in non-judicial, judicial such as civil and criminal cases and administrative proceedings – across Europe by fostering a practical implementation of the Council of Europe Guidelines on Child-Friendly Justice.

This Project aims to develop child-friendly frameworks, strengthen the capacities of specialised staff so that they are able to use child-friendly procedures, and raise awareness of children in contact with the law and their parents on children's rights *before, during and after* judicial proceedings.

Belgium, Poland and Slovenia have been selected as the focus countries to pilot the implementation of activities at national and local levels. Three additional countries, Greece, Hungary and Portugal have joined the project as valued partners.

The project is co-funded by the European Commission and the Council of Europe and implemented by the Children's Rights Division of the Council of Europe in close co-operation with partner countries from 1st January 2024 to 31st March 2026.²⁶

6. The Development of the Child's Right to Express Views in the Field of Judicial Cooperation in Civil Matters

The regulation of the child's right to express their views has undergone remarkable development in the field of judicial cooperation in civil matters.

Article 81 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) defines the framework of judicial cooperation in civil matters in Title V 'Area of freedom, security and justice'.

According to Article 81 (3), measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a *special legislative procedure*. The Council *shall act unanimously* after consulting the European Parliament. The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes its opposition known within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.

26 See more information: <https://www.coe.int/en/web/children/child-friendly-justice-project> (Accessed: 12 January 2024).

Legislation affecting the field of family law has a long history. In the following, the development of “European family law” in EU legal sources regarding the child’s right to express views will be analysed.

6.1. The Brussels II Convention

Above all, it must be noted that this source of law is not yet part of EU law, but rather an international treaty between the member states of the European Communities. However, given that it is the first step in family law legislation, its mention is obligatory.

On May 28th 1998, the Member States of the European Communities signed the *Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters* (hereinafter: Brussels II Convention), which the legal literature named the Brussels II Convention after the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter: Brussels Convention).

The Brussels II Convention – as with the Brussels Convention – was a so-called “double treaty”, containing provisions on jurisdiction as well as on the recognition and enforcement of judgments. Its purpose was primarily to create a unified jurisdictional system within the European Union, regarding civil proceedings relating to divorce, legal separation or marriage annulment and the issue of parental responsibility for the children of both spouses; and secondly, to ensure the free circulation of decisions within the Union in the areas under its scope.

These rules were included in the framework of an independent international convention because the scope of the Brussels Convention did not apply to matters relating to personal status. At the beginning of the 1990s, negotiations began on extending the scope of the Brussels Convention to family law matters, especially the dissolution of the marriage as a result of which a Working Committee was set up in 1993. However the draft prepared by the Working Committee soon focused on formulating an independent convention dealing with matrimonial matters, which following its regulatory technique, was based in many respects on the Brussels Convention.

The Brussels II Convention, due to its scope, *did not contain special rules for the hearing of the child* involved in the procedure. Nevertheless, among the rules dictating the grounds of non-recognition in Article 15 of the convention, a reference regarding the hearing of the child can already be found.

According to Article 15 (2) (b) a judgment relating to the parental responsibility of the spouses given on the occasion of matrimonial proceedings shall not be recognised if it was given, except in case of urgency, without *the child having been given an opportunity to be heard*, in violation of the fundamental principles of procedure of the Member State in which the recognition is being sought.

In the Explanatory Report of Professor Borrás, it was pointed out that as in the 1996 Hague Convention²⁷ (Article 23(2) (b) and (c)), the grounds of non-recognition include (in points (b) and (d)) the fact that the child was not given an opportunity to be heard or that any person claiming that the judgment infringed his or her parental responsibility was not given an opportunity to be heard. The child must be heard in accordance with the rules applicable in the Member State concerned, which must include the rules in the United Nations Convention of 20th November 1989 on the Rights of the Child and in particular Article 12.²⁸

6.2. *Brussels II Regulation*

The Brussels II Convention did not enter into force because the area of judicial cooperation in civil matters became Community law, it was replaced by the Council Regulation (EC) No 1347/2000 of 29th May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (hereinafter: Brussels II Regulation), which essentially took over the structure and the provisions of the Brussels II Convention.²⁹

This was one of the first EU regulations in the field of judicial cooperation in civil matters under the Treaty of Amsterdam. The scope of the Brussels II Regulation was the same as the scope of the Brussels II Convention. The regulation covered cases related to parental responsibility for the children of both spouses, as long as they were initiated during divorce, separation or marriage annulment proceedings, and the child's habitual residence is in this Member State.

On July 3rd 2000, France presented a proposal to amend the Brussels II Regulation, which sought to extend the scope of the regulation to all civil procedures relating to parental responsibility, with reference to ensuring the equal rights of children.

The aim of the initiative entitled “French initiative on rights of access to children” was to extend the unified jurisdiction system established by the Brussels II Regulation, as well as a common recognition and enforcement rules in cases related to parental responsibility, where a legal dispute related to parental responsibility was not related to civil proceedings concerning divorce, legal separation or marriage, but

27 The 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 (HCCH 1996 Child Protection Convention) is a multilateral treaty covering a broad range of civil measures to protect children in cross-border situations. The Convention provides uniform rules that prevent conflicting decisions, enable cross-border co-operation between authorities, and secure the recognition and enforcement of measures among Contracting Parties. The “Child Protection Section” provides information about the operation of the Convention and the work of the Hague Conference in monitoring its implementation and promoting international co-operation in the area of child protection. See: <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-protection> (Accessed: 16 January 2024).

28 Borrás, 1998.

29 See more: McEleavy, 2002, pp. 883–908; Wopera, 2012, pp. 37–45.

had arisen independently of it, or when it came to the case of parental responsibility over children born out of wedlock.

Article 15 (2) point b) of the Brussels II Regulation is completely the same as the provision of Brussels II Convention cited in point 4.1. It contains a provision for the grounds of non-recognition of judgment if the court did not provide the opportunity to hear the child.

As a result of the French initiative, the Council repealed the Brussels II Regulation and the European Union adopted Council Regulation (EC) No 2201/2003 of 27th November 2003 concerning the jurisdiction, recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter: Brussels IIa Regulation) with a significantly expanded scope, which entered into force on 1st March 2005.

6.3. The Brussels IIa Regulation

The scope of the Brussels IIa Regulation (hereinafter in this section: Regulation) in matrimonial cases is the same as the Brussels II Convention, but the scope of the regulation essentially covers the entire spectrum of matters of parental responsibility.³⁰ Based on the nearly 20-years practice of the CJEU, it can also be established that the CJEU extensively interprets the concept of parental responsibility.³¹

In view of the significant extension of the scope of the Regulation, the central character of parental responsibility matters, the child, also became the focus of the ruling. In the reform of the Regulation, an important goal was to take the interests of children more strongly into account, as this is referred to in several recitals of the Regulation.³²

However, the child's right to participate has not yet been separately regulated and there was no harmonised obligation for the courts of the Member State exercising jurisdiction in parental responsibility matters to provide the child with an opportunity to express their own views. The Recital (19) highlights the importance of the child's participation. According to Recital (19) the hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify applicable national procedures.

The hearing of the child was regulated among the provisions of the Regulation only in child abduction cases in Article 11(2), but the Regulation did not formulate

30 According to Article 1 (2) the matters parental responsibility deal with: (a) rights of custody and rights of access; (b) guardianship, curatorship and similar institutions; (c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child; (d) the placement of the child in a foster family or in institutional care; (e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

31 See e.g.: Judgment of the Court, 26 April 2012 C-92/12. *PPU Health Service Executive v S.C. and A.C.*

32 See e.g.: Recitals (5), (12), (13), (19), (20).

such a requirement for other provisions related to parental responsibility. Article 11 regulates the procedural rules of the return of the child in child abduction cases.

According to Article 11(2) when applying Articles 12 and 13 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter: the 1980 Hague Convention), it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate with regard to their age or degree of maturity.

An important difference to the 1980 Hague Convention is that pursuant to Article 11 (2), during the procedure, it must be ensured that the child is given the opportunity to be heard. The 1980 Hague Convention does not specifically require the participation of the child in the procedure. In several Member States, this resulted in the child either not being interviewed during the procedure or being interviewed by a psychological expert. The hearing may be waived on the basis of the child's age or graduation level, but it is not permitted to waive the hearing due to being out of line.

In the case *C-491/10 PPU Joseba Andoni Aguirre Zarraga v Simone Pelz*³³ the CJEU comprehensively interpreted the regulations related to the hearing of the child in connection with Article 24 of Charter, and with the certificate issued according to Article 42 of the Regulation. The CJEU stated that it was clear from Article 24 of Charter and from Article 42 (2) (a) of Regulation that those provisions refer not to the hearing of the child per se, but to the child having the opportunity to be heard. Firstly, it is a requirement of Article 24 (1) of the Charter that children should be able to express their views freely and that the views expressed should be taken into consideration on matters which concern the children, solely ‘in accordance with their age and maturity’, and of Article 24 (2) of the Charter that, in all actions relating to children, the best interests of the child be taken into account, since those interests may then justify a decision not to hear the child. Secondly, it is a requirement of Article 42 (2) (a) of the Regulation that the child be given the opportunity to be heard ‘unless a hearing was considered inappropriate with regard to his or her age or degree of maturity’.

33 The main factual elements of the case from the point of view of hearing the child: Mr Aguirre Zarraga, of Spanish nationality (Father), and Ms Simone Pelz, of German nationality (Mother), were married in 1998 at Spain. In 2000 a daughter was born from the marriage, named Andrea. The family’s habitual residence was in Spain. At the end of 2007, the relationship of the spouses broke down, they separated, and thereafter both parents brought divorce proceedings before the Spanish courts. Both Ms Pelz and Mr Zarraga sought *sole rights of custody*. By judgment 12 of May on 2008 of the Spanish Court the Father get sole rights of custody with provisional measure, while the Mother was granted rights of access. Following that judgment, Andrea went to her father’s home. Ms Pelz had repeatedly expressed her wish to settle in Germany with her new partner and her daughter, the court considered that the award of custody to the mother would have been contrary to the conclusions of that report of the child psychologist expert. In June 2008 Ms Pelz moved to Germany and settled there. In August 2008, at the end of the summer holidays which she had spent with her mother, Andrea remained with her mother in Germany. Since then, Andrea has not returned to her father in Spain. Since the Spanish court handling the case considered that Andrea had been living with her mother in Germany in breach of its judgment of 12 May 2008, on 15 October 2008 that court handed down a fresh judgment in respect of provisional measures requested by the Father, which included prohibiting Andrea from leaving Spanish territory in the company of her mother, any member of her mother’s family, and suspended until final judgment the rights of access previously granted to the Mother. In July 2009 the proceedings in relation to rights of custody were continued before the same court. The court considered that it was necessary both to obtain a fresh expert report and to hear Andrea personally and fixed dates for both in Spain. However, neither Andrea nor her mother attended on those dates. According to the referring court, the Spanish court rejected the Mother’s application that she and her daughter be permitted to leave Spanish territory freely after Andrea’s hearing. Nor did that court agree to Mother’s request that Andrea be heard by video conference. By judgment of 16 December 2009 the Spanish court awarded sole rights of custody in respect of Andrea to her father. Ms Pelz brought before an appeal against this judgment which included the request that Andrea be heard.

Meanwhile, the procedure for the return of child was ongoing in Germany, where the second-instance court found that the Spanish Court did not obtain Andrea’s current views and was therefore unable to take account of those views in its judgment of 16 December 2009 concerning rights of custody in respect of that child. According to the German Court’s opinion the efforts made by the Spanish court to hear Andrea were inadequate given the importance attached to taking into account the child’s views in Article 24(1) of the Charter of Fundamental Rights. The German court initiated the preliminary ruling procedure in the case.

Consequently, it is for the court which has to rule on the return of a child to assess whether such a hearing is appropriate, since the conflicts which make a judgment awarding custody of a child to one of the parents necessary, 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, or even harmful to the psychological health of the child, who is often exposed to such tensions and adversely affected by them. Accordingly, while remaining 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(2) of the Charter of Fundamental Rights. It follows that, as provided for in Article 24 of the Charter and the first subparagraph of Article 42(2) of Regulation, it is not a necessary consequence of the right of the child to be heard, that a hearing before the court of the Member State of origin must take place, but that right does require that the legal procedures and conditions which enable the child to express his or her views freely are made available to that child and that those views are obtained by the court. In other words, whilst it is not a requirement of Article 24 of the Charter and Article 42(2)(a) of Regulation 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*.³⁴

The CJEU therefore added two very important adjectives to the text of the Article 12 of the CRC: the child must be given a *genuine* and *effective* opportunity to express views.

In addition, in Article 23 (b) there is a reference to hearing the child on the grounds of non-recognition of judgments relating to parental responsibility. According to this provision a judgment relating to parental responsibility shall not be recognised if it was 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.

6.4. The Brussels IIb Regulation

On 15th April 2014, the Commission adopted a report on the application of the Brussels IIa Regulation.³⁵ The report concluded that the Brussels IIa Regulation was a well-

34 Judgment of the Court 22 December 2010 in Case C-491/10 PPU *Joseba Andoni Aguirre Zarraga v Simone Pelz*, points (62)–(66).

35 See the commentaries of the Regulation in Hungarian and English: Wopera, 2023a; González Beilfuss et al., 2023.

functioning instrument that had brought important benefits to citizens, but that the existing rules could be improved.

Based on Article 65 of the Brussels IIa Regulation, the final report³⁶ on evaluation and amendment of the regulation was published in 2015. According to this report, the number of international couples has been increasing continuously since 2008, along with the number of international divorces and cross-border cases related to parental responsibility.

Based on the experiences of the judicial practice of the Brussels IIa Regulation, the proposal for the recast of the regulation was prepared for 2016, and after years of negotiations, on June 25th 2019, the Council adopted the Council Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) (hereinafter in this section: Regulation or Brussels IIb Regulation), which entered into force on August 1st 2022. It should be emphasised that the Brussels IIb Regulation is a recast of the Brussels IIa Regulation and not a new regulation.

There are many innovative provisions in the Brussels IIb Regulation, but if one thing were to be pointed out *as a general characteristic*, it is the strong child-centred approach of the Regulation, which is much more effective than in the Brussels IIa Regulation. The Brussels IIa regulation is characterised by the absolute priority of the enforcement of judgments. If an enforceable judgment was made, the enforcement procedure had to be carried out even if it was seriously harmful to the child, and only in exceptional cases could the enforcement be suspended or terminated.

Article 56 of the Brussels IIb Regulation already allows the suspension of enforcement proceedings and the refusal of enforcement, if in the best interests of the child. According to Article 56 (4) in exceptional cases, the authority competent for enforcement or the court may, upon application of the person against whom enforcement is sought or, where applicable under national law, of the child concerned or of any interested party acting in the best interests of the child, *suspend the enforcement proceedings if enforcement would 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*. Where the grave risk referred to in paragraph 4 is of a lasting nature, the competent authority charged with enforcing the judgement of the court, upon application, may refuse the enforcement of the decision.

This child-centred approach is also clearly detectable in other provisions of the Brussels IIb Regulation. The best example of this is Article 21, which constitute the right of the child to express his or her views.

It is considered a big step in the field of the child's right to express their views that the Brussels IIb Regulation already establishes the child's right to express views in a separate article, and not only in child abduction cases in return proceedings, but in all matters related to parental responsibility.

36 European Commission, 2015.

We must mention that Article 26 of Chapter III of the Regulation, which defines the rules related to 'International Child Abduction', refers back to Article 21 of the Regulation.³⁷

According to Article 21

'(1) When exercising their jurisdiction, the courts of the Member States shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body. (2) Where the court, in accordance with national law and procedure, gives a child an opportunity to express his or her views in accordance with this Article, the court shall give due weight to the views of the child in accordance with his or her age and maturity.'

These provisions can be examined in more detail.

6.4.1. 'The Court Having Jurisdiction'

The Regulation establishes an obligation for the court with jurisdiction regarding the child's expression of views. According to the case-law of the CJEU the term 'court' should be given a broad meaning, so as to also cover administrative authorities, or other authorities, such as notaries, who exercise jurisdiction in certain matrimonial matters or matters of parental responsibility.³⁸

The question arises, when the *court orders a provisional, including protective measures* pursuant to Article 15 of the Regulation, does it have this obligation?

Above all, it should be mentioned that a significant change of attitude can be observed regarding provisional including protective measures in the Regulation. Article 15 of the Regulation states that in urgent cases the court ordering a provisional including protective measure *has jurisdiction* to do so, even if the court of another Member State has jurisdiction over the substance of the matter.³⁹

In my opinion, the court ordering provisional including protective measures has an obligation to provide an opportunity to the child to express views, and it can only ignore this obligation if the exceptional urgency of the case does not allow this. This interpretation is in accordance with the provisions of Article 39, paragraph 2, point b of the Regulation. (See later in detail)

6.4.2. 'The Child Who Is Capable of Forming Views'

The court must determine whether the child is capable of forming views or not. As was mentioned earlier, and as it was presented in detail in earlier chapters of this

37 According to Article 26 'Right of the child to express his or her views in return proceedings': Article 21 of this Regulation shall also apply in return proceedings under the 1980 Hague Convention.

38 Recital (14) of the Regulation.

39 See more: Ágnes Váradi: Article 15 in Wopera, 2023a, pp. 123–127.

book, the definition of a child capable of forming views should be determined in accordance with the General Comment to Article 12 of the CRC.

The fact that a child is very young or in a vulnerable situation (e.g. has a disability, belongs to a minority group etc.) does not deprive him or her of the right to express his or her views. The views of young children may be expressed by non-verbal forms of communication including play, body language, facial expressions, drawing and painting. Age and maturity are relevant when the court has to consider the weight of the views of the child in the decision-making process. The assessment of the capability of the child does not depend either on his or her request to be heard or on the request of the parents.⁴⁰

If the court establishes that the child is capable of forming a view, it must provide this child with the opportunity to express his or her views freely. The court must record this assessment in the certificate attached to its judgment.

6.4.3. *'In Accordance With National Law'*

The court having jurisdiction must act in accordance with its national law, including national substantive law and procedural law. According to the Practice Guide, the Regulation does not modify the applicable national law and procedures on the question of how to establish the capability of the child to form his or her own views. Courts in the Member States develop their own techniques and strategies. Some courts do so directly; others commission special experts, such as psychologists, who then report back to the court. Whichever technique is deployed, it is a matter for the court itself to decide whether or not the child is capable of forming his or her own views.⁴¹

The requirement “in accordance with national law” means the procedural law regulation of the Member State. According to their own procedural rules, the member states determine how and when the child is guaranteed the right to express views. In the comparative law chapter of this book, the individual national reports show which procedural regulations apply in some Central-European countries.

The Regulation should, however leave the question of *who will hear the child* and *how the child is heard* to be determined by national law and procedures of the Member States. Consequently, it should not be the purpose of this Regulation to set out whether the child should be heard by the judge in person or by a specially trained expert reporting to the court afterwards, or whether the child should be heard in the courtroom or in another place or through another means.⁴² National law is also applicable to the provision of information to the child. In general, listening to the child needs to be carried out in a manner which takes account of the child's age and maturity. Assessing the views of all children should be done with expertise and care and in a manner compatible with the age and maturity of the child.⁴³

40 European Commission: Directorate-General for Justice and Consumers and Musseva, 2023 (hereinafter: Practice Guide), p. 159.

41 Ibid.

42 Recital (39) of the Regulation.

43 Practice Guide, pp. 162–163.

6.4.4. 'Genuine and Effective Opportunity to Express Views'

The court must provide the child has a genuine and effective opportunity to express views; it cannot be formal. With this, the requirement imposed by the CJEU in the previously cited Zarraga case⁴⁴ was also included in the normative text of the Article 21 of the Regulation. In this regard, we emphasise that neither during or since the Zarraga case has the CJEU explained what can be considered a genuine and effective opportunity. This must be considered by the court in each case.

In the light of the earlier described facts of the Zarraga case, we can conclude what the CJEU meant by genuine and effective opportunity. The Spanish court of first instance ordered the hearing of the child living in Germany, but even before the hearing, it decided that the child could not leave the territory of Spain, unless for some important reason, e.g. she returns for her hearing. The Spanish court rejected the mother's application that she and her daughter be permitted to leave Spanish territory freely after the child's hearing, or that the child be heard via video conference, which was rejected by the Spanish court. So, it can be concluded that the *child was not given a genuine and effective opportunity to express her views*, because by appearing in court she would have risked not being able to leave the territory of Spain after her hearing.

The Practice Guide points out, that *all appropriate legal tools* must be made available for the child to express his or her views freely. Thus, the court of the Member State concerned is required to take all measures which are appropriate for the arrangement of the hearing, regarding the best interests of the child and the circumstances of each individual case. The court should, in so far as possible, and always taking into consideration the best interests of the child, use all means available to it under national law as well as the specific instruments of international judicial cooperation, including when appropriate, those provided for by the Taking of Evidence Regulation.⁴⁵ The reference to the Taking of Evidence Regulation in Recital 39 is intended to clarify that the hearing of the child falls within its scope for the purposes of this Regulation, irrespective of the national classification of the hearing as evidence, or another procedural institute. In addition, where it is not possible to hear a child in person, and where the technical means are available, the court might consider holding a hearing via videoconference or by means of any other communication technology⁴⁶ unless, on account of the particular circumstances of the case, the use of such technology would not be appropriate for the fair conduct of the proceedings.⁴⁷

44 Judgment of the Court 22 December 2010 in Case C-491/10 PPU Joseba Andoni Aguirre Zarraga v Simone Pelz, points (62)–(66).

45 European Parliament and European Council, 2020.

46 See more: European Commission, 2021b.

47 See: Recital 53; Practice Guide, pp. 160–161.

6.4.5. 'Right and Not an Obligation'

Article 21 does not require the hearing of the child, but the provision of the opportunity to express views: the child is free to decide whether or not to exercise his or her right to express their views.

According to the Recital (39) of the Regulation while remaining a right of the child, hearing the child *cannot constitute an absolute obligation*, but must be assessed, taking into account the best interests of the child, for example in cases involving agreements between the parties.

If, according to the court, the child must be provided with the opportunity to express his opinion, his opinion must also be taken into account.

6.4.6. 'Giving Due Weight to the Child's Views'

If the child makes use of the opportunity to freely express his or her views directly or through a representative or an appropriate body, the court of the Member State shall give due weight to these views in accordance to his or her age and maturity. The consideration of the views of the child is of particular importance when assessing his or her best interests (see Recital 39). Any decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child to influence the determination of their best interests.

The obligation to give due weight means that it is not sufficient to merely listen to the child; and in addition, the views of the child must be taken into consideration. The reasoning of the court in this regard should be part of the decision, in particular when the decision does not follow the child's views. The court must evaluate the views of the child with regard to the particular circumstances of each case and of each individual child, as the level of different children of the same age's development may differ.

In any case, the obligation of the court to give due weight to the child's views does not mean that the court is bound by the wishes of the child when deciding on the subject matter, as decisions need to be taken according to the best interests of the child.⁴⁸

6.4.7. *The Consequences of Violating the Child's Right to Express Views*

The provisions of refusal of recognition and enforcement of decisions show that there are serious consequences for violating the rules of the rights of the child to express views.

Article 39 (2) of the Regulation establishes the possibility to refuse recognition, in case the child's right to express views is ignored. According to this provision the recognition of a decision in matters of parental responsibility *may be refused* if they were given without the child who is capable of forming his or her own views having being given an opportunity to express his or her views in accordance with Article 21, except where: the proceedings only concerned the property of the child and provided

48 Practice Guide, pp. 161-162.

that giving such an opportunity was not required in light of the subject matter of the proceedings; or there were serious grounds to take into account, in particular, the urgency of the case.

As was mentioned earlier, the grounds for refusal related to the child's right to express views can be found in Article 23(b) of the Brussels IIa Regulation. In order to make the grounds for refusal more prominent in the Regulation, they were made independent grounds for refusal named in paragraph 2 of Article 39, if the court did not provide an opportunity for the child, who is capable of forming his or her own views during the procedure.

It should be emphasised that, contrary to the mandatory grounds for refusal in Article 39 (1), a refusal of recognition is not mandatory in the case of a violation of the child's right to express views.

The court must consider whether the absence of the opportunity to express views affected the substance of the decision to such an extent that the refusal to recognise was justified.

Two exceptions to the duty to hear the child where the absence of hearing may not be a reason for the refusal of recognition and enforcement stem from Article 39(2). The first exception concerns proceedings related only to *the property of the child*, provided that giving an opportunity to the child to express his or her own views is not required in light of the subject matter of the proceedings. The second exception refers to the existence of serious grounds, to be established taking into account, in particular, the *urgency of the situation*, (for example when ordering provisional, including protective, measures).⁴⁹ Such serious grounds could be given, for instance, where there is imminent danger to the child's physical and psychological integrity or life, and any further delay might increase the risk that this danger materialises.⁵⁰

All exceptions to the duty to hear the child *should be interpreted very restrictively*. In particular it should be borne in mind that the rights of the child are significant in relation to proceedings affecting the child, and that generally decisions about the future of a child and his or her relationship with parents and others are crucial in ensuring the best interests of the child.⁵¹

6.5. Proposal in Matters of Parenthood

It should briefly be mentioned that the Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (hereinafter: Proposal) is being prepared in the field of judicial cooperation in civil matters.

49 Practice Guide, p. 164.

50 Recital (57).

51 Practice Guide, p. 165.

The Proposal concerns the recognition in a Member State of the parenthood⁵² of a child as established in another Member State. It aims to protect the fundamental rights and other rights of children in matters concerning their parenthood in cross-border situations, including their right to an identity, to non-discrimination and to a private and family life, taking the best interests of the child as a primary consideration. This Proposal also aims to provide legal certainty and predictability and to reduce litigation costs and burden for families, as well as national courts and other competent authorities in connection with proceedings for the recognition of parenthood in another Member State. To attain these aims, this Proposal should require Member States to recognise for all purposes the parenthood of a child as established in another Member State. The Proposal shall apply to civil matters of parenthood in cross-border situations.

Article 15 of the Proposal, like the Brussels IIb Regulation, provides in title ‘Right of children to express their views’ about the child’s right to express views. According to this Article, 1 when exercising their jurisdiction under this Regulation, the courts of the Member States shall, in accordance with national law and procedure, provide children below the age of 18 years whose parenthood is to be established and who are capable of forming their own views, with a genuine and effective opportunity to express their views, either directly or through a representative or an appropriate body. 2. Where the court, in accordance with national law and procedure, gives children below the age of 18 years an opportunity to express their views in accordance with this Article, the court shall give due weight to the views of the children in accordance with their age and maturity.”

If adopted, this Proposal will be the second instrument in which the provision of the child’s right to express views appears specifically in the field of judicial cooperation in civil matters.

7. Closing Remarks

The development is clearly visible in the field of the child’s right to participate, as the EU creates more precise provisions in the EU legal sources adopted and about to be adopted in the field of judicial cooperation in civil matters, which clearly strengthen the child’s right to express an opinion. Combining the provisions on the child’s right to express views with the rules on refusal of recognition and enforcement in the Brussels IIb Regulation is an effective tool for the implementation of these provisions. However, in order for these provisions to be implemented in the practice of the courts of the member states, a change of attitude is necessary, which requires balancing the best interests of the child and the purpose of the civil procedure; which is precisely what child-friendly justice means.

52 Parenthood means the parent-child relationship established in law. It includes the legal status of being the child of a particular parent or parents.

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