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The hearing of the child in the Brussels IIa Regulation and its Recast Proposal

Benedetta Ubertazzi*

The right of children to be heard is acknowledged as a fundamental human right, as the European Court of Human Rights in the case *Iglesias Casarrubios and Cantalapiedra Iglesias v Spain* of 11 October 2016 emphasized. In the Brussels IIa Regulation this right plays a crucial role. On 30 June 2016, the European Union Commission issued a Recast Proposal of this Regulation, which suggests amending it in several aspects including the hearing of the child. This paper analyzes how the Brussels IIa Regulation addresses the right of the child to be heard and the amendments suggested by its Recast Proposal.

Keywords: cross-border families; parental responsibility; child; hearing; Brussels IIa Regulation; Recast Proposal

A. Introduction

In the European Union (EU) the number of international families is now estimated at 16 million and increasing. Currently within the EU there are 140,000 international divorces and around 1800 parental child abductions per year.¹ In line with these numbers, cross-border family disputes are also

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¹See EU Commission, *Helping Parents and Children Involved in Cross-Border Family Proceedings, The Brussels IIa Regulation – What Will Change with the New Rules?*, July 2016, 1, http://ec.europa.eu/justice/civil/files/family-matters/brussels2_factsheet_en.pdf accessed on 2 November 2016; EU Commission, *The Proposed New Rules of the Brussels IIa Regulation: Questions and Answers*, Brussels, 30 June 2016, 1, http://europa.eu/rapid/press-release_MEMO-16-2359_it.htm accessed on 2 November 2016; European Parliament, *Cross Border Parental Child-Abduction in the European Union*, Study for the LIBE Committee, 2015, 36 ff, [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510012/IPOL_STU\(2015\)510012_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510012/IPOL_STU(2015)510012_EN.pdf) accessed on 2 November 2016. Data on child abductions are available at “INCASTAT”, a database created by the Hague Conference on Private International Law for monitoring the implementation of the 1980 Hague Child Abduction Convention. INCASTAT collects information through questionnaires distributed to National Central Authorities of the States Parties. See the Child Abduction Section of the Hague

increasing,² as well as complications for children to maintain relations with both parents who may live in different countries. Cross-border judicial cooperation to give children a secure legal environment to maintain these relationships is therefore crucial. Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility was then enacted, repealing Regulation (EC) No 1347/2000 (hereinafter: the Brussels IIa Regulation).³ This Regulation applies to two areas of family law, namely matrimonial matters and parental responsibility; it determines which country's court has international jurisdiction for divorce, custody and access procedures; it ensures that judgments rendered in one Member State are recognized and enforced in another; and it regulates parental child abduction cases, where a parent wrongfully takes (or retains) a child from (or in) one EU country to (or from) another. The Brussels IIa Regulation does not cover applicable law. Therefore, in the EU the law applicable to divorce is determined by the Rome III Regulation⁴ and the law applicable to parental responsibility is determined by the 1996 Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.⁵

Conference Website: <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction> accessed on 2 November 2016.

²*Ibid.*

³[2003] OJ L338/1. This Regulation applies since 1 March 2005 to all Member States except Denmark. To Bulgaria, Romania and Croatia the Regulation applies from the beginning of their membership, namely Bulgaria and Romania 1 January 2007, Croatia 1 July 2013. On this Regulation see K Boele-Woelki and C Gonzalez Beilfuss (eds), *Brussels II Bis: Its Impact and Application in the Member States* (Oxford University Press, 2007); K Boele-Woelki and M Jäntarä-Jareborg, "Protecting Children Against Detrimental Family Environments under the 1996 Hague Convention and the Brussels II Bis Regulation", in K Boele-Woelki, T Einhorn, D Girsberger and S Symeonides (eds), *Convergence and Divergence in Private International Law, Liber Amicorum K. Siehr* (Schulthess, 2010), 619; N Lowe, M Nicholls and M Everall, *International Movement of Children: Law, Practice and Procedure* (Jordan Publishing, 2004). See also the bibliography indicated in the following footnotes.

⁴The Rome III Regulation applies in just over half of the Member States, since it was adopted through the procedure of enhanced cooperation. See Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III), [2010] OJ L343/10. On this Regulation see C Gonzalez-Beilfuss, "The Rome III Regulation on the Law Applicable to Divorce and Legal Separation: Much Ado about Little", in A Bonomi and C Schmid (eds), *Droit international privé de la famille, Les développements récents en Suisse et en Europe* (Schulthess, 2013), 29.

⁵This Convention was adopted under the auspices of the Hague Conference on Private International Law and ratified by all EU Member States "in the interest of the European Community". Italy was the last Member State to ratify, but did so on 30 September 2015. The Convention entered into force in Italy on 1 January 2016. See the text of the

Ten years and several judgments of the Court of Justice of the European Union (hereinafter: CJEU) after the entry into application of the Brussels IIa Regulation,⁶ the Commission assessed its operation in practice. It adopted a report on 15 April 2014 and launched an extensive consultation of the interested public, Member States, institutions and experts. The report suggested amendments and received 193 responses.⁷ The Brussels IIa Regulation was overall considered to work well, apart from several shortcomings in the area of parental responsibility. Thus, on 30 June 2016 the Commission issued a Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and in matters of parental responsibility, and on international child abduction (recast) (hereinafter: the Brussels IIa Recast Proposal).⁸ This proposal suggests amending the Brussels IIa Regulation in six main matters related to parental responsibility, namely the child return procedure, the placement of the child in another Member State, the requirement of exequatur, the actual enforcement of decisions, the cooperation between central authorities and the hearing of the child.

The hearing of the child is the subject matter of this paper. In the recent past, certain States did not grant the right of a child to be heard in judicial proceedings.

Convention and the States parties at http://www.hcch.net/index_en.php?act=conventions.status&cid=70 accessed on 2 November 2016. On the Convention see N Lowe, "The 1996 Hague Convention on the Protection of Children – A Fresh Appraisal" (2002) *Child and Family Law Quarterly* 14, 191–206, available at SSRN: <http://ssrn.com/abstract=2089365> accessed on 2 November 2016; N Lowe and M Nicholls, *The 1996 Hague Convention on the Protection of Children* (Jordan Publishing, 2012).

⁶See K Lenaerts, "The Best Interests of the Child Always Come First: The Brussels II Bis Regulation and the European Court of Justice" (2013) 20 *Jurisprudencija/Jurisprudence* (online) 1302; A Dutta and A Schulz, "First Cornerstones of the EU Rules on Cross-Border Child Cases: The Jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation from C to Health Service Executive" (2014) 10 *Journal of Private International Law* 1; T Kruger and L Samyn "Brussels II Bis: Successes and Suggested Improvements" (2016) 12 *Journal of Private International Law* 132, 145 ff.

⁷See European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgements in Matrimonial Matters and the Matters of Parental Responsibility, Repealing Regulation (EC) No 1347/2000*, Brussels, COM(2014) 225 final, 15 April 2014, http://ec.europa.eu/justice/civil/files/matrimonial_act_part1_v3_en.pdf accessed on 2 November 2016.

⁸See European Commission, *Proposal for a Council Regulation on Jurisdiction, the Recognition and Enforcement of Decisions in Matrimonial Matters and the Matters of Parental Responsibility, and on International Child Abduction (Recast)*, COM(2016) 411/2, http://ec.europa.eu/justice/civil/files/family-matters/brussels2_regulation_en.pdf accessed on 2 November 2016. See P Beaumont, L Walker and J Holliday, "Parental Responsibility and International Child Abduction in the Proposed Recast of Brussels IIa Regulation and the Effect of Brexit on Future Child Abduction Proceedings", Centre for Private International Law Working Paper No. 2016/6, <https://www.abdn.ac.uk/law/research/working-papers-455.php> accessed on 6 August 2017.

This was because parents were believed to do what was in their child's best interests; children were to be protected from the traumatizing event of taking sides in their parents' dispute; and children were considered incapable to act.⁹ Today, research reveals that not listening to children in judicial proceedings which affect them harms children more than hearing their voices; that children want to be heard; and that taking children's views into account empowers not only the child but also the credibility of the entire proceeding.¹⁰

Therefore, a process is taking place to recognize children as rights holders and to hear their voices in judicial proceedings. In this process the right of children to be heard is acknowledged as a fundamental human right, confirmed by the UN, the Council of Europe and the EU, in the superior interest of the child and as an essential tool for the judge to enable better assessment of factual situations. Investment in the realization of the child's right to be heard in all matters of concern to him or her and for his or her views to be given due consideration, is a clear and immediate legal obligation of States Parties under the 1989 United Nations Convention on the Rights of the Child.¹¹ This process

necessitate[s] dismantling the legal, political, economic, social and cultural barriers that currently impede children's opportunity to be heard and their access to participation in all matters affecting them. It requires a preparedness to challenge assumptions about children's capacities, and to encourage the development of environments in which children can build and demonstrate capacities. It also requires a commitment to resources and training.¹²

⁹See B Ubertazzi, *La capacità delle persone fisiche nel diritto internazionale privato* (Cedam, 2006), 421; B Ubertazzi, "Capacity and Emancipation", in J Basedow, G Rühl, F Ferrari and P De Miguel (eds), *Encyclopedia of Private International Law* (Edward Elgar, 2016), 666–77.

¹⁰See T Kruger, *International Child Abduction: The Inadequacies of the Law* (Oxford, Hart, 2011), 200 ff; A Parkes, *Children and International Human Rights Law: The Right of the Child to be Heard*, (Routledge, 2013); L Elrod "'Please Let Me Stay': Hearing the Voice of the Child in Hague Abduction Cases" (2011) 63 *Oklahoma Law Review*, 663, 664 ff; P Beaumont, L Walker and J Holliday, "Conflicts of EU Courts on Child Abduction: The Reality of Article 11(6)-(8) Brussels IIa Proceedings Across the EU" (2016) 12 *Journal of Private International Law* 211, 233 ff.

¹¹Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, New York; entered into force 2 September 1990, in accordance with Art 49; available at United Nations, Treaty Series, vol 1577, 3, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en accessed on 2 November 2016. See UN Committee on the Rights of the Child (CRC), *General Comment No. 12 (2009): The Right of the Child to be Heard*, 20 July 2009, CRC/C/GC/12, <http://www.refworld.org/docid/4ae562c52.html> accessed on 2 November 2016. This General Comment was adopted by the Committee at its Fifty-first session Geneva, 25 May–12 June 2009, 31. See also the following paragraph of this paper.

¹²*General Comment No. 12, Ibid.*

The Brussels IIa Regulation and its Recast Proposal play an important role in this process. They both acknowledge the fundamental human right of the child to be heard in judicial proceedings related to cross-border disputes on parental responsibility.¹³ Yet, the Brussels IIa Regulation presents weaknesses, which the Brussels IIa Recast Proposal aims to overcome. This paper will analyse these two instruments in relation to the hearing of the child, and address their shortcomings.

B. Child's right to be heard in human rights treaties

The right of children to be heard in legal proceedings affecting them is granted by the UN. The 1989 United Nations Convention on the Rights of the Child¹⁴ recognizes the child's right to be heard as a fundamental human right¹⁵ and as one of the four general principles of this Convention. The three remaining principles are the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests.¹⁶ Article 12 of the 1989 UN Convention states that

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

Article 12(1) poses certain conditions on the enjoyment of the right to be heard, namely those of age and capacity. The condition related to freely expressing the child's views in all matters affecting her or him is also relevant. That of giving due weight to these views in accordance with the age and maturity of the child plays a crucial role too. On these conditions the UN Committee emphasizes the following.

The conditions of age and capacity should not be seen as limitations, but rather as obligations for States Parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that States Parties cannot begin with the assumption that a child is incapable of expressing her or

¹³See A Gouttenoire "L'audition de l'enfant dans le règlement 'Bruxelles II bis'", in *Le nouveau droit communautaire du divorce et de la responsabilité parentale* (Daloz, 2005), 201 et seq; Kruger, *supra* n 10; K Trimmings, *Child Abduction Within the European Union* (Hart, 2013), 182; Kruger and Samyn, *supra* n 6, 155 ff; Beaumont, Walker and Hollday, *supra* n 10, 233.

¹⁴This Convention is in force in 196 State Parties which is almost universal.

¹⁵See Parkes, *supra* n 10.

¹⁶*General Comment No. 12*, *supra* n 11.

his own views. On the contrary, States Parties should presume that a child has the capacity to form his or her own views and recognize that he or she has the right to express them. It is not up to the child to first prove his or her capacity. Also, Article 12 imposes no age limit on the right of the child to express his or her views, and discourages States Parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting him or her.¹⁷

The condition that the child expresses his or her views freely means that the child should not be exposed to pressure or manipulation and can choose whether or not to exercise his or her right to be heard. States Parties must ensure conditions for expressing views that account for the child's individual and social situation and an environment in which the child feels respected and secure when freely expressing her or his opinions. A child should not be interviewed more often than necessary, in particular when harmful events are explored, since the "hearing" of a child is a difficult process that can have a traumatic impact. To express his or her views freely, the child shall be informed of the matters, options, possible decisions and their consequences. This information is to be given by those who are responsible for hearing the child, and by the child's parents or guardian. Thus, the right to information is essential; it is the precondition of the child's decisions.¹⁸

The condition that the child is able to express his or her views in all matters affecting her or him has to be understood broadly. In fact, a wide interpretation of matters affecting children helps to include children in the social processes of their community and society.¹⁹

The condition that the views of the child must be given due weight in accordance with the age and maturity of the child means that simply listening to the child is insufficient. The views of the child have to be seriously considered when the child is capable of forming these views. Age alone cannot determine the significance of a child's views, since children's levels of understanding are not uniformly linked to their biological age. On the contrary, information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacities to form a view. For this reason, the weight that should be given to the views of the child has to be assessed on a case-by-case examination.²⁰

Article 12(2) specifies that opportunities to be heard have to be provided in particular in any judicial and administrative proceedings affecting the child. In addition, the hearing may be carried out either directly, or through a representative or an appropriate body and in a manner consistent with the procedural rules of

¹⁷*Ibid*, para 21.

¹⁸*Ibid*, para 25.

¹⁹*Ibid*, paras 26–27.

²⁰*Ibid*, paras 28–31.

national law. With regard to this paragraph the UN Committee emphasizes the following.

In “any judicial and administrative proceedings affecting the child” means in all relevant judicial proceedings affecting the child, without limitation, including those of relevance here such as separation of parents and custody. Those proceedings may “involve alternative dispute mechanisms such as mediation and arbitration”²¹ and must be both accessible and child-appropriate. A child can be heard effectively only where the environment is not intimidating, hostile, insensitive or inappropriate for her or his age. So, particular attention needs to be paid to delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.²²

Either directly or through a representative or an appropriate body means that, “wherever possible, the child must be given the opportunity to be directly heard in any proceedings”.²³ The representative can be the parent(s), a lawyer or another person such as a social worker. In cases of risks of a conflict of interest between the child and their most obvious representative parent(s), it is of utmost importance that the child’s views are transmitted correctly to the court by the representative, typically other than the parent(s). Representatives must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children.²⁴

In a manner consistent with the procedural rules of national law means that the procedures regarding the hearing of the child are typically determined by the States Parties. Yet, the use of procedural legislation which restricts or prevents enjoyment of this fundamental right shall not be permitted. States Parties are encouraged to comply with the basic rules of fair proceedings, including the right to a defence.²⁵ If the right of the child to be heard is breached with regard to judicial and administrative proceedings, the child must have access to appeals and complaints procedures which provide remedies for rights violations.²⁶

Articles 12 and 3 of the 1989 UN Convention on the Right of the Child are interdependent. According to the latter, “in all actions concerning children,

²¹*Ibid*, para 32.

²²*Ibid*, para 34.

²³*Ibid*, para 35.

²⁴*Ibid*, para 36.

²⁵*Ibid*, para 38, according to which

the opportunity for representation must be “in a manner consistent with the procedural rules of national law”. This clause should not be interpreted as permitting the use of procedural legislation which restricts or prevents enjoyment of this fundamental right. On the contrary, States parties are encouraged to comply with the basic rules of fair proceedings, such as the right to a defence and the right to access one’s own files.

²⁶*Ibid*, para 47.

whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". The UN Committee emphasized that Articles 3 and 12 have complementary roles. The former aims to realize the child's best interests, while the latter provides the methodology for hearing the views of the children and their inclusion in all matters affecting them, such as the assessment of their best interests.²⁷ In particular, the evolving capacities of the child must be taken into consideration when the child's best interests and right to be heard are at stake. Thus, whenever a decision is to be made that will affect a specific child, the decision-making process must include an evaluation of the possible impact of the decision on the child concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, it must always be explained how the right has been respected in the decision, namely what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other interests and considerations.²⁸

The right of children to be heard in legal proceedings affecting them is also granted by the Council of Europe. The European Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) does not explicitly mention the right of the child to be heard. Yet, the European Court of Human Rights (hereinafter: ECtHR) maintained that the right of children to be heard is incorporated into Article 8 of the ECHR, according to which

1. Everyone has the right to respect for his [...] family life [...]. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society [...] for the protection of health or morals, or for the protection of the rights and freedoms of others.

In addition, the ECtHR maintained that the right of children to be heard is incorporated into Article 6 of the ECHR, according to which "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is

²⁷See UN Committee on the Rights of the Child (CRC), *General Comment No. 14 (2013) on the Right of the Child to have his or her Best Interests Taken as a Primary Consideration* (Art. 3, para. 1), 29 May 2013, CRC/C/GC/14, <http://www.refworld.org/docid/51a84b5e4.html> accessed on 17 August 2016. This General Comment was adopted by the Committee at its 62nd session (14 January–1 February 2013).

²⁸See *General Comment No. 14, Ibid*, para 6. See also M Freeman, *A Commentary on the United Nations Convention on the Rights of the Child: Article 3, The Best Interests of the Child* (Martinus Nijhoff Publishers, 2007); J Eekelaar, "The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children" (2015) 23 *The International Journal of Children's Rights* 3; M Župan, "The Best Interest of the Child – A Guiding Principle in Administering Cross-Border Child Related Matters?" in T Liefwaard and J Sloth-Nielsen (eds), *25 Years CRC* (Brill-Nijhoff, 2015), 35.

entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

Thus, Articles 6 and 8 require the competent domestic courts to strike a fair balance between the interests of the child and those of the parents, giving preference to the former rather than the latter. To determine the best interest of the child, his or her hearing in person by the domestic courts plays a crucial role. The child may be heard directly by the court or indirectly by an expert who reports to the court after the hearing. Yet, the domestic court cannot be required to hear the child in every case, but should have some discretion over whether to proceed with such a hearing and how, depending on the specific circumstances of the case and the age and maturity of the child concerned.²⁹

In the case *Pini, Bertani, Manera and Atripaldi v Romania* of 22 June 2004, the ECtHR considered that the national authorities had not exceeded their discretion in setting 10 years as the age beyond which the child’s consent to his or her adoption must be obtained.³⁰ In the case *Elsholz v Germany* of 13 July 2000, the ECtHR emphasized that Article 8 of the Convention is respected by a court, in the context of a domestic case, even where the child is not heard, provided that the decision of the court not to hear the child is based on an expert’s opinion, according to whom a direct hearing in court as well as indirect questioning would

²⁹*Sahin v Germany*, No. 30943/96, 8 July 2003, ECHR 2003-VIII, para 73 ff.

³⁰*Pini, Bertani, Manera and Atripaldi v Romania*, No. 78028/01 and 78030/01, 22 June 2004, ECHR 2004-V, para 164. This case originated in two applications against Romania lodged with the Court by four Italian nationals. The applicants complained, in particular, of an infringement of their right to respect for their family life under Art 8 of the ECHR on account of the failure to execute final decisions of the Braşov County Court concerning their adoption of two Romanian minors. According to the ECtHR, the relationship established between the applicants and their respective adopted daughters constituted a family tie, protected by Art 8 of the ECHR. Yet, the children’s consent was not obtained by the domestic courts that allowed adoption. In fact, the children being nine and a half years old on the date on which their adoption was disposed, they had not yet reached the age at which their consent should have been obtained for the adoption order to be valid, set at 10 years under the domestic legislation. Indeed, the children’s views were heard by the domestic authorities after they had reached the age of 10, and therefore after their final adoption decisions. Then, it became clear that the children would have rather remained in the social and family environment in which they had grown up at the Poiana Soarelui Educational Centre in Braşov, into which they considered themselves to be fully integrated and which was conducive to their physical, emotional, educational and social development, than be transferred to different surroundings abroad. Thus, the ECtHR noted that the Romanian authorities correctly weighted the children’s consistent refusal to travel to Italy and join their adoptive parents. In fact, “their conscious opposition to adoption would [have] ma[de] their harmonious integration into their new adoptive family unlikely”. The ECtHR concluded that the national authorities “were legitimately and reasonably entitled to consider that the applicants’ right to develop ties with their adopted children was circumscribed by the children’s interests, notwithstanding the applicants’ legitimate aspiration to found a family” (para 165). Therefore, according to the Court there had been no violation of Art 8 ECHR.

psychologically strain the child.³¹ In the domestic case *NTs and Others v Georgia* of 2 February 2016, the ECtHR was asked whether Article 8 was violated in a situation where at no stage of Georgian proceedings to issue an order for the return of three brothers to the care of their father, were they heard by the domestic courts in person.³² The ECtHR noted that the domestic authorities refused to hear the children in person because of an allegedly manipulative role of the maternal family in alienating the boys from their father. Yet, since there was a flaw in the quality of the children's representation, the need for the direct involvement of the boys, particularly the older one, was apparent. Also, whatever manipulative role was played

³¹*Elsholz v Germany*, No. 25735/94, 13 July 2000, ECHR 2000-VIII. In this case the ECtHR was asked whether Art 8 was violated in a situation where during the German divorce proceedings the interested child was heard in court before the District Court on 9 November 1992 and on 8 December 1993. This Court noted that the child stated that he no longer wished to see his father who, according to the child, was bad and had beaten his mother repeatedly (para 13). The appellate Court decided on 21 January 1994 without having heard the child again. The Court of Appeal observed that due to the short time elapsed, there was no necessity to hear the child again since there was no indication that any findings more favourable for the applicant could result from such a hearing (para 18).

³²*NTs and Others v Georgia*, No. 71776/12, 2 February 2016, <http://hudoc.echr.coe.int> accessed 19 July 2017, paras 73 ff. In this case, the applicants were a maternal aunt and her three minor nephews. Following the death of their mother in November 2009, the boys went to live with their mother's relatives as their father, who had a previous conviction for drug abuse, was undergoing treatment for drug addiction. In early 2010 the father sought a court order for the return to his care of his sons. The proceedings ended in an order for the boys' return to the care of their father, despite an expert report recommending that no change be made to their living environment as they suffered from separation anxiety disorder and showed a negative attitude towards their father. Although the order for the boys' return was ultimately upheld following a series of appeals, it remained unenforced, as the boys refused to move in with their father. Thus, the applicants lodged an application complaining, in essence, that the procedures followed by the domestic authorities disregarded the best interests of the children and violated Art 8. In particular, according to the applicants the boys were not duly involved in the proceedings, since they were not duly represented and they were not heard in person by the domestic courts. The ECtHR noted that the first-instance court had requested the appointment of the Georgian Social Service Agency as a representative for the boys. Yet, this Agency had become formally involved in the proceedings only from the appeal stage and then only as an "interested party", therefore without a formal procedural role. Also, during the period of more than two years the proceedings in the applicants' case had lasted, representatives of the Agency had met the boys only a few times with the purpose of drafting reports on their living conditions and their emotional state of mind, but no regular contact had been maintained in order to monitor the boys and establish a trustful relationship. Moreover, the national courts had failed to hear in person and to consider the possibility of directly involving the boys, not even the older one (who was born in 2002), in the proceedings. The domestic authorities, in fact, refused to hear the children in person because of an allegedly manipulative role of the maternal family in alienating the boys from their father. Yet, the Georgian provisions provided for a right of minors between 7 and 18 years of age to be directly involved in proceedings affecting their rights.

by the maternal family, the evidence before the domestic courts concerning the boys' hostile attitude towards the father was unambiguous. So, the Court concluded that the boys' best interests and their emotional state of mind was simply ignored by the domestic authorities, in breach of their right to respect for their family and private life under Article 8.

Finally, in the case *Iglesias Casarubios and Cantalapiedra Iglesias v Spain* of 11 October 2016, the ECtHR was asked whether Article 6 was violated in a situation where at no stage of the Spanish divorce proceedings the children were heard in court. In this case, Ms Casarubios' husband (hereinafter: the father) applied for judicial separation in 1999. In a judgment delivered in June 2000 the court granted the judicial separation, awarded custody of the two minor daughters to Ms Casarubios (hereinafter: the mother) with shared parental responsibility, and granted the father a right of contact. Subsequently, the father was condemned for injuries and threats to the mother and the daughters, while the mother was condemned for threats as well as for manipulating the daughters. Thus, the father's right of contact was suspended in 2003, 2004 and 2005. In 2006 the father instituted divorce proceedings. Yet, the mother opposed them for economic reasons and for obtaining the sole parental responsibility of the daughters. However, the mother's opposition was rejected.

In particular, during the relevant domestic proceedings for divorce, the mother expressly requested on different occasions that the two daughters be heard by the judge. In fact, Spanish law sets 12 years as the age beyond which the child's opinion must be obtained, provided that the child involved is mature enough. At the time when the divorce proceeding started, the children were 13 and 11, when the divorce judgment was issued they were 14 and almost 12, and, when the divorce judgment was appealed by their mother, they were almost 15 and almost 13. Yet, the judge did not interview the children involved himself, but directed that the children were to be heard by the psychological unit attached to the court. However, the elder daughter requested the recording of her hearing by this psychological unit. This request was refused by the same unit and therefore in the end the hearing of the children did not take place. Thus, the children wrote two letters to the judge, complaining that during the proceedings for their parents' divorce he had not personally interviewed them and that he only knew of their relationship with their father through other people. The judge did not reply. Therefore, the mother and her two daughters seized the ECtHR, complaining of a violation of Article 6 on the right to a fair hearing of the ECHR on account of the refusal of the domestic courts to hear the children in person during the proceedings for their parents' divorce, and the failure of the domestic courts to respond to their request.

On the admissibility, the ECtHR held that the application was lodged by three persons, the mother and the two daughters. The only parties to the domestic divorce proceedings were the mother and the father, while the daughters were third parties. Therefore, in the divorce proceedings the daughters did not have any rights, including that to be heard in person by the judge. This right in fact

belonged only to the parties to the proceedings. Thus, the ECtHR declared inadmissible the daughters' application to assess a violation of their allegedly existing right to be heard in person by the court. In contrast, the ECtHR declared admissible the mother's request to assess a violation of her right to a fair trial because of a failure to hear her daughters in person by the Spanish courts (para 23 ff).

On the merits, the ECtHR unanimously held that there had been a violation of Article 6. In line with its previous case law, the ECtHR affirmed that the domestic courts cannot be expected in all cases to hear the child in person. This decision is determined by the same courts having regard to the particular circumstances of each case and to the age and maturity of the child involved. Yet, when the child requests to be heard by the judge, the refusal to hear him or her shall be adequately reasoned. In sum, the court may consider that a child shall not be given the genuine and effective opportunity to express his or her views during the proceedings. This may happen for instance when the child, despite being of an appropriate age and maturity, is not capable of forming his or her own views because he or she has been manipulated by one of the parents. In those cases, however, if the court refuses to hear the child, it must give reasons for doing so in its decision (para 36). Thus, the ECtHR concluded that the mother's fundamental right to have her daughters heard by the courts in person was violated by the domestic courts.³³

In addition, the right of the child to express his or her views is granted by Article 3 of the 1996 European Convention on the Exercise of Children's Rights adopted under the auspices of the Council of Europe and ratified by 20 States, including several EU States.³⁴ This Convention aims to protect the best

³³*Affaire Iglesias Casarrubios et Cantalapiedra Iglesias c. Espagne*, No. 23298/12, 11 October 2016, <http://hudoc.echr.coe.int> (in French and Spanish only), para 42.

³⁴See European Convention on the Exercise of Children's Rights, adopted in Strasbourg 25 January 1996, available at European Treaty Series – No. 160, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007cdaf> accessed on 12 November 2016. Art 3, headed "right to be informed and to express his or her views in proceedings", states that

a child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights: a) to receive all relevant information; b) to be consulted and express his or her views; c) to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

Art 4 establishes certain procedures for hearing the child, namely that

1. the child shall have the right to apply, in person or through other persons or bodies, for a special representative in proceedings before a judicial authority affecting the child where internal law precludes the holders of parental responsibilities from representing the child as a result of a conflict of interest with the latter. 2. States are free to limit the right in paragraph 1 to children who are considered by internal law to have sufficient understanding.

interests of children and therefore provides a number of procedural measures to allow the children to exercise their rights such as that to be heard in family proceedings before judicial authorities. In particular, Article 6 on the decision-making process emphasizes that in proceedings affecting a child, the competent judicial authority before taking a decision shall

consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child.

The same authority shall “allow the child to express his or her views”. Finally, the competent judicial body shall “give due weight to the views expressed by the child”. The relevant case law of the States Parties to the Convention, such as the Italian one, refers constantly to Article 6 together with Article 12 of the UN Convention as sources imposing obligations on the competent judicial authorities to hear the child.³⁵

Furthermore, the right of children to be heard in legal proceedings affecting them is promoted by the Council of Europe’s 2010 Guidelines on child-friendly justice.³⁶

Art 5 poses other procedural requirements, by stating that

Parties shall consider granting children additional procedural rights in relation to proceedings before a judicial authority affecting them, in particular: a) the right to apply to be assisted by an appropriate person of their choice in order to help them express their views; b) the right to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer; c) the right to appoint their own representative; d) the right to exercise some or all of the rights of parties to such proceedings.

³⁵See Italian Supreme Court, 19 May 2010 n. 12293, (2012) *Rivista di diritto internazionale privato e processuale* 225. See R Bosisio, “Children’s Right to Be Heard. What Children Think” (2012) 20 *International Journal of Children’s Rights* 141.

³⁶See Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted on 17 November 2010 together with an explanatory memorandum, Council of Europe Publishing, 2010, <https://rm.coe.int/16807000f1> accessed on 2 November 2016. Art 44 of these Guidelines states that

judges should respect the right of children to be heard in all matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question. Measures used for this purpose should be adapted to the child’s level of understanding and ability to communicate and take into account the circumstances of the case. Children should be consulted on the manner in which they wish to be heard.

In addition, Art 47 emphasizes that

a child should not be precluded from being heard solely on the basis of age. Whenever a child takes the initiative to be heard in a case that affects him or her, the judge should not, unless it is in the child’s best interests, refuse to hear the child and should listen to his or her views and opinions on matters concerning him or her in the case.

The right of children to be heard in legal proceedings affecting them is also granted by the EU. Article 24 of the EU Charter of Fundamental Rights states that

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

The Brussels IIa Regulation recalls Article 24 of the EU Charter of Fundamental Rights. In fact, Recital 33 emphasizes that

this Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union.

As such, the Brussels IIa Regulation explicitly recognizes children as rights holders and acknowledges that their right to be heard is a fundamental human right, which is established in the superior interest of the child.

C. Child's right to be heard under the Brussels IIa Regulation

The Brussels IIa Regulation contains several provisions on the hearing of the child. Besides aforementioned Recital 33, Recital 19 states that "the hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify national procedures applicable". Recital 20 emphasizes that

the hearing of a child in another Member State may take place under the arrangements laid down in Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters. (Hereinafter: the Evidence Regulation)³⁷

In addition, the following norms deal with the hearing of the child.

The first norm of the Brussels IIa Regulation that deals with the hearing of the child is Article 11. This provision is headed "return of the child" and addresses cases of wrongful removal or retention of children (hereinafter: wrongful removal or retention will be referred to as abduction). It establishes a specific EU procedure which complements that indicated by the 1980 Hague Child

³⁷[2001] OJ L174/1.

Abduction Convention with the aim of ensuring a certain procedural unification among EU Member States.³⁸ In particular, the 1980 Hague Convention establishes procedures to secure the prompt return of children to the State of their habitual residence in cases of abduction. This prompt return of children is in fact perceived by the Convention as being in their best interest. Therefore, the Convention establishes only limited exceptions allowing for children's non-return, namely consent or acquiescence by the applicant (Article 13(1)(a)); a grave risk that return will expose the child to harm or place him or her in an intolerable situation (Article 13(1)(b)); the objection by a mature child (Article 13(2)) and the violation of fundamental human rights (Article 20). Also, the child becoming settled due to the passing of time may play a relevant role in this respect (Article 12(2)); but only if more than one year has elapsed between the abduction and the date when the return application was filed with the court competent to decide upon it. In the presence of any of those exceptions the court of the State to which the child was abducted and is currently located has discretion as to whether to return him or her to the State of his or her habitual residence. The exceptions therefore do not apply automatically and do not impose on the judge a duty to refuse to return the child, but give him or her discretion to decide. In addition, the court must interpret these exceptions strictly, due to the strong presumption favouring the return of the wrongfully removed or retained child under the 1980 Hague Convention. Thus, a child's view is important but not presumptive or determinative: the objecting child should have a voice under the Hague Convention, but not a veto.³⁹

The procedure established by the 1980 Hague Convention is partially modified by Article 11 of the Brussels IIa Regulation in intra-EU return proceedings. This provision reinforces the 1980 Hague Convention policy. In fact, Article 11(2) of the Brussels IIa Regulation provides that

³⁸See C Honorati, "Sottrazione internazionale dei minori e diritti fondamentali" (2013) *Rivista di diritto internazionale privato e processuale*, 5; U Magnus and P Mankowski (eds), *European Commentaries on Private International Law Brussels II Bis Regulation* (Sellier, 2012), 128.

³⁹See A Crihana, AR Sas and TC Ciobanu, *Behind the Curtains of International Child Abduction Proceedings, Hearing the Voice of the Child*, http://www.ejtn.eu/Documents/THESIS%202015/Written_paper_Romania_2pdf.pdf accessed on 2 November 2016. See also *Raw and Others v France*, No. 10131/11, 7 March 2013. This case concerned the failure to execute a judgment confirming an order to return underage children to their mother in the UK, their divorced parents having shared residence rights. The children wished to stay with their father in France. The Court held that although the children's opinion had to be taken into account when applying international law, notably the Hague Convention and the Brussels IIa Regulation, their objections were not necessarily sufficient to prevent their return. See Registrar of the European Court of Human Rights, French authorities' failure to comply with an order to return children to their mother in the UK breached the right to respect for private and family life, Press Release, ECtHR 71 (2013) 7 March 2013, <https://adam1cor.files.wordpress.com/2013/04/judgment-raw-and-others-v-france-child-custody.pdf> accessed on 2 November 2016.

when applying Articles 12 and 13 of 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 having regard to his or her age or degree of maturity.

Thus, the Brussels IIa Regulation explicitly states that a child is to be given an opportunity to be heard in return proceedings in the Member State where a child has been wrongfully removed or retained.⁴⁰ This provision of the Brussels IIa Regulation may be seen as having a precedent in Article 13(2) of the Hague Convention, according to which

the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and maturity at which it is appropriate to take account of its views.

Yet, in the 1980 Hague Convention the obligation to hear children is not explicitly stated, but is just implied from the wording of its Article 13(2), whereas in the Brussels IIa Regulation the obligation to hear children is explicitly emphasized. Also, the Brussels IIa Regulation requires that the enforcement of the return order under Article 11(8) is conditional on the child having been given the opportunity to be heard during the proceedings, unless it is inappropriate.⁴¹

Despite Article 11 of the Brussels IIa Regulation, courts are allowed to decide not to hear the child if they consider such a hearing inappropriate. Recent data indicate that in practice when courts in EU Member States hear children in return proceedings, either in cases that are governed by the Regulation, or in relation to situations that are covered by the 1980 Hague Convention, the child is not heard.⁴² Also, under the Brussels IIa Regulation the court must issue a

⁴⁰See Magnus and Mankowski, *supra* n 38, 132; Trimmings, *supra* n 13, 242.

⁴¹See Beaumont, Walker and Holliday, *supra* n 10, 232 ff, according to whom this was perceived as a necessary requirement in light of the abolition of the exequatur. In this framework, statistics show that contrary to Art 13(2) of the 1980 Hague Convention that is seldom used as a basis for a non-return order, the Brussels IIa Regulation reinforced a child-centred approach in child abduction-cases. In fact, when courts in EU Member States hear children in return proceedings, they do so not only in relation to cases that are governed by the Regulation, but rather also in relation to situations that are covered by the 1980 Hague Convention; and not only in cases where Arts 12 and 13 of the Convention are raised but also in situations where other matters are at stake such as the lack of habitual residence in the requesting State prior to the removal/retention under Art 3 of the Convention. Trimmings, *supra* n 13, 242. See also EU Commission, *Study on the Assessment of Regulation (EC) No 2201/2003 and the Policy Options for its Amendment, Final Report, Analytical Annexes*, 2014, http://ec.europa.eu/justice/civil/files/bxl_ii_a_final_report_analtical_annexes.pdf, 135, accessed on 2 November 2016.

⁴²See Beaumont, Walker and Holliday, *supra* n 10, 233. See also C Honorati, "La prassi italiana sul ritorno del minore sottratto ai sensi dell'art. 11 par. 8 del regolamento Bruxelles II-bis" (2015) *Rivista di diritto internazionale privato e processuale*, 275; Kruger and Samyn, *supra* n 6, 157.

decision on the return of the child within six weeks from being seized with the request (Article 11(3)). In this strict time limit the court should exercise great caution before deciding on the return, since its decision is subject to human rights review by the ECtHR. According to a judgment of the ECtHR, in fact, Article 8 of the ECHR requires to

conduct an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and [to make] a balanced and reasonable assessment of the respective interests of each person.⁴³

This judgment, however, has clearly been overturned by the subsequent Grand Chamber decision of the ECtHR in *X v Latvia*.⁴⁴ In fact, in the frame of the Brussels IIa Regulation

while the requirement of “in-depth examination” seems over-all synergetic to the role of the court of habitual residence, also when such court is judging on the return of the abducted minor pursuant to Article 11(8) Reg. 2201/2003, deeper concerns arise with reference to the role of the court of the State of refuge. When such a court is asked to enforce a decision for the return of the abducted child, the possible violation of the child’s fundamental right in the State of origin might raise the question of opposition to recognition and enforcement.⁴⁵

The second norm of the Brussels IIa Regulation that deals with the hearing of the child is Article 23. This provision establishes that the failure to hear a child can be a reason for declining recognition of judgments on parental responsibility. Foreign judgments, orders or decrees relating to parental responsibility given in another Member State have to be recognized in other EU countries save where a ground of non-recognition among those enumerated in Article 23 arises.

In particular, among these grounds stand the following: that the judgment “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” (Article 23(b)). Thus, under this provision, the recognition of a foreign decision relating to parental responsibility

⁴³See *Neulinger v Switzerland*, No. 41615/07, 6 July 2010, 139. On this case-law, see P Beaumont, K Trimmings, L Walker and J Holliday, “Child Abduction: Recent Jurisprudence of the European Court of Human Rights” (2015) 64 *International and Comparative Law Quarterly*, 39, 52 ff.

⁴⁴See *X v Latvia*, No 27853/09, 26 November 2013, paras 104–08.

⁴⁵See Honorati, *supra* n 38, 42, who endeavours to find a solution balancing the child’s fundamental rights and EU general finality to strengthen the area of freedom, security and justice. See also Beaumont, Walker and Holliday, *supra* n 10, 211 ff.

must be declined if the child has not been heard, if he or she was capable of forming his or her own views, and if there was no urgency.⁴⁶

Despite Article 23(b) of the Brussels IIa Regulation indicating that courts shall assess if the child had not been given the opportunity to be heard as a ground to refuse recognition, the test in Article 23(b) of the Brussels IIa Regulation is whether the failure to grant such opportunity was in violation of fundamental principles of procedure of the Member State in which recognition is sought. Yet, this test is overly prudent in the protection of national procedural autonomy, and it would be preferable to assess whether there was a violation of the human right of the child to be heard.⁴⁷

The third and fourth norms of the Brussels IIa Regulation that deal with the hearing of the child are Articles 41 and 42. These Articles establish that the failure to give the child an opportunity to be heard can be a reason for non-enforcement of certain types of judgments, namely decisions on access rights or return orders issued by the State of origin under Article 11(8). Such judgments are to be automatically recognized and can directly be enforced in other Member States without the need for any intermediate procedures and particularly for a declaration of enforceability by the court of the enforcement State (without which normally no judgment can be enforced in another Member State). The reason for this facilitated procedure is to avoid lengthy court proceedings which could render access and return orders futile. Instead of the declaration of enforceability in the enforcement State, Articles 41 and 42 require the court of the State of origin to issue a certificate in the standardized form of Annex III to the Brussels IIa Regulation. Yet, the certificates under Articles 41 and 42 may only be issued if the child was given an opportunity to be heard unless this was considered inappropriate. This has to be examined and certified by the court of origin. In addition, Articles 41 and 42 do not include any exception for cases of urgency, whereas under Article 23 of the Brussels IIa Regulation recognition may be denied if the

⁴⁶This provision is similar to Art 23(2)(b) of the 1996 Hague Convention. Under Art 23 (2)(b)

(1) The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States. (2) Recognition may however be refused [...] b) if the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the child having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the requested State.

See K Boele-Woelki, F Ferrand, C Gonzalez Beilfuss, M Jänterä Jareborg, N Lowe, D Martiny and W Pintens, *Principles of European Family Law Regarding Parental Responsibilities* (Intersentia, 2007) 242; Beaumont, Walker and Holliday, *supra* n 10, 233.

⁴⁷See Kruger and Samyn, *supra* n 6, 157.

child had not been given the opportunity to be heard, save in the case of urgency.⁴⁸

Despite Articles 41 and 42 introducing certificates that request the judge to confirm that the child has been given the opportunity to be heard, this question is open to interpretation by each domestic court. This is clearly indicated by the many cases where despite the fact that the child has not been heard, the courts still issue the certificate under Article 42.⁴⁹ This happened in *Joseba Andoni*

⁴⁸Under Art 41 on “rights of access”,

1. The rights of access referred to in Art 40(1)(a) 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 and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2. Even if national 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. 2. The judge of origin shall issue the certificate referred to in paragraph 1 using the standard form in Annex III (certificate concerning rights of access) only if: (c) 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.

Under Art 42 of the Brussels IIa Regulation, headed “return of the child”,

1. The return of a child referred to in Art 40(1)(b) entailed by 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 and without any possibility of opposing its recognition if the judgment has been certified in the Member State of origin in accordance with paragraph 2. Even if national law does not provide for enforceability by operation of law, notwithstanding any appeal, of a judgment requiring the return of the child mentioned in Art [11(8)], the court of origin may declare the judgment enforceable. 2. The judge of origin who delivered the judgment referred to in Art 40(1)(b) shall issue the certificate referred to in paragraph 1 only if: (a) 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.

In particular, in the certificate referred to in Art 39 concerning judgments on parental responsibility (Annex II), the court of the Member State that rendered the judgments to be enforced in another Member State is not obliged to comment on whether or not the child was heard and is not required to explain its reasoning for this. In the certificate referred to in Art 41(1) concerning judgments on rights of access (Annex III), the court of the State that rendered the judgment shall clarify if “the children [affected by the proceeding] were given an opportunity to be heard, unless a hearing was considered inappropriate having regard to their age or degree of maturity” (point 11). In the certificate referred to in Art 42(1) concerning the return of the child (Annex IV), the court of the State that rendered the judgment shall clarify if “the children [affected by the proceeding] were given an opportunity to be heard, unless a hearing was considered inappropriate having regard to their age or degree of maturity” (point 11).

⁴⁹See *Kruger and Samyn*, *supra* n 6, 157; *Beaumont, Walker and Holliday*, *supra* n 10, 233. See also the following paragraph.

Aguirre Zarraga v Simone Pelz (hereinafter: *Aguirre Zarraga*).⁵⁰ This case concerned the non-return of a child from Germany to Spain. The initial divorce and custody proceedings were held in Spain and provisional custody was given to the father after Andrea (the daughter) had been heard. The mother then moved to Germany. Andrea went to visit her mother for a school holiday and has remained in Germany ever since. Following the retention of Andrea in Germany the father initiated return proceeding under the 1980 Hague Convention in Germany. The German court of second instance under Article 13(2) of the 1980 Hague Convention rejected the father's Hague return application on the basis "that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views". This finding was based on an expert opinion that after hearing Andrea concluded that she was resolutely opposed to the return requested by the father; and that since Andrea was nine-and-a-half years old and mature at that time, her view should be taken into account. The father initiated parallel proceedings in Spain under the Brussels IIa Regulation to obtain a custody order and have a certificate issued, requesting that Andrea be returned to Spain. The Spanish courts ordered the personal appearance of Andrea and her mother and a psychological expert opinion on the girl. Andrea's mother refused to travel to the hearing in Spain with her daughter and applied for her to be heard by videoconference. This was rejected by the Spanish court of first instance which prohibited Andrea from leaving Spain and removed the mother's rights of access. Andrea's mother then appealed, applying for permission to present new evidence, in particular concerning the hearing of Andrea and herself by videoconference. The Spanish court rejected this application, and the mother therefore withdrew her appeal. So the first instance decision which awarded sole rights of custody to the father became final, and that court issued a certificate requesting that Andrea be returned to the left-behind father.

Yet, the Spanish courts stated in this certificate that Andrea had been given an opportunity to be heard, whereas in fact her views were not heard by the Spanish

⁵⁰Case C-491/10 PPU *Joseba Andoni Aguirre Zarraga v Simone Pelz* [2010] ECR I-14247, para 72. See Lenaerts, *supra* n 6, 1316–17; L Walker and P Beaumont, "Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice" (2011) 7 *Journal of Private International Law*, 231, 239 ff; Dutta and Schulz, *supra* n 6, 26 ff; See Kruger and Samyn, *supra* n 6, 157. Before the *Aguirre Zarraga* judgment Germany maintained that the child should have been heard directly by the judge before any decision could have been made and indeed German courts did not recognize any decision made by another country according to different standards. See M Völker and G Steinfatt, "Die Kindesanhörung als Fallstrick bei der Anwendung der Brüssel IIa-Verordnung" (2005) *Familie Partnerschaft Recht*, 415–76. See also V Gaertner, "Hess: Remarks on Case C-491/10PPU – Andrea Aguirre Pelz", *Conflictolaws.net*, 12 December 2010, <http://conflictolaws.net/2010/hess-remarks-on-case-c-49110ppu—andrea-aguirre-pelz/> accessed on 2 November 2016.

courts before rendering the judgment. When the father requested the automatic enforcement of the Spanish judgment accompanied by the certificate under Article 42(2)(a), the German courts were hesitant since, in their view, it contained a declaration that was manifestly false and therefore seriously infringed Andrea's fundamental right to be heard. Consequently, the German court made a preliminary ruling reference to the CJEU questioning whether the certificate provided for by Article 42 of the Brussels IIa Regulation ordering the return of a child could be disregarded by a court in the Member State of enforcement, where its issue amounted to a serious violation of fundamental rights.

After recalling its previous judgments in *Rinau* and *Povse*,⁵¹ the CJEU held that since recognition of a judgment certified under Article 42(2) is automatic, there is nothing a court of the Member State of enforcement can do to oppose it. The Brussels IIa Regulation system is so envisaged that the court of the Member State of enforcement lacks the authority to rely on public policy considerations and on the fundamental rights of the child concerned to oppose recognition of a certified judgment under Article 42(2). This does not mean that the fundamental rights of the child are deprived of judicial protection, since the Brussels IIa Regulation system rests on the principle of mutual trust. Thus, it is presumed that each domestic court provides an equivalent and effective level of protection of children's fundamental rights.

In addition, Article 42(2)(a) is to be interpreted in accordance with Article 24 of the Charter of Fundamental Rights, which does not impose an absolute obligation to hear the child in every single case of abduction. In fact, it simply requests that a child who is sufficiently capable of forming his or her own views has been given an opportunity to express his or her view. Yet, that view is not binding on the court but is one of the criteria by which this court should assess the child's best interests.⁵² Also, the child shall be given the opportunity to be heard unless a hearing is considered inappropriate having regard to his or her age or degree of maturity.⁵³ Furthermore, where a court decides to hear the child, it shall 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. This is in order to ensure the effectiveness of the Brussels IIa Regulation provisions, and to offer to the child a genuine and effective opportunity to express his or her views freely. Finally, if one of the parties considers that the court of the Member State of origin has issued a certificate in violation of Article 42(2)(a), then it must bring legal proceedings before the court of that Member State. It is therefore only for the courts of the Member State of origin to determine

⁵¹See Case C-195/08 PPU *Rinau* [2008] ECR I-5271 and Case C-211/10 PPU *Povse* [2010] ECR I-6673. On these cases, see Lenaerts, *supra* n 6, 1312 ff; Dutta and Schulz, *supra* n 6, 22 and 26 ff; Walker and Beaumont, *Ibid.*, 241.

⁵²See Advocate General Bot, in Case C-491/10 PPU, *supra* n 50, para 68.

⁵³*Ibid.*, para 63 ff.

whether the judgment certified pursuant to Article 42 is vitiated by an infringement of the child's right to be heard.⁵⁴

Despite the above norms of the Brussels IIa Regulation, the importance of hearing children is not emphasized in general terms for all cases on matters of parental responsibility, but only in relation to return proceedings. In addition, hearing the child is an explicit requirement in child abduction procedures under Article 11 (2), is an important and general ground for non-recognition of decisions under Article 23, and is also a condition for the delivery of the certificate that guarantees the international efficiency of the right of access under Article 41(2)(c) and the return of the child under Article 42(2)(a).⁵⁵ Yet, hearing the child has different purposes depending on the type and objective of procedure: in proceedings on custody rights the objective is to find the most suitable environment for the child to reside, whereas in child abduction cases the aim is to ascertain the nature of the child's objections to return and whether the child may be at risk, rather than a preference for the custodial parent.⁵⁶

In any case, the hearing of the child under the Brussels IIa Regulation should have an autonomous content, namely that it must be uniformly understood by all the Member States. In fact, this Regulation must be implemented in accordance with the fundamental rights established by the already quoted international instruments, which must be interpreted in a uniform, non-national meaning.⁵⁷ Also, a provision of EU law which makes no express reference to the legal system of the Member States for the purpose of determining its meaning and scope must be given an autonomous interpretation.⁵⁸ Furthermore, where under Articles 41 and 42 direct enforcement of a judgment in another Member State becomes possible without any examining or exequatur procedure, in contrast to Article 23, all Member States should use the same standards.⁵⁹ Yet, because the Brussels IIa Regulation does not harmonize the domestic rules of Member States on the procedures for the hearing of a child, different standards apply with regard to the hearing of the child.⁶⁰

⁵⁴*Ibid*, CJEU judgment, para 72.

⁵⁵See Magnus and Mankowski, *supra* n 38, 132.

⁵⁶See EU Commission, *Practice Guide for the Application of the Brussels IIa Regulation* (2014), 76–80, http://ec.europa.eu/justice/civil/files/brussels_ii_practice_guide_en.pdf accessed on 26 September 2017.

⁵⁷See Magnus and Mankowski, *supra* n 38, 358.

⁵⁸The Court already applied that case law in connection with the Brussels IIa Regulation, in relation to the meaning of “civil matters” in Art 1 and the meaning of “habitual residence” in Art 8. See Case C-435/06 C [2007] ECR I-10141, para 46; Case C-523/07 A [2009] ECR I-2805, paras 35–37; and Case C-497/10 PPU *Mercredi* [2010] ECR I-14309. On these cases see AG Bot, *supra* n 52, para 74 ff; Lenaerts, *supra* n 6, 1305 ff; Dutta and Schulz, *supra* n 6, 9 and 13.

⁵⁹See Magnus and Mankowski, *supra* n 38, 357–58; AG Bot, *supra* n 52, paras 75–78.

⁶⁰See EU Commission, *Proposal*, *supra* n 8, 2.

D. Child's right to be heard in Member States' procedural laws

The Brussels IIa Regulation addresses in which proceedings a child must be given the opportunity to be heard under the condition that this hearing is considered appropriate. However, as indicated by Recital 19, the Brussels IIa Regulation does not establish any common rules on the procedures regarding the hearing of the child. Many issues are left open: whether judges are expected to act on their own initiative, that is regardless of whether parties made a reference for instance to Article 11(2) in their submissions; the minimum appropriate age for hearing a child; the methods and means available to the court to hear the child,⁶¹ whether the judge must personally hear the child or whether a hearing by a mandated social worker or other professional suffices; the form of representation of the child in court, designation of a guardian ad litem as well as his or her functions and powers.⁶² It is true that Recital 20 to the Brussels IIa Regulation recalls the Evidence Regulation,⁶³ under which a court may either request the competent court of another Member State to take evidence or take evidence directly in the other Member State, for instance by using a videoconference or teleconference. Thus it is not necessary for the child to be heard directly by the judge at a court hearing, but rather the child's views may be obtained by other competent authorities, for instance social workers who present reports to the court.⁶⁴ Yet, the Brussels IIa Regulation does not address other related procedural issues, such as those just mentioned together with that of training, whether the hearing of the child is carried out by the judge directly or indirectly by another official, this person shall receive adequate training including how best to communicate with children and to perceive manipulations by parents.⁶⁵

The procedural laws of the Member States on the hearing of the child were recently compared by several reports and studies,⁶⁶ among which in chronological order are the 2010 Study of the European Parliament on the Protection of Children in Proceedings;⁶⁷ the 2010 Training module on Parental responsibility in a

⁶¹See T Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR* (Sellier, 2010), 155.

⁶²Yet the Brussels IIa Regulation includes matters such as the establishment of "guardianship, curatorship or similar institutions" (Art 1(2)(b)) and "the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child" (Art 1(2)(c)).

⁶³See EU Commission, *Practice Guide*, *supra* n 56. See also Magnus and Mankowski, *supra* n 38, 282 and 358; Rauscher, *supra* n 61, 155.

⁶⁴See *Practice Guide*, *Ibid.*

⁶⁵See *Practice Guide*, *Ibid.* See also Rauscher, *supra* n 61, 155; Magnus and Mankowski, *supra* n 38, 282 and 358.

⁶⁶See in particular Beaumont, Walker and Holliday, *supra* n 10, 233. This study presents the final findings from a research project funded by the Nuffield Foundation and conducted by the authors on "Conflicts of EU Courts on Child Abduction".

⁶⁷This study was conducted by the Advokat Mia Reich Sjögren, Advokaterna Sverker och Mia Reich Sjögren AB, Gothenburg, Sweden on behalf of the European Parliament,

cross-border context, including child abduction, prepared by the Academy of European Law on behalf of the European Commission, DG Justice;⁶⁸ the 2014 Report of the European Commission on the assessment of Regulation (EC) No 2201/2003 and the policy options for its amendment;⁶⁹ the 2014 Report of the Council of Baltic Sea States (CBSS) Children's Unit;⁷⁰ the 2015 Report of the EU Fundamental Rights Agency (FRA), in cooperation with the European Commission (hereinafter: the FRA's Report);⁷¹ and the 2016 Study on Cross-border parental child abduction in the EU, carried out on behalf of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.⁷² These sources highlight the following.

The criteria for deciding whether a child will be heard are age and maturity. Some countries have not established a minimum age (Croatia, Poland and the UK: England and Wales), whereas others have set clear minimum age limits, starting at 10 years old in Bulgaria and Romania, and going up to 14 in Spain and 15 in Finland. At the court's discretion, however, children younger than those limits may be heard. However, in other Member States, like in Hungary, other criteria are relevant in that respect, such as an agreement between the parents, which is considered sufficient to represent the child's views. In addition, national laws frequently lack a clear definition of maturity. In Croatia and France, an individual judge determines if the child is mature on a case-by-case basis. In Poland, children can be heard if their maturity, development and health enable them to participate in

[http://www.europarl.europa.eu/RegData/etudes/IDAN/2010/432737/IPOL-JURI_NT\(2010\)432737_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2010/432737/IPOL-JURI_NT(2010)432737_EN.pdf) accessed on 26 September 2017.

⁶⁸See https://www.era-comm.eu/EU_Civil_Justice_Training_Modules/kiosk/pdf/EN_parental.pdf, 51 ff accessed on 2 November 2016.

⁶⁹See EU Commission, *Study on the Assessment*, *supra* n 41, 48–49. This Study was rendered by a team from Deloitte, headed by Luc Chalsège with the support of Éva Kamarás, Katarina Bartz, Anna Siede, Florian Linz, Charlotte Dekempeneer, Lionel Kapff, Nicolas Moalic and the external expert prof. Rainer Hausmann.

⁷⁰See Council of Baltic Sea States (CBSS) Children's Unit, *Protect Children on the Move, 4th Expert Meeting, Transnational Child Protection: The Role of Judges, Social Services and Central Authorities*, Riga, Latvia, November 2014, 10 ff, http://childcentre.info/public/PROTECT/4th_Expert_Meeting_Riga_November_2014_Full_Meeting_Report.pdf accessed on 2 November 2016.

⁷¹See European Union Agency for Fundamental Rights, *Child-Friendly Justice. Perspectives and Experiences of Professionals on Children's Participation in Civil and Criminal Judicial Proceedings in 10 EU Member States*, 38–52, http://fra.europa.eu/sites/default/files/fra-2015-child-friendly-justice-professionals_en.pdf accessed 20 July 2017. This Report collected and analysed data through interviews with professionals and children who experienced judicial proceedings and examined the responses of 570 judges, prosecutors, lawyers, court staff, psychologists, social workers and police officers interviewed in 10 EU Member States.

⁷²The Study was carried out under the coordination of Lukas Heckendorn Urscheler and Ilaria Pretelli both of whom of Swiss Institute of Comparative Law (SICL), Lausanne, Switzerland. See the study at [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510012/IPOL_STU\(2015\)510012_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510012/IPOL_STU(2015)510012_EN.pdf), 66–67, accessed on 2 November 2016.

the proceedings. In Finland, if the child is deemed mature, his/her views must be taken into account in custody or visitation cases, even in cases where the parents disagree with those views. In the UK (England and Wales), a child is regarded as "Gillick competent" when he or she has sufficient levels of understanding and intelligence to be able to make up his or her own mind on the matter in question.

In a number of Member States, courts are obliged to assess the child's legal, psychological, social, emotional, physical and cognitive situation, throughout the cooperation between professionals. Thus, the majority of countries, save for instance Romania, regulate the right of a child to receive assistance when attending family law proceedings, including from an interpreter, social worker, lawyer or friend. In Scotland, the child can express his/her views in writing, audio or video tape or through interpreters or so-called Safeguarders. In England and Wales, a children's guardian from the Children and Family Court Advisory Service may represent the child's wishes. In Finland, social welfare officials ascertain the child's views. A child can also be heard in court, although in that case, it may be a social worker who questions him/her in front of the judge. When social welfare officials hear a child they must draft a memorandum reflecting the child's own replies and not just the interviewer's interpretation of them. The interviewer can also describe the child's gestures, and the interview may be video recorded. In a few Member States the courts in accordance with their domestic law shall conduct hearings with children in a non-intimidating and child-friendly environment, for instance in France, Poland and the UK (England and Wales). Evidence may be provided through video recording in civil proceedings just in a few countries, such as Croatia, Estonia, Poland and the UK (England and Wales). Furthermore, professionals working with children shall be trained in Finland (judges who work in expert-assisted judicial mediation), in France (judges, public prosecutors and child's lawyers), in Germany (social workers of the youth offices) and in Scotland (volunteers of the Children's Panels).

Children have the statutory right to counsel and representation in their own name when there are potential conflicts of interest between the child and the parent in the great majority of Member States, except Finland, Spain and Poland. In these countries a legal guardian might be appointed instead. In France and Scotland, children have the right to seek legal advice. In France, regardless of the child's representation by parents/guardians or administrators, judges are obliged to ask the child to choose a lawyer during his/her first interview. In Scotland, children under the age of 16 are legally capable to have solicitors. The majority of EU Member States, except Romania, regulate the right of children involved in family law proceedings to have free legal aid. In some Member States, legal aid is automatically available, whereas in others it is subject to certain conditions. In France, when the child spontaneously seeks consultation from a lawyer, legal advice is provided free of charge.

As this comparison clearly indicates, failing a uniform EU approach, and despite the abovementioned human rights treaties, Member States' laws on the relevant procedures for hearing children differ widely and applying one law or

another can lead to different outcomes. Determining the law applicable to these procedures is therefore crucial. In the absence of a uniform EU rule on the law applicable to the procedures on the hearing of the child, each domestic court applies the law that is determined as applicable by the relevant conflict-of-laws norms. Certain of these conflict-of-laws norms related to procedures are harmonized by the 1996 Hague Convention in all EU Member States. For instance, who has the parental responsibility of a child, and therefore is his or her legal representative, is determined by the law of his/her habitual residence under Article 16 of the 1996 Hague Convention. However, this Convention does not harmonize all conflict-of-laws rules. For instance, it does not determine the law applicable to the extent to which children are involved in court proceedings and therefore need representation; the persons that can act as guardian ad litem, being this person the same who has parental responsibility or not; the procedure of appointment; as well their functions and powers. For all these matters and for any further procedure related to the hearing of the child, the applicable law is determined by the relevant conflict-of-laws rules of the forum State. Yet, certain EU Member States refer to the procedural law of the forum State, while others to the law applicable to the substance of the case. Thus, with particular regard to the need for, and the appointment of, a person representing a child in court proceedings, certain EU Member States qualify these issues as procedural matters and therefore apply the *lex fori*. Other EU Member States qualify these issues as substantive, and therefore refer to the law of the habitual residence of the child, which is typically applicable to the substance of the cases. This substantive approach may be supported by the judgment of the CJEU in *Matoušková*, which concerns jurisdiction rather than applicable law, and indeed emphasizes that the jurisdiction to appoint a guardian is for the courts of the State of habitual residence of the child under the Brussels IIa Regulation.⁷³

Because of these many differences in the procedural laws of the Member States in many cases the best interest of the child is not sufficiently considered. First, as mentioned, when courts in EU Member States hear children in return proceedings in intra-EU cases that are governed by the Brussels IIa Regulation (Article 11(6)–(8)), the child is heard in only 20% of cases and indeed in the 80% of cases where the child was clearly not heard, the courts still issued the Article 42 certificate. So:

when looking at cases where the child was 6 years or over (in cases where the ages are known), only 9 out of 33 children, or 27%, of these children were heard. This means that on the basis of the information provided, 73% of children aged 6 and over were not heard. Only 4 children aged 5 or younger out of a total of 24 children in that age group were heard; 16 of these children fall within the ages of 3–5 years.⁷⁴

⁷³See Case C-404/14 *Marie Matoušková*, EU:C:2015:653 paras 36–38.

⁷⁴Beaumont, Walker and Holliday, *supra* n 10, 233.

Second, in cases on parental responsibility, children are not heard through their legal representative and therefore their representation in court is not ensured. In fact, as mentioned in the procedural law of certain Member States, the child needs to have appointed a guardian ad litem in proceedings on parental responsibility. Yet, as just mentioned, the jurisdiction to appoint this guardian is for the courts of the State of habitual residence of the child under the Brussels IIa Regulation. If the seized court is not that of habitual residence, except for urgent matters, it cannot appoint a guardian.⁷⁵ Third, in other cases related to parental responsibility, children are not heard although their hearing is appropriate. In fact, as mentioned, for instance, in the procedural law of certain Member States in cases relating to rights of access, no hearing of the child takes place when the parents reach an agreement. Yet the relevant certificate is issued under Article 41(2)(c) even though the child was not given the opportunity to be heard.⁷⁶

Because of these cases, Member States do not trust the domestic procedures of other countries and invoke a failure to hear a child as the most common reason for declining recognition and enforcement of judgments. Thus,

Member States with stricter standards regarding the hearing of the child than the Member State of origin of the decision are encouraged by the current rules to refuse recognition and exequatur if the hearing of the child does not meet their own standards.⁷⁷

As already mentioned, this is possible under Article 23(b)), but is not feasible under Articles 41 and 42 as the CJEU clarified in *Aguirre Zarraga*. In addition, this is against the purposes of the Brussels IIa Regulation, namely the promotion of mutual trust and the best interests of the child. To avoid such lack of trust and refusal to recognize and enforce foreign judgments, common standards for all Member States on the procedure to hear children would be necessary.

E. Child's right to be heard in the Brussels IIa Recast Proposal

The Brussels IIa Regulation presents two main shortcomings, as already mentioned. First, it does not highlight the importance of hearing children in general terms for all cases on matters of parental responsibility. Second, it does not harmonize domestic rules on the procedures for the hearing of a child. Consequently, Member States do not trust the national procedures of other EU countries and invoke the failure to hear a child as the most common reason for declining recognition and enforcement of foreign judgments. Therefore, the Brussels IIa

⁷⁵EU Commission, *Study on the Assessment*, *supra* n 41, 48 ff.

⁷⁶*Ibid.*

⁷⁷EU Commission, *Proposal*, *supra* n 8, 4.

Regulation does not sufficiently enhance mutual trust, recognition and enforcement of judgments and the best interests of the child. To overcome these two shortcomings and to further develop mutual trust and to better protect the best interests of the child, the Brussels IIa Recast Proposal suggests the following.⁷⁸

With regard to the hearing of the child in general, the Brussels IIa Recast Proposal suggests to insert in section 3 on “common provisions” of chapter II on “jurisdiction” of the Brussels IIa Regulation a new Article 20 on the right of the child to express his or her views, which renders the hearing of the child a general rule for all cases on matters of parental responsibility, and not only in relation to return proceedings. According to this new Article 20:

when exercising their jurisdiction [...], the authorities of the Member States shall ensure that a child who is capable of forming his or her own views is given the genuine and effective opportunity to express those views freely during the proceedings. The authority shall give due weight to the child’s views in accordance with his or her age and maturity and document its considerations in the decision.

Thus, first the domestic courts of Member States shall give the child an opportunity to be heard in legal proceedings affecting him or her, if the child is capable of freely forming and expressing his or her own views. This does not require the physical presence of the child; alternative means such as videoconferencing may be used as appropriate. Second, domestic courts of Member States shall give to the child’s views the appropriate weight depending on his or her age and maturity. Third, the domestic courts of Member States shall record in their judgment and in the annexed certificate their decision on the weight given to the views of the child.

Indeed, these three obligations are already imposed on Member States by Articles 12 of the UN Convention on the Rights of the Child and 24 of the Charter of Fundamental Rights. This is explicitly acknowledged by Recital 19 under which:

proceedings in matters of parental responsibility under this Regulation as well as return proceedings under the 1980 Hague Convention should respect the child’s right to express his or her views freely, and when assessing the child’s best interests, due weight should be given to those views. The hearing of the child in accordance with Article 24(1) of the Charter of Fundamental Rights of the European Union and Article 12 of the United Nations Convention on the Rights of the Child plays an important role in the application of this Regulation.

With regard to return proceedings, the Brussels IIa Recast Proposal suggests to replace Article 11(2) of the Brussels IIa Regulation by a new Article 24 on the “hearing of the child in return proceedings under the 1980 Hague Convention”. According to this new Article 24, “when applying Articles 12 and 13 of the 1980 Hague Convention, the court shall ensure that the child is given the

⁷⁸*Ibid*, 2.

opportunity to express his or her views in accordance with Article 20 of this Regulation". Thus, this Article will simply recall Article 20 which applies to the hearing of children in general, not only in return proceedings and contains an exception for a child who is not yet capable of forming his or her own views.

With regard to the recognition of judgments in matters of parental responsibility, the Brussels IIa Recast Proposal suggests to replace Article 23 of the Brussels IIa Regulation by Article 38 of the Brussels IIa Recast Proposal on the "grounds of non-recognition for decisions in matters of parental responsibility". Among these grounds is listed manifestly contrary to the public policy of the Member State in which recognition is sought. To determine if a judgment is manifestly contrary to public policy, relevance shall be given to the best interests of the child, according to Article 20. In any case, as the Proposal clarifies, recognition of judgments that grant rights of access or entail the return of the child cannot be refused on the basis of public policy and the best interest of the child.

With regard to the enforcement of judgments in matters of parental responsibility, the Brussels IIa Recast Proposal suggests to insert a new Article 40(2), according to which

the enforcement of a decision may be refused upon the application of the person against whom enforcement is sought where, by virtue of a change of circumstances since the decision was given, the enforcement would be manifestly contrary to the public policy of the Member State of enforcement because one of the following grounds exists: (a) the child being of sufficient age and maturity now objects to such an extent that the enforcement would be manifestly incompatible with the best interests of the child.

This new Article 42(2) aims at abolishing exequatur for all judgments on matters of parental responsibility, rather than just for those on access rights and return orders. Thus, judgments on all matters of parental responsibility from one Member State can be enforced in another without the need to be declared enforceable by the courts of the Member State where enforcement is sought. Yet, in exceptional circumstances a decision given in one Member State can be prevented from taking effect in another Member State. Challenging recognition and/or enforcement in the Member State of enforcement is in fact possible in cases where the decision – on any matter of parental responsibility including those on access rights and return orders – is incompatible with the child's best interest, such as those where the strength of the objections of a child of sufficient age and maturity reaches an importance comparable to the public policy exception.⁷⁹ According to the proposal the only two bases on which a violation of public policy can be found are the following. Firstly, the child now being of sufficient age and maturity objects to such an extent that the enforcement would be "manifestly incompatible with the best interests of the child". Secondly, "other circumstances have changed

⁷⁹See Beaumont, Walker and Holliday, *supra* n 8, 8–9.

to such an extent since the decision was given that its enforcement would now be manifestly incompatible with the best interests of the child”.

With regard to the standard certificates which aim at facilitating the recognition or enforcement of the foreign decision in the absence of the exequatur procedure, the Brussels IIa Recast Proposal suggests to replace Articles 39, 41 and 42 of the Brussels IIa Regulation by Article 53 of the Brussels IIa Recast Proposal on “certificate concerning decisions in matrimonial matters and certificate concerning decisions in matters of parental responsibility”. Under Article 53(2), “the judge who has given a decision in matters of parental responsibility shall issue a certificate using the form set out in Annex II”. Under Article 53(5)

the judge who has given a decision in matters of parental responsibility shall issue the certificate referred to in paragraph 2 only if the child was given a genuine and effective opportunity to express his or her views in accordance with Article 20.

This para 5 applies also to certified judgments related to the question of custody and taken in the framework of a return proceeding. Thus, in Annex II on “certificate referred to in Article 53 concerning decisions on parental responsibility, including right of access; or the return of the child”, a new part is added under which the rendering court shall mention whether “the child was given a genuine and effective opportunity to express his or her views” and whether “due weight was given to the child’s view”.

With regard to the procedures on the hearing of the child, the Brussels IIa Recast Proposal fails to suggest any uniform rules with common minimum standards and leaves the relevant domestic laws untouched. Recital 23 of the Recast Proposal clarifies in fact that

this Regulation is not intended to set out how to hear the child, for instance, whether the child is heard by the judge in person or by a specially trained expert reporting to the court afterwards, or whether the child is heard in the courtroom or in another place.

To facilitate mutual recognition and enforcement of judgments, the Brussels IIa Recast Proposal only imposes on Member States the recording of the assessment of the court with respect to the age and capacity of the child to freely express his or her views. This recording shall eliminate any doubt on the fact that an opportunity to be heard was given to the child by the court that rendered the judgment. So, when recognition of a decision is sought in another Member State, a court in the requested country shall not decline recognition based on the mere fact that a hearing of the child in the rendering State was done differently compared to the standards applied by the requested court.

Indeed, these amendments suggested by the Brussels IIa Recast Proposal do not solve all weaknesses of the Brussels IIa Regulation. The general obligation to hear the child, suggested by Article 20 of the Proposal and the amended provisions recalling this Article, adequately overcomes the first shortcoming of the

Brussels IIa Regulation. Namely, that this Regulation does not highlight the importance of hearing children in general terms for all cases on matters of parental responsibility, but only in relation to return proceedings. On the contrary, the failure to propose uniform minimum standards on the procedures to hear the child does not overcome the second shortcoming of the Brussels IIa Regulation. Namely, that this regulation does not sufficiently enhance mutual trust, recognition and enforcement of judgments and the best interest of the child.

On the one hand, the Brussels IIa Recast Proposal facilitates mutual recognition and enforcement of judgments in matters of parental responsibility. First, an obligation to mutually recognize and enforce judgments in matters of parental responsibility is derived from the entire system of recognition and enforcement of judgments suggested by the Brussels IIa Recast Proposal. In particular, from the abovementioned abolition of exequatur and the limits to the adoption of public policy as a defence related to the incompatibility with the child's best interest.⁸⁰ Second, a further obligation to mutually recognize and enforce judgments in matters of parental responsibility is derived from the certificate rendered by the court that issued the judgment. In particular, since this certificate shall specify if "the child was given a genuine and effective opportunity to express his or her views" and if "due weight was given to the child's view".⁸¹ Therefore, recognition and enforcement of judgments cannot be denied because of the existence of different standards and procedures on how the child is heard in the Member States domestic systems. Thus, Article 20 imposes on Member States the implicit obligation to "mutually recognising the different national systems for hearing children".⁸² This obligation clearly enhances mutual recognition and enforcement of judgments and the efficiency of proceedings in matters of parental responsibility.

On the other hand, however, the same obligation does not necessarily enhance mutual trust and the effective protection of the best interests of the child too. Trust cannot be imposed, but shall be deserved. Yet, it is difficult to deserve trust when different standards of evaluations of similar situations are adopted. Simply imposing on Member States purely formal requirements, like certifying that the child

⁸⁰As mentioned the strength of the objections of a child of sufficient age and maturity should only be considered if it reaches an importance comparable to the public policy exception. Public policy shall be limited to the best interests of the child rather than allowing the court to also take into account public policy in relation to the competing rights of both parents. Beaumont, Walker and Holliday, *supra* n 8, 8–9. Yet, as the CJEU emphasized in *Aguirre Zarraga* the Brussels IIa Regulation system is so envisaged that the court of the Member State of enforcement lacks the authority to rely on public policy considerations and on the fundamental rights of the child concerned to oppose recognition of a certified judgment under Art 42(2), Art 53 in the Brussels IIa Recast Proposal. Case C-491/10 PPU *supra* n 50, para 72.

⁸¹This recording of the assessment of the court with respect to the age and capacity of the child to freely express his/her views shall eliminate any doubt on the fact that an opportunity to be heard was given to the child by the court that rendered the judgment.

⁸²EU Commission, *Helping*, *supra* n 1, 4.

was given an opportunity to be heard, does not generate trust. This is clearly indicated by the abovementioned *Aguirre Zarraga* case where the child was clearly not heard and the court nevertheless still issued the certificate of Article 42. The Brussels Recast Proposal poses new requirements, namely that the court that rendered the judgment shall certify if the opportunity to hear the child was genuine and effective and if due weight was given to his or her views. Yet, those new requirements in the certificate are once again merely formal and do not change the substance of the problem. Namely, that each State has total discretion to evaluate if a true opportunity to hear the child and weight to his or her views were given, as well as according to which procedures this hearing shall take place. On each of these issues States follow very different standards of evaluation.

Common minimum standards on both certificates and related judgments, and procedures on the hearing of the child, are therefore necessary. With regard to the certificates, the Brussels IIa Regulation should impose on Member States common requirements, namely that both certificates and related judgments state clearly what the opportunities for the hearing of the child concerned were, when were they offered, why the child did not take these opportunities to be heard, and why the judge decided it was inappropriate to hear the child.⁸³ With regard to the procedures, the Brussels IIa Regulation should impose on Member States uniform minimum standards on tools, environment and suitable training to allow the child's voice to be heard by well-trained people with skills and capacity to enquire without harming the child.⁸⁴

In the absence of these common minimum standards on certificates and procedures, States with lower standards of evaluation rarely succeed in deserving the trust of States with higher standards in favour of the children involved. Obliging the latter to recognize and enforce the judgments of the former is in line with the system envisaged by the CJEU in the *Aguirre Zarraga* case, facilitating mutual recognition and enforcement of judgments. Yet, this obligation does not enhance mutual trust, nor does it better protect the interest of the children involved. After all, in the *Aguirre Zarraga* case, despite formal requirements and certificates, it seems that Andrea was not given any reasonable opportunity to be heard (either directly or indirectly) by the Spanish courts; her right to be heard was breached; human rights considerations could not override the issued certificate; and all of

⁸³Beaumont, Walker and Holliday, *supra* n 10, 240; Kruger and Samyn, *supra* n 6, 166.

⁸⁴Beaumont, Walker and Holliday, *Ibid*, 241. See Kruger and Samyn, *Ibid*, 161 according to whom national procedural laws on the hearing of children should be harmonized. This harmonization however should be carried out not by the Recast of Brussels IIa itself, but rather by an EU directive, which could better respect the procedural autonomy of Member States. See, however, M Bobek, "Why there is no Principle of 'Procedural Autonomy' of the Member States" in B De Witte and H Micklitz (eds), *The European Court Of Justice And Autonomy Of The Member States* (Intersentia, 2011), 305, available at SSRN: <http://ssrn.com/abstract=1614922> accessed on 2 November 2016.

this surely enhanced the system based on mutual recognition and enforcement of judgments, but at the same time failed to protect Andrea's best interest.⁸⁵

F. Conclusions

The Brussels IIa Regulation recognizes the right of the child to be heard as a fundamental human right and highly reinforces the trend towards the acknowledgments of the importance of the voice of the child and of a child-centred approach in proceedings on parental responsibility.⁸⁶ Yet, the Brussels IIa Regulation presents two main shortcomings. First, the hearing of the child is not promoted to a sufficient extent: it is merely mentioned in certain provisions of the Brussels IIa Regulation as opposed to appearing as a general rule. Second, the Brussels IIa Regulation fails to impose on Member States a uniform approach related to the procedures for the hearing of a child. Thus, Member States do not trust the national procedures of other EU countries, and invoke the failure to hear children as the most common reason for declining recognition and enforcement of judgments. Therefore, the Brussels IIa Regulation is criticized for not sufficiently enhancing mutual trust, recognition and enforcement of judgments and the best interest of the child.

The Brussels IIa Recast Proposal adequately responds to the first shortcoming of the Brussels IIa Regulation, by establishing a general obligation to hear the child under Article 20 of the Proposal as well as a series of other provisions related to Article 20. On the contrary, the Brussels IIa Recast Proposal does not overcome the second shortcoming of the Brussels IIa Regulation, since it merely imposes on Member States mutual trust and purely formal requirements in certificates, rather than a necessary uniform minimum standard on the procedures for hearing children.

On the one hand, the Brussels IIa Recast Proposal imposes mutual recognition and enforcement of judgments in matters of parental responsibility, enhancing the efficiency of proceedings in such matters. On the other hand, however, this does not necessarily enhance mutual trust and the effective protection of the best interests of the child. This approach of the Brussels IIa Recast Proposal is in line with that of the CJEU in *Aguirre Zarraga*, which, however, “plac[es] too much confidence in the principle of mutual trust and [does] not ensur[e] sufficient protection for the best interest of the child”.⁸⁷

It is true that the two objectives of protecting the best interests of the child and enhancing mutual trust among national courts

are not in competition, but in a mutually depending relationship. The system set up by the Brussels II[a] Regulation will work at its best where the court of the Member

⁸⁵Walker and Beaumont, *supra* n 50, 245–46.

⁸⁶Trimming, *supra* n 13, 242.

⁸⁷Walker and Beaumont, *supra* n 50, 231.

State of origin does its work properly, i.e. where it affords an effective judicial protection to the fundamental rights of the child concerned.⁸⁸

It is true also that Article 81(3) of the Treaty on the Functioning of the EU requires unanimity in the legislative procedures to amend the Brussels IIa Regulation. In cross-border matters on parental responsibility unanimity may be difficult to achieve on uniform minimum standards in regard not only to the substance, but also to the procedures.

Yet, adopting uniform minimum standards regarding the procedures on the hearing of the child, rather than imposing mutual trust and purely formal requirements in certificates, would best assure that the Member State of origin properly protects the interest of the child.

Disclosure statement

No potential conflict of interest was reported by the author.

⁸⁸Lenaerts, *supra* n 6, 1326.