



ARTICLES

THE CHILD'S RIGHT TO BE HEARD IN THE BRUSSELS SYSTEM

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ABSTRACT: Ten years after its enactment, and on the basis of substantial case law derived from the Court of Justice, on 30 June 2016 the Commission adopted a Recast Proposal of the Brussels IIa Regulation. The Proposal suggests amending the Brussels IIa Regulation in regards to several aspects, including the hearing of the child. The right of the child 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 (no. 50811/10) emphasised. In the system of the Brussels IIa Regulation and of its Recast Proposal, this right plays a considerable role. This paper analyses the approach adopted by the Regulation and the amendments suggested by its Recast Proposal.

KEYWORDS: cross-border families – parental responsibility – child – hearing – Brussels IIa Regulation – Recast Proposal.

I. INTRODUCTION

In the EU the number of international families is now estimated at 16 million and increasing. Currently there are 140,000 international divorces and around 1,800 parental child abductions per year.¹ In line with these figures, cross-border family disputes are

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¹ European Commission, *Helping Parents and Children Involved in Cross-Border Family Proceedings, The Brussels IIa Regulation – What Will Change With the New Rules?*, July 2016, ec.europa.eu; European Commission, *The Proposed New Rules of the Brussels IIa Regulation: Questions and Answers*, 30 June 2016, europa.eu; European Parliament, *Cross-Border Parental Child Abduction in the European Union, Study for the LIBE Committee*, January 2015, europarl.europa.eu, p. 36 *et seq.* (the Study was carried out under the coordination of Lukas Heckendorn Urscheler and Ilaria Pretelli, both of whom are of the Swiss Institute of Comparative Law (SICL), Lausanne, Switzerland). Data on child abductions are available at

also increasing significantly,² as well as the subsequent complications for children in maintaining 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. Regulation (EC) 2201/2003 of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (hereinafter: the Brussels IIa Regulation) was thus enacted,³ repealing Regulation (EC) 1347/2000.⁴ 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 recognised and enforced in another; and it regulates parental child abduction cases, whereby 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, because in the EU the law applicable to divorce is determined by the Rome III Regulation,⁵ and the law applicable to parental responsibility is determined by the 1996 Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, En-

INCASTAT, a database created by the Hague Conference on Private International Law for monitoring the implementation of the Hague Convention. INCASTAT collects information through questionnaires distributed to National Central Authorities of the States Parties. See Hague Conference on Private International Law, *Child Abduction Section*, www.hcch.net.

² European Commission, *Helping Parents and Children*, cit.

³ Regulation (EC) 2201/2003 of the Council of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. 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 1 January 2007 for Bulgaria and Romania, and 1 July 2013 for Croatia. On this Regulation, see K. BOELE-WOELKI, C. GONZALEZ BEILFUSS (eds), *Brussels II bis: Its Impact and Application in the Member States*, Oxford: Oxford University Press, 2007; K. BOELE-WOELKI, M. JANTARA-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, S. SYMEONIDES (eds), *Convergence and Divergence in Private International Law*, Liber Amicorum Kurt Siehr, Zürich: Schulthess, 2010, p. 125 *et seq.*; N. LOWE, M. NICHOLLS, M. EVERALL, *International Movement of Children: Law, Practice and Procedure*, Bristol: Jordan Publishing, 2004. See also the bibliography indicated in the following footnotes.

⁴ Regulation (EC) 1347/2000 of the Council of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses.

⁵ Regulation (EU) 1259/2010 of the Council of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III Regulation). The Rome III Regulation applies in just over half of the Member States, since it was adopted through the procedure of enhanced cooperation. 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, C. SCHMID (dir.), *Droit international privé de la famille, Les développements récents en Suisse et en Europe*, Zürich: Schulthess, 2013, p. 29 *et seq.*

forcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.⁶

Ten years after the entry into application of the Brussels IIa Regulation,⁷ and on the basis of several judgments of the Court of Justice, 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, which suggested amendments and received 193 responses.⁸ The Brussels IIa Regulation was generally 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).⁹ This proposal suggests amending the Brussels IIa Regulation in six main matters relating to parental responsibility; 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. Traditionally, the right of a child to be heard in judicial proceedings was not recognised in Member States' legal orders, as parents were believed to do what was in their child's best interests, children were to be protected from the traumatising event of taking sides in their parents' dispute, and children were considered incapable to act.¹⁰ Today researchers reveal that

⁶ This Convention was adopted under the auspices of the Hague Conference of Private International Law and ratified by all EU Member States under EU authorisation. 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. On the Convention see N. LOWE, *The 1996 Hague Convention on the Protection of Children – A Fresh Appraisal*, in *Child and Family Law Quarterly*, 2002, p. 191 *et seq.*; N. LOWE, M. NICHOLLS, *The 1996 Hague Convention on the Protection of Children*, Bristol: Jordan Publishing, 2012, *passim*.

⁷ K. LENAERTS, *The Best Interests of the Child Always Come First: the Brussels II bis Regulation and the European Court of Justice*, in *Jurisprudencija/Jurisprudence* (online), 2013, p. 1302 *et seq.*, www.mruni.eu; A. DUTTA, A. SCHULZ, *First Cornerstones of the EU Rules on Cross-Border Child Cases: the Jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation From C To Health Service Executive*, in *Journal of Private International Law*, 2014, p. 1 *et seq.*; T. KRUGER, L. SAMYN, *Brussels II bis: Successes and Suggested Improvements*, in *Journal of Private International Law*, 2016, p. 132 *et seq.*

⁸ European Commission, Report 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.

⁹ 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 final.

¹⁰ B. UBERTAZZI, *La capacità delle persone fisiche nel diritto internazionale privato*, Padova: Cedam, 2006, p. 421; B. UBERTAZZI, *Capacity and Emancipation*, in J. BASEDOW, G. RÜHL, F. FERRARI, P. DE MIGUEL (eds), *Encyclopedia of Private International Law*, The Hague: Edward Elgar, 2017, p. 666 *et seq.*

not providing children with the opportunity to express their view in judicial proceedings, 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 proceedings.¹¹

Therefore, a process is taking place to recognise 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, granted by the United Nations, 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. The realisation of the child's right to be heard in all matters of concern for 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 Right of the Child.¹² 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".¹³

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.¹⁴ Yet, the Brussels IIa Regulation presents weaknesses, that the Brussels IIa Recast Proposal

¹¹ T. KRUGER, *International Child Abduction: The Inadequacies of the Law*, Oxford: Hart, 2011, p. 200 *et seq.*; A. PARKES, *Children and International Human Rights Law: The Right of the Child to be Heard*, New York: Routledge, 2013; L. ELROD, "Please Let Me Stay": *Hearing the Voice of the Child in Hague Abduction Cases*", in *Oklahoma Law Review*, 2011, p. 663 *et seq.*; P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abduction: the Reality of Article 11(6)-(8) Brussels IIa Proceedings across the EU*, in *Journal of Private International Law*, 2016, p. 211 *et seq.*

¹² United Nations Human Rights: Office of the High Commission, Convention on the Rights of the Child, New York, 2 September 1990, treaties.un.org. 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, www.refworld.org. The Committee adopted this General Comment at its fifty-first session in Geneva, 25 May-12 June 2009. See also the following paragraph of this paper.

¹³ *Ibidem*.

¹⁴ A. GOUTTENORE, *L'audition de l'enfant dans le règlement Bruxelles II bis*, in H. FULCHIRON, C. NOURISSAT (dir.), *Le nouveau droit communautaire du divorce et de la responsabilité parentale*, Paris: Dalloz, 2005, p. 201 *et seq.*; T. KRUGER, *International Child abduction*, cit., *passim*; K. TRIMMINGS, *Child Abduction within the European Union*, Oxford: Hart Publishing, 2013, p. 182; T. KRUGER, L. SAMYN, *Brussels II bis: Successes and Suggested Improvements*, cit., p. 155 *et seq.*; P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 233.

aims to overcome. This paper will analyse these two instruments in relation to the rules governing the hearing of the child, and address their shortcomings.

II. 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 United Nations. The 1989 United Nations Convention on the Right of the Child¹⁵ recognises the child's right to be heard as a fundamental human right¹⁶ 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.¹⁷ Art. 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".

Art. 12, para. 1, poses certain conditions to the enjoyment of the right to be heard, namely those of age and capacity, of freely expressing the child's views in all matters affecting her or him, and of giving due weight to these views in accordance with the age and maturity of the child. In regards to these conditions, the UN Committee on the Rights of the Child (hereinafter UN Committee) emphasises 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 his own views. On the contrary, States Parties should presume that a child has the capacity to form his or her own views and recognise that he or she has the right to express them. It is not the onus of the child to initially prove his or her capacity. Additionally, Art. 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.¹⁸

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

¹⁵ This Convention is nearly universally ratified by States.

¹⁶ A. PARKES, *Children and International Human Rights*, cit., *passim*.

¹⁷ UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009)*, cit.

¹⁸ *Ibidem*, para. 21.

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 the topic nature is of harmful events, 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 should 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.¹⁹

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.²⁰

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 capacity to form a view. For this reason, the views of the child have to be assessed on a case-by-case examination.²¹

Art. 12, para. 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 national law. With regard to this paragraph, the UN Committee emphasises the following.

"In any judicial and administrative proceedings affecting the child" means in all relevant judicial proceedings affecting the child including, without limitation, those of relevance here such as separation of parents, custody, abduction. Those proceedings may involve alternative dispute mechanisms such as mediation and arbitration 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, ade-

¹⁹ *Ibidem*, para. 25.

²⁰ *Ibidem*, paras 26-27.

²¹ *Ibidem*, paras 28-31.

quate 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 heard directly by the court in any proceedings. 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 of working with children.²³

"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. On the contrary, States Parties shall comply with the basic rules of fair proceedings, such as the right to a defence and the right to access one's own files. 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.²⁴

Arts 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, 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 emphasised that Arts 3 and 12 have complementary roles. The former aims to realise 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.²⁵ 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, since the child's best interests is a rule of procedure, 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

²² *Ibidem*, para. 34.

²³ *Ibidem*, para. 36.

²⁴ *Ibidem*, para. 47.

²⁵ 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, www.refworld.org. The Committee adopted this General Comment at its sixty-second session (14 January – 1 February 2013).

been explicitly taken into account. In this regard, it shall be always 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.²⁶

The right of children to be heard in legal proceedings affecting them is also granted by the Council of Europe. The European Convention for 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 maintained that the right of children to be heard is incorporated into Art. 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 European Court of Human Rights maintained that the right of children to be heard is incorporated into Art. 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 entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

Thus, Arts 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.²⁷

In the case *Pini, Bertani, Manera and Atripaldi v. Romania* of 22 June 2004, the European Court of Human Rights considered that the national authorities had not exceeded their discretion in setting 10 years as the age beyond which the child's consent

²⁶ *Ibidem*, p. 12 *et seq.* 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* by Michael Freeman, The Hague: Martinus Nijhoff Publishers, 2007, *passim*; J. EEKELAAR, *The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children*, in *The International Journal of Children's Rights*, 2015, p. 3 *et seq.*; M. ŽUPAN, *The Best Interest of the Child – A Guiding Principle in Administering Cross-Border Child Related Matters?*, in T. LIEFAARD, J. SLOTH-NIELSEN (eds), *25 Years CRC*, The Hague: Brill-Nijhoff, forthcoming.

²⁷ European Court of Human Rights, judgment of 8 July 2003, no. 30943/96, *Sahin v. Germany*, para. 73 *et seq.*

to his or her adoption must be obtained.²⁸ In the case *Elsholz v. Germany* of 13 July 2000, the European Court of Human Rights emphasised that Art. 8 of the Convention is respected by domestic courts even in cases where the child is not heard, provided that the decision of the domestic 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 psychologically strain the child.²⁹ In the case *N.Ts. et al. v. Georgia* of 2 February 2016, the European Court of Human Rights was asked whether Art. 8 was violated in a situation where at no stage of Georgian proceedings, to issue an order for the return of three

²⁸ European Court of Human Rights, judgment of 22 June 2004, no. 78028/01 and no. 78030/01, *Pini, Bertani, Manera and Atripaldi v. Romania*, 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 European Court of Human Rights, 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, as the children were 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 was required for the adoption order to be valid, set at ten 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. Subsequently, 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 European Court of Human Rights noted that the Romanian authorities correctly weighed 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 European Court of Human Rights 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 of the ECHR.

²⁹ European Court of Human Rights, judgment of 13 July 2000, no. 25735/94, *Elsholz v. Germany*. In this case the European Court of Human Rights 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. 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. Also, this was because of the opinion of the expert on whether questioning the child, aged about 5 at the relevant time, at a hearing in court would be a psychological strain for her. The expert explained that she had not directly asked the child about her father. In her view, the risk in hearing the child in court on her relationship with her father and any direct questioning in this respect was that, in the conflict between the parents, the child might have the impression that her statements were decisive.

brothers, were they heard by the domestic courts in person.³⁰ The European Court of Human Rights 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 by the maternal family, the evidence before the domestic courts concerning the boys' hostile attitude towards the father was unambiguous. Consequently, 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 Art. 8.

Finally, in the case *Iglesias Casarrubios and Cantalapiedra Iglesias v. Spain* of 11 October 2016, the European Court of Human Rights was asked whether Art. 6 was violated in a situation where at no stage of the Spanish divorce proceedings were the children heard in court. In this case, Ms Casarrubios' 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 Casarrubios (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

³⁰ European Court of Human Rights, judgment of 2 February 2016, no. 71776/12, *N.Ts. et al. v. Georgia*, para. 73 *et seq.* 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 of his sons. The proceedings ended in an order for the boys' return to 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 European Court of Human Rights 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 that the proceedings in the applicants' case 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 seven and eighteen years of age to be directly involved in proceedings affecting their rights.

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 in 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 at stake is mature enough. At the time when the divorce proceedings started, the interested children were aged 13 years and 11 years respectively. At the time when the judgment of divorce was issued, the interested children were aged 14 years and respectively almost 12 years. At the time when the judgment of divorce was opposed by their mother, the children involved were aged almost 15 years and respectively 12 years. 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 European Court of Human Rights, complaining of a violation of Art. 6 of the ECHR on the right to a fair hearing 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 European Court of Human Rights noted that the application was lodged by three persons, the mother and the two daughters. Yet, in the case at stake the only parties to the domestic divorce proceedings were the mother and the father, while the daughters merely acted as 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 to the parties of these proceedings, namely the mother. Thus, the European Court of Human Rights 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 European Court of Human Rights declared admissible the mother's request to assess a violation of her right to a fair trial because of a lack of hearing her daughters in person by the Spanish courts.³¹

³¹ European Court of Human Rights, judgment of 11 October 2016, no. 23298/12, *Iglesias Casarrubios et Cantalapiedra Iglesias c. Espagne*, para. 23 *et seq.*

On the merit, the European Court of Human Rights unanimously held that there had been a violation of Art. 6. In line with its previous case law, the European Court of Human Rights 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 shall document its considerations in its decision.³² Thus, the European Court of Human Rights 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 Art. 3 of the 1996 European Convention on the Exercise of Children's Rights adopted under the auspices of the Council of Europe.³⁴ This Convention aims to protect the best 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, Art. 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,

³² *Ibidem*, para. 36.

³³ *Ibidem*, para. 42.

³⁴ See Council of Europe, European Convention on the Exercise of Children's Rights, Strasbourg, 25 January 1996, rm.coe.int. 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". 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".

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 this Art. 6 together with Art. 12 of the UN Convention as sources requiring 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

The right of children to be heard in legal proceedings affecting them is also granted by the EU. Art. 24 of the Charter of Fundamental Rights of the European Union (the Charter) 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 refers to Art. 24 of the Charter. In fact, Recital 33 emphasises 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 recognises 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.

³⁵ See Italian Court of Cassation, judgment of 19 May 2010, no. 12293, in *Rivista di diritto internazionale privato e processuale*, 2012, p. 225. See R. BOSISIO, *Children's Right to Be Heard. What Children Think*, in *International Journal of Children's Rights*, 2012, p. 141 *et seq.* See also Italian Court of Cassation, judgment of 8 February 2017, no. 3319.

³⁶ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice*, 17 November 2010, rm.coe.int. 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 emphasises 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".

III. CHILD'S RIGHT TO BE HEARD IN 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 emphasises 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). 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 Art. 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 wrongful abduction). It establishes a specific European procedure which complements that indicated by the 1980 Hague Convention with the aim of ensuring a certain procedural unification among EU Member States.³⁷ 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 wrongful 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 for children's non-return, namely the child becoming settled due to the passing of time (Art. 12, para. 2); consent or acquiescence by the applicant (Art. 13, para. 1, let. a)); a grave risk that return will expose the child to harm or place him or her in an intolerable situation (Art. 13, para. 1, let. b)); the objection by a mature child (Art. 13, para. 2) and the violation of fundamental human rights (Art. 20). In the presence of any of those exceptions, the court of the State where the child was wrongfully abducted and is currently located has a 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 discretion to decide. In addition, the court must interpret these exceptions strictly, due to the strong presumption favouring the return of the wrongfully removed child under the 1980 Hague Convention. Thus, a child's view

³⁷ C. HONORATI, *Sottrazione internazionale dei minori e diritti fondamentali*, in *Rivista di diritto internazionale privato e processuale*, 2013, p. 5 *et seq.*; U. MAGNUS, P. MANKOWSKI (eds), *Brussels Ibis Regulation*, Sellier: Munich, 2012, p. 128. Yet, two major changes are added by the Regulation. Firstly, the Regulation favours the return of the child more than the Hague Convention and to this purpose limits the impact of its Art. 13 among Member States. Secondly, as a consequence of the first change, the Regulation gives clear priority to the decisions rendered in the State of the former habitual residence of the child. See P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 211 *et seq.*

is important but not presumptive or determinative: the objecting child should have a voice under the Hague Convention, but not a veto.³⁸

The procedure established by the 1980 Hague Convention is partially modified by Art. 11 of the Brussels IIa Regulation in intra-EU return proceedings. This provision reinforces the 1980 Hague Convention policy, exhibiting a more child-focused approach. In fact, Art. 11, para. 2, of the Brussels IIa Regulation provides that “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 from which the child was unlawfully removed or in which it is unlawfully retained.³⁹ This provision of the Brussels IIa Regulation has a precedent in Art. 13, para. 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 Art. 13, para. 2, whereas in the Brussels IIa Regulation the obligation to hear children is explicitly emphasised. Also, the Brussels IIa Regulation requires that the enforcement of the return order under Art. 11, para. 8, is conditional on the child having been given the opportunity to be heard during the proceedings, unless it is inappropriate.⁴⁰

³⁸ See A. CRIHANA, A.R. SAS, T.C. CIOBANU, *Behind the Curtains of International Child Abduction Proceedings, Hearing the Voice of the Child*, www.ejtn.eu. See also European Court of Human Rights, judgment of 7 March 2013, no. 10131/11, *Raw et al. v. France*. This case concerned the failure to execute a judgment confirming an order to return underage children to their mother in the United Kingdom, their divorced parents having shared residence rights. The children wished to stay with their father in France. The Court held that although 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, Press Release, *French authorities' failure to comply with an order to return children to their mother in the United Kingdom breached the right to respect for private and family life*, 7 March 2013, adam1cor.files.wordpress.com.

³⁹ See U. MAGNUS, P. MANKOWSKI (eds), *Brussels IIbis Regulation*, cit., p. 132; K. TRIMMINGS, *Child Abduction within the European Union*, cit., p. 242.

⁴⁰ See *infra* in this same paragraph on Art. 42. See P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 232 *et seq.*, 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, para. 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 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. See K. TRIMMINGS, *Child Abduction within the European Union*, cit., p. 242.

Despite the child-focused approach of Art. 11, para. 6, of the Brussels IIa Regulation, which improves the 1980 Hague Convention policy, courts are allowed to decide not to hear the child if they consider such a hearing inappropriate. Thus, recent data indicates that in practice in most intra-EU cases involving Art. 11, para. 6, Brussels IIa proceedings, the child is not heard.⁴¹ Additionally, under the Brussels IIa Regulation the court must issue a decision on the return of the child within six weeks from being seized with the request (Art. 11, para. 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 European Court of Human Rights. According to the European Court of Human Rights, in fact, Art. 8 of the ECHR requires the court 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”.⁴²

In the frame of the Brussels IIa Regulation, however,

“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”.⁴³

The second norm of the Brussels IIa Regulation that deals with the hearing of the child is Art. 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 recognised in other EU countries save where a ground of non-recognition

⁴¹ See P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 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*, in *Rivista di diritto internazionale privato e processuale*, 2015, p. 275; T. KRUGER, L. SAMYN, *Brussels II bis: Successes and Suggested Improvements*, cit., p. 157. See *infra* section IV.

⁴² See European Court of Human Rights, judgment of 6 July 2010, no. 41615/07, *Neulinger v. Switzerland*, para. 139. See also European Court of Human Rights, judgment of 26 November 2013, no. 27853/09, *X v. Latvia*. On this case law, see P. BEAUMONT, K. TRIMMINGS, L. WALKER, J. HOLLIDAY, *Child Abduction: recent Jurisprudence of the European Court of human Rights*, in *International and Comparative Law Quarterly*, 2015, p. 52 *et seq.*

⁴³ C. HONORATI, *Sottrazione internazionale dei minori e diritti fondamentali*, cit., p. 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 (Author’s translation). See also P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 211 *et seq.*

among those enumerated in Art. 23 arises. In particular, among these grounds stands 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” (Art. 23, let. b)). Thus, under this provision, the recognition of a foreign decision relating to parental responsibility 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 case of urgency.⁴⁴

Despite Art. 23, let. 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 Art. 23, let. 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.⁴⁵

The third and fourth norms of the Brussels IIa Regulation that deal with the hearing of the child are Arts 41 and 42. Under Art. 41 on “rights of access”,

“1. The rights of access referred to in Article 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 Article 40(1)(b), entailed by an enforceable judgment given in a Member State shall be recognised and enforceable in another Member

⁴⁴ This provision is similar to Art. 23, para. 2, let. b), of the 1996 Hague Convention. Under Art. 23, para. 2, let. 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. JANERÄ JAREBORG, N. LOWE, D. MARTINY, W. PINTENS, *Principles of European Family Law Regarding Parental Responsibilities*, The Hague: Intersentia, 2007, p. 242; P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 233.

⁴⁵ T. KRUGER, L. SAMYN, *Brussels II bis: Successes and Suggested Improvements*, cit., p. 157.

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 Article (11)(b)(8), the court of origin may declare the judgment enforceable. 2. The judge of origin who delivered the judgment referred to in Article 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 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, para. 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 proceedings] 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, para. 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 proceedings] were given an opportunity to be heard, unless a hearing was considered inappropriate having regard to their age or degree of maturity” (point 11).

Thus, Arts 41 and 42 establish that the failure to hear a child 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 Art. 11, para. 8. Such judgments are to be automatically recognised and can be directly 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 other 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, Arts 41 and 42 require the court of the State of origin to issue a certificate in the standardised form of Annex III to the Brussels IIa Regulation. Yet, the certificates under Arts 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, Arts 41 and 42 do not include any exception for cases of urgency, whereas under Art. 23 of the Brussels IIa Regulation recognition may be denied if the child had not been given the opportunity to be heard, save in the case of urgency.

Despite Arts 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 Art. 42.⁴⁶ This happened in *Joseba Andoni Aguirre Zarraga v. Simone Pelz* (hereinafter: *Aguirre Zarraga*).⁴⁷ This case concerned the non-return of a child from Germany to Spain. The initial divorce and custody order were held in Spain and provisional custody was given to the father. The mother then moved to Germany. Andrea (the daughter) went to visit her mother for a school holiday and remained in Germany ever since. Following the retention of Andrea in Germany, the father initiated return proceedings under the 1980 Hague Convention in Germany. The German courts under Art. 13, para. 2, of the 1980 Hague Convention rejected the father's Hague return application on the basis of 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 have been taken into account. The father initiated parallel proceedings in Spain under the Brussels IIa Regulation to obtain a custody order and issue a certificate requesting that Andrea be returned to Spain. The Spanish courts 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 those concerning the hearing of Andrea and herself by video conference. The Spanish court rejected this application, awarded sole rights of custody to the father and 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 courts before rendering the judgment. When the father requested the automatic enforcement of the Spanish judgment accompanied by the certificate under Art. 42, para. 2, let. a), the German courts were hesitant since it contained a declaration that was manifestly false and since it therefore seriously infringed Andrea's fundamental right to be heard. Consequently, the German court made a preliminary ruling reference to the Court of Justice questioning whether the certificate provided for by Art. 42 of the Brussels IIa

⁴⁶ See T. KRUGER, L. SAMYN, *Brussels II bis: Successes and Suggested Improvements*, cit., p. 157; P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 233.

⁴⁷ Court of Justice, judgment of 22 December 2010, case C-491/10 PPU, *Aguirre Zarraga*, para. 72. See K. LENAERTS, *The Best Interests of the Child Always Come First*, cit., pp. 1316-1317; L. WALKER, P. BEAUMONT, *Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice*, in *Journal of Private International Law*, 2011, p. 239 *et seq.*; A. DUTTA, A. SCHULZ, *First Cornerstones of the EU Rules on Cross-Border Child Cases*, cit., p. 26 *et seq.*; T. KRUGER, L. SAMYN, *Brussels II bis: Successes and Suggested Improvements*, cit., p. 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 recognise any decision made by another country according to different standards. See M. VÖLKER, G. STEINFATT, *Die Kindesanhörung als Fallstrick bei der Anwendung der Brüssel IIa-Verordnung*, in *Familie Partnerschaft Recht*, 2005, p. 415 *et seq.* See also V. GAERTNER, *Hess: Remarks on Case C-491/10PPU – Andrea Aguirre Pelz*, in *Conflict of Laws*, 12 December 2010, conflictoflaws.net.

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*,⁴⁸ the Court of Justice held that since recognition of a judgment certified under Art. 42, para. 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 Art. 42, para. 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, Art. 42, para. 2, let. a), is to be interpreted in accordance with Art. 24 of the Charter, 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 them. Yet, that view is not binding on the court and is rather just one of the criteria by which this court should assess the child's best interests.⁴⁹ 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.⁵⁰ 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 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 Art. 42, para. 2, let. 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 whether the judgment certified pursuant to Art. 42 is vitiated by an infringement of the child's right to be heard.⁵¹

Despite the above four norms of the Brussels IIa Regulation favouring a child-focused approach, the importance of hearing children is not emphasised in general

⁴⁸ See Court of Justice: judgment of 11 July 2008, case C-195/08 PPU, *Rinau* and judgment of 1 July 2010, case C-211/10 PPU, *Povse*. On these cases, see K. LENAERTS, *The Best Interests of the Child Always Come First*, cit., p. 1312; A. DUTTA, A. SCHULZ, *First Cornerstones of the EU Rules on Cross-Border Child Cases*, cit., pp. 22 and 26; L. WALKER, P. BEAUMONT, *Shifting the Balance Achieved by the Abduction Convention*, cit., p. 241.

⁴⁹ Opinion of AG Bot delivered on 7 December 2010, case C-491/10 PPU, *Aguirre Zarraga*, para. 68.

⁵⁰ *Ibidem*, para. 63 *et seq.*

⁵¹ *Aguirre Zarraga*, cit., para. 72.

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 Art. 11, para. 2, an important and general ground for non-recognition of decisions under Art. 23, and also a condition for the delivery of the certificate that guarantees the international efficiency of the right of access under Art. 42, para. 2, let. c), and the return of the child under Art. 42, para. 2, let. a).⁵² 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.⁵³

In any case, the hearing of the child under the Brussels IIa Regulation shall 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.⁵⁴ 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.⁵⁵ Furthermore, where under Arts 41 and 42 direct enforcement of a judgment in another Member State becomes possible without any examining or exequatur procedure, in contrast to Art. 23, all Member States should use the same standards.⁵⁶ Yet, because the Brussels IIa Regulation does not uniformise 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.⁵⁷

⁵² U. MAGNUS, P. MANKOWSKI (eds), *Brussels IIbis Regulation*, cit., p. 132.

⁵³ European Commission, *Practice Guide for the application of the new Brussels II Regulation (Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000*, 1 June 2005, ec.europa.eu.

⁵⁴ U. MAGNUS, P. MANKOWSKI (eds), *Brussels IIbis Regulation*, cit., p. 358.

⁵⁵ The 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 Court of Justice, judgment of 27 November 2007, case C-435/06, *C* [GC], para. 46 and respectively Court of Justice: judgment of 2 April 2009, case C-523/07, *A*, paras 35-37, and judgment of 22 December 2010, case C-497/10 PPU, *Mercredi*, para. 46. On these cases see Opinion of AG Bot, *Aguirre Zarraga*, cit., para. 74 *et seq.*; K. LENAERTS, *The Best Interests of the Child Always Come First*, cit., p. 1305 *et seq.*; A. DUTTA, A. SCHULZ, *First Cornerstones of the EU Rules on Cross-Border Child Cases*, cit., pp. 9 and 13.

⁵⁶ U. MAGNUS, P. MANKOWSKI (eds), *Brussels IIbis Regulation*, cit., pp. 357-358; Opinion of AG Bot, *Aguirre Zarraga*, cit., paras 75-78.

⁵⁷ See Proposal for a Regulation COM(2016) 411, cit.

IV. CHILD'S RIGHT TO BE HEARD IN MEMBER STATES' PROCEDURAL LAWS

The Brussels IIa Regulation identifies the proceedings in which a child must be given the opportunity to be heard, and poses the conditions under which the hearing shall be 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, namely whether judges are expected to act on their own initiative, that is regardless of whether parties made a reference for instance to Art. 11, para. 2, in their submissions; what is the minimum appropriate age for hearing a child; the methods and means available to the court to hear the child,⁵⁸ so 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.⁵⁹ It is true that Recital 20 of the Brussels IIa Regulation recalls the Evidence Regulation,⁶⁰ 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 video-conference and 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 view may be obtained by other competent authorities, for instance social workers who present reports to the court.⁶¹ Yet, the Brussels IIa Regulation does not address many other related procedural issues, such as those just mentioned together with that of the training, namely that when the hearing of the child is carried out by the judge directly or indirectly by another official, whether this person shall receive adequate training for instance on how best to communicate with children and to perceive eventual manipulations by parents.⁶²

The procedural laws of the Member States on the hearing of the child were recently compared by several reports and studies,⁶³ including, in chronological order, the 2010

⁵⁸ T. RAUSCHER (Hrsg.), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR*, Munich: Sellier, 2010, p. 155.

⁵⁹ Yet the Brussels IIa Regulation includes matters such as the establishment of "guardianship, curatorship or similar institutions" (Art. 1, para. 2, let. 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, para. 2, let. c)).

⁶⁰ See European Commission, *Practice Guide for the application of the new Brussels II Regulation*, cit., p. 33. See also U. MAGNUS, P. MANKOWSKI (eds), *Brussels IIbis Regulation*, cit., pp. 282 and 358; T. RAUSCHER (Hrsg.), *Europäisches Zivilprozess- und Kollisionsrecht*, cit., p. 155.

⁶¹ European Commission, *Practice Guide for the application of the new Brussels II Regulation*, cit., p. 42.

⁶² *Ibidem*, p. 33. See also T. RAUSCHER (Hrsg.), *Europäisches Zivilprozess- und Kollisionsrecht*, cit., p. 155; U. MAGNUS, P. MANKOWSKI (eds), *Brussels IIbis Regulation*, cit., pp. 282 and 358.

⁶³ See in particular P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 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".

Study of the European Parliament on the Protection of Children in Proceedings;⁶⁴ the 2010 Training module on Parental responsibility in a cross-border context, including child abduction, prepared by the Academy of European Law on behalf of the European Commission, DG Justice;⁶⁵ the 2014 Report of the European Commission on the assessment of Regulation (EC) 2201/2003 and the policy options for its amendment;⁶⁶ the 2014 Report of the Council of Baltic Sea States (CBSS) Children's Unit;⁶⁷ the 2015 Report of the European Union Fundamental Rights Agency (FRA), in cooperation with the European Commission (hereinafter: the FRA's Report);⁶⁸ and the 2016 Study on Cross-Border Parental Child Abduction in the European Union, carried out on behalf of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.⁶⁹ These sources highlight the following.

In certain Member States the hearing of the child is mandatory, even though the consequences for not hearing a child in the absence of legitimate reasons vary: in some countries not hearing the child can be a procedural error, which can be the subject-matter of an appeal against the judgment; in other States there are no specific consequences for not hearing the child. In other countries there is no obligation for courts to hear the child, and this is left to the entire discretion of the court, even though certain grounds for not hearing the child may be specifically indicated.⁷⁰

In addition, in certain Member States the criteria for deciding whether a child will be heard are age and maturity. In some countries, a specific age is indicated after which it is mandatory to hear a child. Typically the crucial age that determines whether or not a child is considered mature enough to be heard is set between 10 and 15 years. In most Member States that establish this age limit it is also possible to hear younger children who are considered mature enough to state a reasoned and uninfluenced opinion. Thus,

⁶⁴ European Parliament, *Protection of Children in Proceedings*, 2010, www.europarl.europa.eu. This Study was conducted by the Advokat Mia Reich Sjögren, Advokaterna Sverker och Mia Reich Sjögren AB, on behalf of the European Parliament.

⁶⁵ European Commission, *Training Module on Parental Responsibility in a Cross-Border Context, Including Child Abduction*, www.era-comm.eu, p. 51 *et seq.*

⁶⁶ European Commission, *Study on the Assessment of Regulation (EC) No 2201/2003 and the Policy Options for its Amendment*, 2015, ec.europa.eu. This Study was rendered by a team from Deloitte, headed by Luc Chalsège with the support of Eva Kamarás, Katarína Bartz, Anna Siede, Florian Linz, Charlotte Dekempeneer, Lionel Kapff, Nicolas Moalic and the external expert Prof. Rainer Hausmann.

⁶⁷ 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*, 25-26 May 2014, childcentre.info, p. 10.

⁶⁸ See Fundamental Rights Agency, *Annual Activity Report 2015*, 2016, fra.europa.eu, pp. 27-29. 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.

⁶⁹ European Parliament, *Cross-Border Parental Child Abduction*, *cit.*, pp. 66-67.

⁷⁰ European Commission, *Study on the Assessment*, *cit.*, p. 48.

in some countries children of three years are heard when appropriate. In other Member States, however, other criteria are relevant in that respect, such as an agreement between the parents, which is considered sufficient to represent the child's views.⁷¹

Moreover, in certain Member States, children's hearings are always conducted by the court, either in a private room (in camera), or in alternative settings. In some countries it is specifically required to ensure a pleasant atmosphere for the child. In the majority of Member States hearings can typically be conducted by a judge, a court official, child welfare services or other relevant authorities, psychologists or mediators. While it is necessary that the child is heard alone in some Member States, other Member States allow the parents to be present, while other countries prescribe that parents are absent to ensure that the child is not influenced, even though the guardian *ad litem* may be present. In some Member States, the statement of the child is read out loud in the courtroom after the hearing and is thus made available to the parents. A few Member States allow the child's representatives to express the opinion of the child instead of hearing the child directly.⁷² The hearings are not held in public in any of the Member States, unless it is specifically considered appropriate.

Finally, in all Member States the holders of parental responsibility are legal representatives of the child, individually or jointly, depending on the arrangements of custody. On the modalities of the representation there is a great variety of solutions. In some States it is possible to appoint an external person, if there is a potential conflict between the parents and the child. This person is usually named special guardian or guardian *ad litem* and is appointed by the court among relevant authorities, natural persons such as relatives of the child in other States, or lawyers depending on the countries. In some States the guardians promote the interest of the child and keep him or her informed about the course of the proceedings, while in other countries they also perform other competences that are determined by the court on a case-by-case basis. In certain States in addition to the child's guardian *ad litem*, other forms of representation to children are available, such as child's support, namely an appropriately qualified person at the court's disposal that in the case of intense disputes may access the files, be present in hearings and inform the children involved. In some States, it is possible for children to participate in court proceedings directly without any representatives.

As this comparison clearly indicates, failing a uniform EU approach, the law governing the procedures for hearing the children may differ widely, and this entails a number of controversial implications. 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 its conflict of law norms. These are partially harmonised by the 1996 Hague Convention in all EU Member States. For instance, according to Art. 16 of the 1996 Hague Convention, the pa-

⁷¹ *Ibidem*.

⁷² See T. RAUSCHER (Hrsg.), *Europäisches Zivilprozess- und Kollisionsrecht*, cit., p. 155.

rental responsibility of a child, and therefore his or her legal representation, is determined by the law of the state of habitual residence of the child. However, this Convention does not establish which is the applicable law to determine to what extent children may be involved in court proceedings, and whether they require representation. It also fails to indicate which law applies to establish 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. To all these matters and to any further procedure related to the hearing of the child, the applicable law is typically determined by the relevant conflict of laws in the procedural law of the State of the forum.

Yet, because of the many differences in these procedural laws of the Member States, in many cases the best interest of the child is not sufficiently considered. First, in spite of the child-focused approach of Art. 11, para. 6, of the Brussels IIa Regulation, only in 20 per cent of the cases of return proceedings the child is heard; in the remaining 80 per cent of cases where the child was clearly not heard, the courts still issued the Art. 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 per cent, of these children were heard. This means that on the basis of the information provided, 73 per cent of children aged 6 and over were not heard. Only four children aged five or younger out of a total of 24 children in that age group were heard; 16 of these children fall within the ages of three to five years”.⁷³

Second, in cases on parental responsibility, children are not heard through their legal representative and therefore their representation in court is not properly ensured. In fact, as mentioned under the procedural law of certain Member States, the child needs to have appointed a guardian *ad litem* in proceedings on parental responsibility. Yet the competence 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 it cannot appoint a guardian.⁷⁴ Third, in other cases related to parental responsibility, children are not heard although their hearing is appropriate. In fact, under 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 Art. 41, para. 2, let. c), even though the child was not given the opportunity to be heard.⁷⁵

These figures can explain why there is a diffuse mistrust among the Member States toward the domestic procedures of other countries; indeed, the failure to hear a child is invoked as the most common ground for declining recognition and enforcement of

⁷³ P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 233.

⁷⁴ European Commission, *Study on the Assessment*, cit., p. 48 *et seq.*

⁷⁵ *Ibidem*.

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”.⁷⁶ However, as already mentioned, this is possible under Art. 23, let. b), but is not feasible under Arts 41 and 42 as the Court of Justice clarified in *Aguirre Zarra-ga*. 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 recognise and enforce foreign judgments, common standards for all Member States on the procedure to hear children would be necessary.

V. 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 fails to highlight the importance of hearing children in general terms for all cases on matters of parental responsibility. Second, it does not uniformise domestic rules on the procedures for the hearing of a child. Therefore, the Brussels IIa Regulation does not sufficiently enhance mutual trust, recognition and enforcement of judgments and the best interests of the child. A number of provisions enshrined in the Brussels IIa Recast Proposal are precisely designed to overcome these two shortcomings and to further develop mutual trust and to better protect the best interests of the child.⁷⁷

With regard to the hearing of the child in general, the Brussels IIa Recast Proposal suggests an insertion in section 3 on “common provisions” of ch. II on “jurisdiction” of the Brussels IIa Regulation of a new Art. 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 Art. 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

⁷⁶ Proposal for a Regulation COM(2016) 411, cit., p. 4.

⁷⁷ *Ibidem*, p. 2.

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 posed to Member States by Arts 12 of the UN Convention on the Rights of the Child and 24 of the Charter. 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 Art. 11, para. 2, of the Brussels IIa Regulation with a new Art. 24 on the “hearing of the child in return proceedings under the 1980 Hague Convention”. According to this new Art. 24, “when applying Articles 12 and 13 of the 1980 Hague Convention, the court shall be ensured that the child is given the opportunity to express his or her views in accordance with Article 20 of this Regulation”. Thus, this provision simply refers to Art. 20 without mentioning any longer the exception that the child shall be heard during the return proceedings “unless this appears inappropriate having regard to his or her age or degree of maturity”.

With regard to recognition of judgments in matters of parental responsibility, the Brussels IIa Recast Proposal suggests to replace Art. 23 of the Brussels IIa Regulation with Art. 38 of the Brussels IIa Recast Proposal on the “grounds of non-recognition for decisions in matters of parental responsibility”. One of the grounds is the manifest contrariety 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 Art. 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 Art. 40, para. 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 Art. 42, para. 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 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.

With regard to the standard certificates which aim at facilitating the recognition or enforcement of foreign decisions in the absence of the exequatur procedure, the Brussels IIa Recast Proposal suggests to replace Arts 41 and 42 of the Brussels IIa Regulation with Art. 53 of the Brussels IIa Recast Proposal on "certificate concerning decisions in matrimonial matters and certificate concerning decisions in matters of parental responsibility". Under Art. 53, para. 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 Art. 53, para. 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 return proceedings. Thus, in Annex II on "certificate referred to in Art. 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 19 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 of the fact that an opportunity to be heard was given to the child by the court that rendered the judgment. As such, when recognition of a decision is sought in another Member State, a court in the requested country shall not decline recognition 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 Art. 20 of the Proposal, and the amended provisions recalling this Art. 20, 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 recognise 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 abolishment of exequatur and the limits to the adoption of public policy as a defence related to the incompatibility with the child's best interest.⁷⁸ Second, a further obligation to mutually recognise and enforce judgments in matters of parental responsibility is derived from the certificate rendered by the court that issued the judgment. In particular, 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".⁷⁹ 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, Art. 20 poses on Member States the implicit obligation to "mutually recognis[e] the different national systems for hearing children".⁸⁰ 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

⁷⁸ As 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. Yet, as the Court of Justice emphasised 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, para. 2, Art. 53 in the Brussels IIa Recast Proposal. See *Aguirre Zarraga*, cit., para. 72.

⁷⁹ This recording of the assessment of the court with respect to the age and capacity of the child to freely express his or 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.

⁸⁰ European Commission, *Helping Parents and Children Involved in Cross-Border Family Proceedings*, cit., p. 4.

be imposed, but shall be deserved. Yet, it is difficult to deserve trust when different standards of evaluations of similar situations are applied. Simply imposing on Member States purely formal requirements, like certifying that the child was given an opportunity to be heard, does not, by itself, originate trust. This clearly emerges from the above-mentioned *Aguirre Zarraga* case and all other cases where the child was clearly not heard and nevertheless the courts still issued the certificate of Art. 42. The Brussels IIa 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 his or her views were given due weight. 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 to give due weight to his or her views were given, as well as to determine the procedural rules applicable to this hearing. On each of these issues, States retain discretion to apply different rules and standards.

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.⁸¹ 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.⁸²

In the absence of these common minimum standards on certificates and procedures, States with looser standards of evaluation rarely succeed in deserving the trust of States with stricter standards in favour of the children involved. Obliging the latter to recognise and enforce the judgments of the former is in line with the system envisaged by the Court of Justice in the *Aguirre Zarraga* case, which facilitates mutual recognition and enforcement of judgments. Yet, this obliging does not enhance mutual trust, nor does it better protect the interest of the children involved. After all, in the *Aguirre Zar-*

⁸¹ P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 240; T. KRUGER, L. SAMYN, *Brussels II bis: Successes and Suggested Improvements*, cit., p. 166.

⁸² P. BEAUMONT, L. WALKER, J. HOLLIDAY, *Conflicts of EU Courts on Child Abductions*, cit., p. 241. See T. KRUGER, L. SAMYN, *Brussels II bis: Successes and Suggested Improvements*, cit., p. 161, according to whom national procedural laws on the hearing of the children should be harmonised. This harmonisation however should not be carried out 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, H. MICKLITZ (eds), *The European Court of Justice and Autonomy of the Member States*, Cambridge: Intersentia, 2011, p. 305 *et seq.*

raga case despite formal requirements and certificates, the child was not given any reasonable opportunity to be heard (either directly or indirectly) by the Spanish courts; her right to be heard was breached; and human rights consideration could not override the issued certificate. This has enhanced the system based on mutual recognition and enforcement of judgments, but, at the same time, it has failed to protect the child's best interest.⁸³

IV. CONCLUSIONS

The Brussels IIa Regulation recognises the right of the child to be heard as a fundamental human right, and strongly reinforces the trend towards the acknowledgment of the importance of the voice of the child and of a child-centric approach in proceedings of parental responsibility.⁸⁴ Yet, the Brussels IIa Regulation presents two main shortcomings. First, the right to be heard of the child is not promoted to a sufficient extent: the fact that such a right appears to be merely mentioned in certain provisions of the Brussels IIa Regulation prevents it from being considered as a rule having a general scope. 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 has been widely criticised 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 Art. 20 of the Proposal as well as a series of other provisions related to Art. 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 necessary uniform minimum standards 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 matters of parental responsibility. 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 Court of Justice in *Aguirre Zarraga*, which, however, "plac[es] too much confidence in the principle of mutual trust and [does] not ensur[e] sufficient protection for

⁸³ L. WALKER, P. BEAUMONT, *Shifting the Balance Achieved by the Abduction Convention*, cit., pp. 245-246.

⁸⁴ K. TRIMMINGS, *Child Abduction within the European Union*, cit., p. 242.

the best interest of the child”.⁸⁵ 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 IIa Regulation will work at its best where the court of the Member State of origin does its work properly, i.e. where it affords an effective judicial protection to the fundamental rights of the child concerned”.⁸⁶ 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 better ensure that the Member State of origin properly protects the interest of the child.

⁸⁵ L. WALKER, P. BEAUMONT, *Shifting the Balance Achieved by the Abduction Convention*, cit., p. 231.

⁸⁶ K. LENAERTS, *The Best Interests of the Child Always Come First*, cit., p. 1326.