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TAKING CHILDREN'S VOICES INTO CONSIDERATION IN EUROPEAN FAMILY LAW PROCEEDINGS

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Summary: this paper advocates for a better consideration of children's voices in European family law proceedings. While each Member State strongly values children's rights, they protect them to varying degrees. At national level, improvements are required. In addition, ten years after raising children's rights to the top of the EU Agenda, the European Union must consider accelerating the process at European level by planning an approximation of laws, notably to ease cross-border proceedings.

INTRODUCTION

1. "*Children must be given a chance to voice their opinion and participate in the making of decisions that affect them*". These are the exact words the European Commission chose to emphasize in 2011 when fixing the European Union Agenda for the Rights of the Child. In family law proceedings, these words have striking resonance. Parental responsibility, custody, access rights, placement of the child, educational measures or child abduction are all extremely sensitive cases when it comes to children. Around 2.5 million children are involved in judicial

proceedings across the European Union every year.[1] Ensuring they may easily take the floor and play an effective part in the judicial decision-making process is therefore paramount.

2. Children's rights are reflected in various forms of legislation, not only at national level but also at European and International levels. The evolution of European and International legislation tends to acknowledge that children have the same rights as adults and must be recognized as full-rights holders. However, children are entitled to additional rights due to their special needs and vulnerability to exploitation and abuse, especially when they are involved in judicial proceedings. Promoting children's rights is the result of the United Nations Convention on the Rights of the Child;[2] which is obviously worth mentioning and guides decision-making in many states. In Europe, the Council of Europe also fully plays its role through the European Convention on Human Rights, the European Convention on the Exercise of Children's Rights[3] and non-binding guidelines issued by the Committee of Ministers towards "*child-friendly justice*".[4] Likewise, the European Union has not remained silent, as the Charter of Fundamental Rights of the European Union attaches great value to children's rights, as do regulations whose aim is to ease cross-border proceedings in family law matters within the European Union.[5] The European Commission has also committed itself to better promote children's rights.[6]

3. Despite common values, strong disparities are however to be noted in the practice of Member States. Children are not heard in the same way, or at the same age. Some do not receive the same information while others are not even able to take direct legal action. After consultation with European judges involved in family law proceedings, to whom our team sent a survey,[7]

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1 European Union Agency for Fundamental Rights (hereinafter the "FRA"), "*Child-friendly justice - Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States*", February 2017.

2 United Nations Convention on the Rights of the Child adopted by General Assembly Resolution 44/25 of 20 November 1989 (hereinafter the "CRC").

3 European Convention on the Exercise of Children's Rights, opened for signature in Strasbourg on 25 January 1996, and entered into force on 1 July 2000 (hereinafter the "ECECR").

4 Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum (hereinafter the "Guidelines of the Council of Europe").

5 Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and matters of parental responsibility, and on international child abduction (hereinafter "Regulation Brussels II-*ter*") (OJ 2019, L 178, p. 1). This Regulation is about to enter into force in August 2022 and recasts Council Regulation (EC) n° 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility (hereinafter "Regulation Brussels II-*bis*") (OJ 2033, L 338, p. 1). As Regulation Brussels II-*ter* will only be applied to proceedings started after August 2022, both Regulations Brussels II-*bis* and Brussels II-*ter* will be analyzed.

6 See Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, "*Ensuring justice in the EU – a European judicial training strategy for 2021-2024*", COM(2020) 713 final, December 2020. Available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/child-friendly-justice_en [last access April 2022].

7 Judges from Belgium, England and Wales, France, Germany, Hungary, Ireland, and Italy answered the survey. A

disparities became apparent, leaving open the question of the place of the child in family law proceedings and the weight of the child's opinion in the decision-making process.

4. In this regard, this paper advocates for a better consideration of children's voices in European family law proceedings. While each Member State strongly values children's rights, they protect them to varying degrees. At national level, improvements are required (part I). In addition, ten years after raising children's rights to the top of the EU Agenda, the European Union must consider accelerating the process at European level by planning an approximation of laws, notably to ease cross-border proceedings (part II).

PART I — THE NEED FOR BETTER CONSIDERATION OF CHILDREN'S VOICES IN EUROPE

5. A child's fundamental right to participate and express his or her views in civil proceedings cannot be exercised effectively, whether directly or indirectly, if the child involved does not receive adequate information and support. To make the justice systems across Europe more child-friendly, the Council of Europe and the European Commission have collected and analyzed data showing that different standards among Member States lead to unequal access to information (A) and justice (C). Besides, procedures to hear a child differ between European countries (B). These disparities are even more apparent at the decision-making stage, as the principle of the best interest of the child is widely open to interpretation.

A — Disparities in a child's right to information

6. The right to receive adequate information is a fundamental right of a child involved in civil proceedings, as stated in Articles 12 and 13 of the CRC, as well as Articles 3, 6 and 10 of the ECECR. Article 13 of the CRC states that "*the child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice*". Article 3 of the ECECR asserts: "*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*".

copy of the latter is annexed to this paper.

7. To underline the importance of the information that must be given to children, the ECECR has defined the term "*relevant information*" as information which is appropriate to the age and understanding of the child, and which will be given to enable the child to fully exercise his or her rights, unless sharing the information is contrary to the welfare of the child.[8]
8. Moreover, the concern given to a child's right to information also emerges from its efficiency, which is guaranteed by Article 6 of the ECECR dealing with the decision-making process which specifies that "*in proceedings affecting a child, the judicial authority, before taking a decision, shall, in a case where the child is considered by internal law as having sufficient understanding, ensure that the child has received all relevant information*".
9. These principles ensure child-friendly justice, especially the right to information, which is the first step in any child's involvement in judicial proceedings. Child-friendly justice and effective involvement of children in proceedings depends clearly on the information that is given to them. Likewise, the principle of the child's best interests, inspiring the Brussels II-*bis* and Brussels II-*ter* Regulations, implies that children should be given adequate preparation before their involvement in judicial proceedings.
10. For the same purpose, the Guidelines of the Council of Europe recommend that both children and their parents or legal representatives should promptly and directly receive the information, considering that sharing the information with the parents should not be an alternative to sharing that information with the child. This means that children can fulfil their rights only if they receive reliable, comprehensive and understandable information before, during, and after the proceedings. This condition is critical to ensure that children have a correct understanding of any judicial proceedings in which they are involved.
11. However, while sharing the information is essential to promote and implement the procedural rights of the child, it is not necessarily true that all information has to be shared with children. Some may be harmful to the child's welfare, and it may not be in the child's best interest to receive it.
12. Therefore, a fundamental aspect of providing adequate information is that both information and advice should be provided to children in a manner adapted to their age and maturity, in a language they can understand, and sensitive to culture and gender. In this way, every child involved in civil proceedings will be informed of their rights. Most of all, expressing their views must remain a choice and not an obligation. To that end, they should receive information about the stages, scope and purpose of the proceedings, the possibility of legal representation, what

[8] See Article 2 of the ECECR.

to expect from the hearings and the availability of protective measures.

13. Furthermore, providing information about the potential impact of the procedure is essential. It must be explained to children how their views will be considered, on what matters, and what weight will be given to them. This includes information about the notion of best interest of the child as a primary consideration in any judicial proceedings and the fact that children's views may not necessarily determine the final decision. Unfortunately, a FRA study shows that sixty-two per cent of interviewed children felt that they did not receive sufficient information.[9]
14. To improve a child's right to information, it is essential to have a better understanding of national legislation. To this extent, the European Commission conducted a study to collect data on children's involvement in criminal, civil and administrative judicial proceedings in its 28 Member States. This study revealed some disparities between Member States with regards the child's right to information: some children benefit from a statutory right to receive information on the judicial system and proceedings, while in some Member States, these rights do not exist.[10]
15. To have a precise idea of the different professional practices within the European Union, a survey was sent to several European judges, the findings of which are set out below. In French family law, family judges ensure that children have been informed of their right to be heard and to be assisted by a lawyer. The information is provided by their legal guardian or guardians or, in some cases, by the person or body to whom they have been entrusted.[11] The same obligations are also applicable in non-judicial consensual divorces by means of a template form.[12] Regarding French procedure in educational measures, Judge Emmanuelle Lajus-Thizon, Juvenile Judge in Bordeaux, also explains that "*children with sufficient understanding – or discernment – have the capacity to act before the juvenile judge. They are informed of their right to be heard and to be assisted by a lawyer in the court summons, while for children without sufficient understanding, guardians or parents are informed that they have to come to the hearing with the child*".
16. According to German rules, Judge Britta Irgang, Judge at the District Court of Berlin-Schöneberg, indicates that "*[i]n most cases the court appoints a guardian ad litem (Verfahrensbeistand) who will represent the interests of the child and inform the child of his or*

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9 See FRA, "*Child-friendly justice - Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States*", February 2017.

10 See European Commission, "*Study on children's involvement in criminal, civil and administrative judicial proceedings in the 28 Member States of the EU*", July 2015.

11 See Article 388-1 of the French Civil Code and Article 338-1 of the French Civil Procedure Code.

12 See Article 229-1 of the French Civil Code, Article 1144 of the French Civil Procedure Code.

her rights".[13] Meanwhile, if the case does not present any difficulties, Judge Martina Erb-Klünenemann, Judge at the District Court of Hamm and Liaison Judge at the European and International Hague Judicial Networks, adds that "*[t]hey are all asked to come to court by information given to the parents, and older children (starting at 14) receive a standardized letter from the court*". In England and Wales, Judge Gordon Y Lingard, District Judge of the Family and County Courts of England and Wales (sitting in retirement) specifies that children are informed of their rights to be heard "*[n]ot by the court, but by a CAFCASS (Children and Family Court Advisory and Support Service) appointed Officer (social worker)*". Similarly, in Ireland, Judge Mary Dorgan handling the Childcare, Family Law and under 18 crime lists in Cork mentions that "*[c]hildren are told that they can be heard by their social worker and/or Guardian ad litem*". Whereas in Hungary, according to Judge Eszter Juhász, at the Local Court of Győr, a child's right to information is provided "*if they [children] have to appear at the court in order to be heard. Otherwise, they can ask to be heard by any parent. Under 14 years, the child gets the writ of summons via the legal representative (parent), over 14 years the child gets the writ of summons personally.*"

17. These findings reveal, on the one hand, that the institutions responsible for providing information to children involved in judicial proceedings differ from one Member State to another, whether it be judges, parents, guardians *ad litem*, lawyers, special services or social workers. On the other hand, some inequalities appear, considering that the content of the information is not specified. Whether or not a child receives adequate information depends on the commitment and training of the person sharing the information, which might be problematic when the information is provided by the parents. The latter have a personal interest in the proceedings and may not objectively evaluate their child's discernment or relay information to him or her in an objective manner. In addition, it also shows that judges have a less prominent role in informing children because they do not see the latter before the hearing. Furthermore, if the person that informed the child is not a professional, judges are not able to verify that the child has received the relevant information. Therefore, it is crucial to have common standards to ensure that every child receives relevant information from specially appointed and well-trained professionals using child-friendly materials.

B — Unsatisfactory right to be heard

18. According to Nacho de la Mata, "*children [must be] effectively listened to, have a voice in the*

[13] See section 158(b) of the Procedure Act in Family Matters and Non-contentious Jurisdiction Matters.

world in which we live".[14] The child's right to be heard stems from the fundamental principle of the best interest of the child and constitutes the main tool to fulfil this goal. The CRC was based on four principles, two of them being the best interest of the child and the views of the child. Article 12 of the CRC stresses that "*[s]tates 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. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child […]*". This idea fully inspired European Union law and the European Convention on Human Rights. For instance, according to Article 24 of the Charter of Fundamental Rights of the European Union (hereinafter the "Charter") children "*may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity*."

19. The Guidelines of the Council of Europe also emphasize that "*judges should respect the right of children to be heard in any matters that affect them or at least to be heard when they are deemed to have a sufficient understanding of the matters in question*". The way the hearing is conducted "*should be adapted to the child's level of understanding and ability to communicate and take into account the circumstances of the case*". The environment of the hearing should be adapted to the age of the child so he or she feels safe and at ease to talk. Since its recognition, the child's right to be heard has been transcribed into national legislation in Europe but has encountered difficulties in practice.

20. First of all, one condition to hear a child is his or her maturity or "sufficient understanding". This is an essential condition, but it also leads to a subjective assessment by the judge that generates inequalities in the application of this right in Europe. There is no definition of the "sufficient understanding" concept. However, there are criteria on which judges can rely to decide whether a child is able to express him or herself. The Guidelines of the Council of Europe explain that the concept of "*sufficient understanding*" implies a certain level of comprehension without implying that the child should fully understand all aspects of the case. There is no age limit, "*as it tends to be too rigid and arbitrary and can have truly unjust consequences*". Therefore, the analysis of "*sufficient understanding*" must be carried out individually and take into account the development of the child, his or her "*personal capacities, life experiences,*

[14] See quotes by the European Judicial Training Network (EJTN) in its course "*Promoting a child friendly justice*", 2014. Available at https://www.ejtn.eu/fr/Training/Catalogue-2014/Promoting-a-child-friendly-justice-/ [last access April 2022].

cognitive skills"[15] and the issues at stake. Some 10-year-old children might be more mature than a 12 year old. Age is only one criterion among others, because the level of understanding of a child is not uniformly linked to their biological age.[16]

21. In practice, some Member States set minimum age requirements for children to be heard. The age limit differs considerably from one country to another. In adoption cases, eleven Member States set an age limit between 10 and 12 years old, while one sets an age limit of 14. In placement cases, where the child is in danger, eight Member States set an age limit between 10 and 12, and two between 14 and 16 years old. In these two kinds of proceedings, only twelve Member States apply no age limit.[17] As a result, it is worth noting that in almost half of the Member States, age is in fact the main criterion.
22. Furthermore, in family law proceedings, children under 5 or 6 years old are not considered as having sufficient understanding. However, these same young children are heard in criminal proceedings which begs the following question: why would we take their voices into account in criminal proceedings and not in family law matters? In matrimonial matters, a child may also be either a witness or a victim of his or her parents' behavior, even though no direct physical harm has been caused.
23. To improve the child's right to be heard in France, the "Défenseur des droits" advised in 2013 that a presumption of sufficient understanding should be granted to any child who asks to be heard, so the judge would have no other choice than to meet the child to decide if he or she is mature enough to be heard.[18] One may also draw inspiration from Germany. An interviewed judge highlighted the fact that hearings are now systematically organized for every child in family matters, no matter whether he or she has sufficient understanding. The child will meet the judge so that he or she can at least get a first impression. This is a great improvement, worth setting up as a binding principle at European level.
24. Secondly, to make the right to be heard effective, the conditions in which the child is heard and the way the hearing is conducted is decisive, keeping in mind that one of the objectives of such

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15 Guidelines of the Council of Europe, n° 96, p. 75.

16 See A. Parkes, C. Shore, C. O'Mahony and K. Burns, "The right of the child to be heard? Professional experiences of childcare proceedings in the Irish district court", *Child and Family Law Quarterly*, vol. 27, n° 4, 2015.

17 FRA, "*Mapping minimum age requirements: Children's rights and justice*", September 2017. Available at https://fra.europa.eu/en/publication/2018/mapping-minimum-age-requirements-childrens-rights-and-justice [last access April 2022]. In Norway, the Children Act gives an unconditional right to be heard for children above 7 years old. Under this age, they can be heard if the judge decides he or she is able to do so. But in practice, only "*children aged 12 or above are often invited to the hearing in the tribunal*". See A. Nylund, "*Children's Constitutional Rights in Nordic Countries*", in "Children's right to participate in decision-making in Norway", Chapter 11, Brill, 2019, point 5.2.

18 This idea is also well reflected in the Guidelines of the Council of Europe. See Guidelines of the Council of Europe, point 47.

a hearing is to enlighten the judge on what is the best interest of the child. Family law judges in Europe are not always specialized and trained for children's hearings. They can therefore either be reluctant to hear a child or forced to do so by law without having the right training to do so effectively. For children who are mature enough to be heard, the conditions in which the hearing is conducted are crucial.

25. Family law proceedings are often very stressful for the child. Whether a divorce or a placement is at stake, the proceedings are very intrusive in the private life of a family and it is often very hard for the child to feel free to express his or her opinion and wishes without feeling guilty. Therefore, the conditions in which the child is heard are crucial and must enable the child to talk freely and the judge or the child's representative to understand correctly what is being said. This not only involves a person specially trained to hear young people, but also a special "friendly" room adapted to the age of the child.

26. First, the place where the child is heard is decisive. Courthouses are often intimidating for children. An environment outside the court is preferred in some countries. The European Commission recommends at least a child-friendly room, which is colourful, and has toys for the very young and positives images. In many European countries, influenced by the Guidelines of the Council of Europe, "children's houses" or special places for hearings have been created. Poland and Bulgaria developed "blue-rooms", containing a two-way mirror so that other childhood professionals can see the child's reactions and attitude. In England and Wales, Judge Lingard stressed that the child is heard in the judge's private room in the presence of an officer from the Children and Family Court Advisory and Support Service and that the hearing is recorded on tape. In France, family law judges mostly hear the children in their office, but such places are sometimes filled with toys and stuffed animals. Responding to our survey, a judge from Hungary explains that children are heard in a special room outside the judicial conference room, in the absence of the parties (parents and lawyers). It is indeed very important that the child feels free to talk without any other adults around, especially family members.

27. Secondly, concerning the way the hearing is conducted, the Council of Europe points out that judges are often untrained to proceed with efficient child hearings. In 2018, the European Commission also noted the importance of specialized adults to communicate with children and it "*urges practitioners not to use language and jargon that alienated children and their families*". The European Commission rightly points out that clear guidance must be given "*so that children's voices were really heard, and so that they felt safe and secure*".[19]

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[19] European Commission, "*Child friendly justice and integrated child protection systems – lessons learned from EU projects*", Conference background paper, 25-26 June 2018, p. 6.

28. Hearing children in criminal proceedings is really advanced in France and in other EU countries, using the National Institute of Child Health and Human Development (NICHD) protocol. This hearing protocol was developed in Canada to permit efficient and friendly hearings of potential young victims of sexual crimes. The main objective of this protocol is to manage the hearing without any suggestion at all, which is a very difficult exercise in practice, because the answer is often suggested in the way the question is asked. The NICHD proved that suggestion does not work with children, because it will either influence them to answer what they feel the listener wants them to say or make them feel so uncomfortable that they will not say anything at all. A French police officer interviewed by the team said: "*if you're waiting for an answer in your question, you won't get anything credible*". This protocol could well be adapted to family law proceedings.

29. When the child is heard correctly, there is so much to benefit from in his or her opinion and point of view. Furthermore, the child feels that he or she is heard and understood. The FRA is calling for many improvements.[20] Where useful, hearings should be video recorded in family law cases, in respect of procedural rules. The listener should carefully prepare the hearing, know the case perfectly, as well as the child's environment and hobbies, and make sure he or she asks all the necessary questions to avoid the child having to be heard more than once. The hearing should always be organized with very few people and with a good explanation of the role of everyone in the room. In order to help the child feel secure and comfortable, the professional should make sure that any contact between the child and any person the child does not wish or need to see is avoided. Finally, the FRA proposes the establishment of clear guidelines and detailed rules on how to hear a child. With specialized training, judges will have the tools to approach hearing a child. The aim is to give judges the opportunity to have all the evidence necessary to decide in the best interest of the child.

30. Finally, the right of a child to be heard is clearly a way to assess his or her best interest.[21] The Guidelines of the Council of Europe highlight the fact that listening to a child is not sufficient and judges must give due weight to their words and opinions. This requires major changes in the way one regards young people. Age alone cannot determine the significance of a child's view. Judge Lingard vouches that "*[s]ection 1 of the Children Act 1989 requires the court, in making decisions about children, to take into account inter alia the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)*". Another

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20 FRA, "*Child-friendly justice - Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States*", February 2017.

21 See J. Eekelaar, R. George, *Routledge Handbook of Family Law and Policy,* Routledge, 1st ed., 2014, p. 290

judge from Hungary assesses that "*[o]ver 14 years, the judge has to decide on the rights of custody according to the opinion of the child unless his [or] her choice is risky to his [or] her improvement*".

31. Once the judge has decided that the child can form his or her own views, the former will decide what weight he or she must give to the child's point of view in the decision to come. Beyond the right of a child to be heard lies the best interest of the child. The principle of the best interest of the child is the very first a judge, when ruling on a case involving a child, must have in mind.[22] However, this principle has been highly criticized as one with too many possible interpretations. For example, it has been qualified as elusive or even as a "magical notion […] favoring judicial arbitrariness".[23] In practice, assessing the best interest of the child will rarely come without hearing the latter, when such a hearing may take place after consideration of the capacity of the child to express his or views. With this hypothesis in mind, taking down the views of the child is a strong element to assess his or her best interest. Obviously, when the child is too young to express his or her views, assessing the best interest of the child would impose the consideration of other elements, such as the context in which he or she lives or how the child may react. Judge Dorgan from Ireland pointed out that "*the child is heard carefully but on occasion, his view may not be in his best interest, and this is where the exercise of judicial discretion and judgment comes into play*".

C — Insufficient right to access justice

32. When children understand and trust the justice system, they feel confident in using it. In this respect, the most absolute right for any child is to take his or her own voice into court. A child's right of access to justice stems from Articles 6, 13 and 34 of the ECHR and Article 12 of the CRC stating that the right to access justice may be exercised "*either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law*".
33. As holders of rights, children should have recourse to remedies to effectively exercise their rights or act upon violations of their rights. Only a few applications have however been brought

22 See, within the legal order of the European Union, Charter of Fundamental Rights of the European Union, Article 24§2, and CJEU, 22 December 2010, *Zarraga*, C-491/10 PPU, EU:C:2010:828, points 64-65. See also, within national legal orders, the influence of the European Convention on Human Rights, J-R. Binet, "L'intérêt de l'enfant dans la jurisprudence de la CEDH", CEDH et droit de la famille, Rennes 1, Coll. Colloque et Essais, p. 79. Every rule in Regulations Brussels II-*bis* and Brussels II-*ter* dealing with the situation of a child must reflect the best interest of the child.

23 J. Carbonnier, case note of CA Paris, 30 April 1959: D. 1960, p. 673.

directly by minors before the European Court of Human Rights[24] or national courts. Indeed, the main obstacles for children to take legal action are, on the one hand, a lack of information for children about their rights and, on the other hand, the child's lack of legal capacity to act in domestic law. In fact, access to justice for children usually depends on the support provided by adults, who themselves may not be aware of children's rights or know how to best support their children. Thus, children often have no capacity to act without their parents or legal representatives, which is particularly problematic in cases of conflict of interest. In this situation, a child's right to have their own legal counsel and representation in proceedings in their own name should not be restricted.

34. According to a FRA study, the capacity of children to take legal action or invoke judicial proceedings varies within the European Union.[25] In every Member State, one simple rule is applied: children cannot bring a case to court on their own before they acquire full procedural capacity, which is 18 years old in most Member States. Moreover, in half of the Member States, only legal representatives and guardians, usually the parents, enjoy procedural capacity to bring a case before a court in civil and administrative proceedings.

35. Nevertheless, the report points out some exceptions. For instance, in Poland, from the age of 13 onwards, children can bring family and custody cases related to their person to court, while in Lithuania, from the age of 14 onwards, children can bring all cases regarding relations in which they have full legal capacity to court (and, if they are married, cases related to their marriage). In the Netherlands, children can bring family issues related to them to court from the age of 12 onwards. Children aged 16 or over can also bring cases related to authorized contracts to court, especially employment issues or medical treatment agreements. It appears from the FRA study that, once more, some disparities exist within Member States. Therefore, common standards need to be implemented to increase the child's right to access to justice within the European Union.

PART II — THE NECESSARY APPROXIMATION OF LAWS IN AN EVER-GROWING EUROPEAN CONTEXT

36. National law and procedure govern many aspects of children's rights in family law proceedings. An approximation of laws in this regard would smooth the recognition and enforcement process

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[24] See "*La place du mineur dans la convention européenne des droits de l'homme*", XIème assises nationales des avocats d'enfants. Available at https://www.cairn.info/revue-journal-du-droit-des-jeunes-2009-6-page-8.htm [last access April 2022].

[25] See FRA, "*Age at which a child plaintiff can bring a civil case to court on their own - Minimum age requirements concerning children's rights in the European Union*", April 2018.

of cross-border decisions. It would also be a way to set common standards in the very best interest of European children (B).

A — Ensuring a smooth enforcement of cross-border decisions

37. In some cases, the hearing of a child is crucial to obtain the recognition and enforcement of cross-border decisions. As the child is clearly impacted by decisions taken in parental responsibility matters, but also in child abduction cases, regulations adopted at the level of the European Union aiming at establishing a European judicial system in family law litigation have not evaded this question. The importance given to children's rights varies however, depending on the case at stake.
38. As far as parental responsibility litigation is concerned, the Brussels II-*bis* Regulation allows the judge of the Member State in which the recognition and enforcement of a decision is sought, to refuse the latter when the child, except when faced with an emergency, has not been given the possibility to be heard in accordance with the fundamental principle of its state.[26]
39. This ground for non-recognition and non-enforcement of a decision obviously calls for an approximation of laws within the European Union. The Brussels II-*ter* Regulation, recasting Regulation Brussels II-*bis*, did not head in that direction, however. In parental responsibility matters, the judge of the Member State where the recognition and enforcement of a decision is sought will have fewer options at his or her fingertips when a child has not been given a true and genuine opportunity to be heard.
40. It stems from the Regulation that the judge *may* — but *shall* not anymore — refuse to recognize and enforce such a decision when the child has not been given the possibility to be heard.[27] Besides, the judge will not be able to refuse when the decision deals with the child's assets or when the urgency of the procedure compels the judge of the issuing Member State not to give that possibility to the child.[28] The two exceptions laid down in Article 39 of Regulation Brussels II-*ter* are easily understandable,[29] provided, for the second, that there is a common understanding of the matter of urgency. Here also, an approximation of laws is very much required.[30] The Court of Justice of the European Union ruled that, as far as provisional measures are concerned, urgency refers, for children, to a situation "*likely seriously to endanger their*

26 See Regulation Brussels II-*bis*, Article 23 (b).
27 See Regulation Brussels II-*ter*, Article 39§2.
28 *Ibid*., Article 39§2, (a) and (b).
29 No exceptions are however laid down for recognition and enforcement of an "authentic instrument" dealing with parental responsibility: see Regulation Brussels II-*ter*, Article 68§3.
30 The interpretation given by the Court of Justice of the European Union for provisional measures may not be sufficient to cover all cases of urgency: see CJEU, 2 April 2009, *A*, C-523/07, EU:C:2009:225, point 48.

welfare, including their health or their development".[31] Nevertheless, what is fully understandable for awarding provisional measures may not be the same when dealing with the setting up of a child hearing. Precision on the notion of urgency may be useful. It is even more so when Recital 57 of Regulation Brussels II-*ter* distinguishes between "urgency" and other "serious grounds" justifying the absence of any hearing.

41. If, beyond these two exceptions, the judge may still refuse to recognize and enforce a decision, he or she may not however invoke the fundamental principle of his or her state in the future.[32] This is a big change from the previous Regulation and calls into question what may specifically constitute, without any clear guidance, the common standard of the hearing of the child being enough to refuse recognition and enforcement of a decision in parental responsibility matters.
42. Regulation Brussels II-*ter* has indeed cleared any reference to the fundamental principle of the state where recognition and enforcement is sought and replaced it with a reference to Article 21 of the Regulation stressing, for the very first time, the right of the child to be heard in any proceedings about to impact him or her.[33] This reference is still unsatisfactory, as Article 21 of the Brussels II-*ter* Regulation orders, with many ambiguities, the hearing of the child only with reference to "*national law and procedure*".
43. Article 21 of the Brussels II-*ter* Regulation defines the scope of the right of the child to be heard. It prescribes giving a child "*capable of forming his or her own views*" "*a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body*". Nevertheless, it seems that it remains with "*national law and procedure*" to fix the age at which the child may be given the right to be heard.[34] As a matter of fact, the European legislator has not chosen the path of the approximation of laws of Member States, despite clear disparities.
44. What may also be unsatisfactory is that, in the future, a judge may certify a decision in parental responsibility matters, in particular the full observance of Article 21 of the Brussels II-*ter* Regulation. This certification will enable bypassing the *exequatur* procedure. Consequently, the judge of the executing Member State will have no other choice than to accept the decision, without having a chance to put forward the fundamental principle regarding the hearing of a child in civil proceedings. Also, contrary to the Brussels II-*bis* Regulation, it will be up to the

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31 See CJEU, 2 April 2009, *A*, C-523/07, EU:C:2009:225, point 48.
32 Compare Regulation Brussels II-*bis*, Article 23 (b), and Regulation Brussels II-*ter*, Article 39§2.
33 See Regulation Brussels II-*ter*, Article 21 and Article 26 for cross-reference.
34 Recital 39 of Regulation Brussels II-*ter* could lead to a totally different interpretation as the reference to "*national law and procedure*" would only, according to the Recital, target "*who will hear the child and how the child is heard*". This interpretation may be questioned.

losing side, in the Member State where the recognition and enforcement is sought, to file an application to oppose such enforcement.[35]

45. By removing the *exequatur* procedure for parental responsibility decisions, the Brussels II-*ter* Regulation compels in some way the judge of the Member State where the recognition and enforcement is sought to accept the standards of the issuing Member State, even if those standards are lower.

46. Removing the *exequatur* is only a good idea when the laws of the Member States are sufficiently close. The principle of mutual trust between Member States may not be invoked as a counter-argument when disparities are that great between Member States. It is unquestionable that removing the *exequatur* procedure is a way to speed up procedure and avoid undue delay. Nonetheless, it should not be done without the sufficient approximation of laws, or for the European legislator to put the cart before the horse.[36]

47. These issues are even more significant when dealing with much more sensitive cases, such as child abduction cases or decisions awarding right of access. For these cases, Regulations Brussels II-*bis* and its recast Brussels II-*ter* admit no grounds whatsoever for non-recognition and non-enforcement based on the absence of the hearing of a child. Consequently, the judge of the Member State where the certified decision must be enforced will not be able to verify the respect of standards regarding the hearing of the child.[37]

48. Child abduction cases also raise different and much more complex questions. When an authority is asking for the return of an abducted child, the judge of the Member State where the child has been taken will obviously, even if it is not expressly written in both Regulations, have to hear the child according to national law and procedure.[38] If the judge issues a decision of non-return, it will be up to the judge of the child's habitual residence to assess again the situation of the child by issuing a new decision on the substance of right of custody, following Regulation Brussels II-*ter*.[39] To issue that decision, the judge will have no other choice than to give the child a genuine and effective right to be heard. However, giving a child who is residing in another Member State a genuine and effective right to be heard may become a true enigma to solve.

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35 See Regulation Brussels II-*ter*, article 59.

36 See for example F. Marchadier, "La suppression de l'exequatur affaiblit-elle la protection des droits fondamentaux dans l'espace judiciaire européen?", *Journal européen des droits de l'Homme*, 2013, 3, p. 348.

37 See CJEU, 11 July 11 2008, *Rinau*, C-195/08 PPU, EU:C:2008:406, point 89.

38 See Regulation Brussels II-*ter*, Article 26.

39 See Regulation Brussels II-*ter*, Article 29. Under Regulation Brussels II-*bis*, the situation is different. The judge may force the return of the child, without ruling on the substance of right of custody: see Regulation Brussels II-*bis*, Article 11§8 and CJEU, 1 July 2010, *Povse*, C-211/10 PPU, EU:C:2010:400.

49. In *Zarraga*, brought in 2010 before the Court of Justice of the European Union, a Spanish judge ordered the return of a child taken from Germany under Regulation Brussels II-*bis*.[40] After receiving a formal refusal by his German counterpart, the Spanish judge issued a new decision imposing return by the judge and certified that the child had been given the right to be heard, while this was, in fact, highly questionable.[41]
50. Indeed, the Spanish judge only sent a request to the child and her mother to come to Spain for the hearing and denied the organization of the hearing by videoconference.[42] Without any guarantee for the child to return to Germany, the hearing of the child never took place. The decision ordering the child to come back to Spain was then issued without a proper hearing. In this situation, the Court of Justice of the European Union denied any right for the German judge to oppose the execution of the decision since the child had not been given a chance to be heard. A certified judgment may only be appealed in the issuing Member State.[43]
51. This case is a very good example of the need for an approximation of laws between Member States. It may avoid any difficulties, in particular in child abduction cases, to organize a genuine hearing of a child in the Member State of habitual residence. Instead, the hearing might take place in the Member State from which the child has been taken, provided that, with the approximation of laws, the standards of both Member States are nearly the same.

B — The determination of common standards

52. The determination of common standards deserves proper thinking. By clearing up differences between Member States, the European legislator will automatically lift any obstacle to recognition and enforcement of any decision in cross-border proceedings.[44] Most of all, giving European children the same rights would be a way to reduce to a bare minimum any differences of approach in the principle of the best interest of the child.[45]
53. After analyzing the different European studies and the survey sent to European judges, our team considers that it has become essential for the European Union and, by extension, Member States to adopt common standards and ensure that children's rights are guaranteed to every child and for all judicial proceedings through statutory provisions. The appropriate forum to obtain an

40 See CJEU, 22 December 2010, *Zarraga*, C-491/10 PPU, EU:C:2010:828.
41 *Ibid*., points 16-36.
42 *Ibid*., point 22. The organization of any hearing by videoconference may be requested under Article 10§4 of Council Regulation (EC) n° 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 (OJ 2001, L 174, p. 1).
43 See CJEU, 11 July 2008, *Rinau*, C-195/08 PPU, EU:C:2008:406, point 89.
44 See European Commission, "Study on the assessment of Regulation (EC) n° 2201/2003 and the policy option for its amendment", section 1.3.
45 *Id*.

approximation of laws between European countries as quickly as possible is the European Union, where the European judicial system is well advanced.

54. The first common standard the European Union should implement relates to the provision of child-friendly information to children involved in judicial proceedings. This is critical to ensure equal treatment between children, for them to fully exercise their rights to participate in proceedings and express their views.
55. To that effect, at the beginning of all civil proceedings, it is important to appoint a mandatory childhood or youth professional such as a psychologist or social worker and to increase their role to ensure the child gets all relevant information. They should not only inform, but also support children before, during, and after the trial.
56. Every child should receive the same information according to their age and maturity, which requires appropriate interdisciplinary training of all professionals informing children with the same methods and tools to guarantee a standardised child-friendly approach. Indeed, it is essential to develop different means to inform children of their rights as widely as possible, even at school, by using materials such as brochures and leaflets, which should be available online as well as in printout form and including written and oral information. Moreover, at a time of massive use of mobile phones and internet, child-friendly information should be presented through specialised websites, online forums, or social networks where children can communicate and have access to childhood and youth professionals.
57. Another way to increase a child's right to information is to establish dedicated helplines to provide information and support to children who are eager to have simple access to childhood and youth professionals. The phone number should be easy to memorise and should be the same throughout the European Union.
58. The right for all children to access justice should be taken into consideration as a second common standard. As rights holders, children should have recourse to remedies to effectively exercise their rights or act upon violations of their rights, without any restriction. For this reason, one common standard the European Union should adopt is to remove any obstacle to access court, such as the cost of proceedings or the lack of legal counsel. Children involved in judicial proceedings should systematically have the right to access legal counsel and representation in their own name through freely available legal aid, including children's free and easy access to legal representation. In addition, any obstacle regarding the age of the child should also be removed. This improvement would enable children having sufficient understanding of their rights to access court and make use of any remedies to protect them.
59. Finally, the hearing of children should become mandatory, without any condition of maturity

or age. The decision whether the child can form his or her own views should be left to the judge alone. The only way to refuse to hear a child would be to preserve him or her from any pressure or danger or, obviously, if the child expressly opposes the hearing. The German example is worth considering. This must not come without real and precise guidelines to help judges conduct their hearing. The judges must be able to hear what the child has to say, in any event, when the child takes the initiative in this way.[46]

60. Drafting a proper directive binding European judges in family law proceedings could be rather a long way to go. Any approximation of laws would indeed require the unanimity of Member States as family law is a sensitive topic. Article 81§3 of the Treaty on the Functioning of the European Union (TFEU) clearly states that "*measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament*".

61. In the meantime, the determination of common standards could be achieved by relying on undefined notions mentioned in the Brussels II-*ter* Regulation. The Regulation has already headed in the right direction by making a distinct provision stressing the right of any child to express his or her views.[47] The previous Brussels II-*bis* Regulation only stressed that right in its recitals, lowering its impact on the entire Regulation. However, the European legislator only went half-way by considering that the way the child is given the opportunity to be heard would still be according to "*national law and procedure*". Even if Regulation Brussels II-*ter* deals with cross-border proceedings, any approximation of laws within its framework would obviously have an impact on national proceedings.

CONCLUDING REMARKS

62. The determination of common standards may come from the Court of Justice of the European Union in preliminary ruling proceedings. National judges are indeed able to apply Article 267 TFEU and refer any question of interpretation of a European regulation directly applicable to their proceedings to the Court of Justice of the European Union. This must be strongly considered, as, in cross-border proceedings, Recital 39 of the Brussels II-*ter* Regulation apparently restricts the scope left to "*national law and procedure*" to the question of who will hear the child and how the child will be heard. The Court of Justice of the European Union will however not act on its own but will need judges from Member States to refer questions.

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46 See guidelines of the Council of Europe, point 47.

47 See Regulation Brussels II-*ter*, Article 21 and 26.

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ANNEX

[Copy of the survey sent to judges]

WHAT IS THE PLACE OF CHILDREN'S VOICES IN FAMILY LAW PROCEEDINGS AND HOW MAY THEIR OPINIONS AFFECT DECISION-MAKING PROCESSES?

WE WOULD LIKE TO KNOW YOUR PROFESSIONAL PRACTICES WHEN YOU HEAR CHILDREN IN JUDICIAL PROCEEDINGS.

1/ IN WHICH PROCEEDINGS DO YOU HEAR CHILDREN?

2/ HOW ARE CHILDREN INFORMED OF THEIR RIGHTS TO BE HEARD? WHAT IS THE CONTENT OF THIS INFORMATION?

3/ ARE HEARINGS SYSTEMATICALLY ORGANIZED FOR EVERY CHILD?

4/ OTHERWISE, WHAT ARE THE CONDITIONS THAT YOU REQUIRE TO HEAR A CHILD?

5/ HOW DO YOU HEAR A CHILD?

6/ WHAT IS THE SCOPE OF CHILDREN'S VOICES IN THE DECISION-MAKING PROCESS?