



National Report

ITALY

Children's right to information in civil proceedings in Italy

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The present National Report is intended to present the results of the national research carried out within the project MiRI – *Minor's right to information in EU civil actions* (JUST-JCOO-AG-2018), concerning children's right to information in civil proceedings in Italy.

The research comprises the collection of the relevant Italian provisions of law and case law concerning the aforementioned topic, in order to examine to what extent the right to information is foreseen and respected by the legal system. Moreover, through a questionnaire distributed to judges and lawyers, the research focused on the practice existing in civil proceedings in Italy. The answers to the questionnaires have been examined and rationalized in the present report in order to offer a state-of-the-art assessment of the current situation. This will enable a further development of the research, together with the other partners of the project and the other countries involved in the investigation: the scope is to explore whether it is possible to develop more efficient best practices on children's right to information in civil cases, so as to create a set of guidelines of common best practices that might or should be applied in all EU Member States.

All the national case law cited in the present Report is available in the project's database¹.

¹ Available at <http://dispo.unige.it/node/1159>.

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1. The children's right to information as an essential component of the right to be heard and to participate

As stated above, the present report focuses on children's right to be informed in civil proceedings in Italy.

When speaking of child participation, children must be informed – in a child-friendly language – about the nature of the judicial proceeding and the implications of being heard in this context, otherwise they would not be in the position to consciously express themselves. Those are the considerations expressed, *inter alia*, by the European Fundamental Rights Agency in 2017, within its report on child-friendly justice².

As it will emerge in the following paragraphs, the analysis of Italian law shows that children's right to information is considered in very few provisions that are not specifically dedicated to the enjoyment of such right, but rather mention it within the right of the child to be heard during the proceeding. Thus, it seems that the Italian legal system considers the right to information to be especially important in case the judge hears the child. Indeed, the hearing of the child represents a very delicate phase and a crucial aspect of child's participation in proceedings: in this context of direct contact between the child and the judicial authority, it is particularly important that the child is prepared for the hearing in order to pursue his or her best interests³.

In the light of the above, there is an opportunity to analyse the right to receive adequate information and the right to be heard together, for the purposes of providing a clear assessment of the situation in the Italian legal system.

When it comes to the protection of the child, the context of the Italian justice has to be appreciated in its characteristics. The structure is characterized by a certain degree of fragmentation: generally speaking, competences are allocated between ordinary and juvenile courts (according to Article 38 of the preliminary provisions to the Italian Civil Code, as modified in 2013)⁴. This fragmentation

² FRA, *Child-friendly Justice: Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States*, 2017, available at <https://fra.europa.eu/en/publication/2017/child-friendly-justice-perspectives-and-experiences-children-involved-judicial> (last accessed 9 December 2020).

³ On this topic see the findings reached within the project "VOICE" (reference number: JUST/2016/JCOO/AG/CIVI/764206), presented in T. VAN HOF, S. LEMBRECHTS, F. MAOLI, G. SCIACCALUGA, T. KRUGER, W. VANDENHOLE, L. CARPANETO, *To Hear or not to Hear: Reasoning of Judges Regarding the Hearing of the Child in International Child Abduction Proceedings*, in *Family Law Quarterly*, 2020, p. 327.

⁴ Modifications made by Article 96, par. 1, let. c) of Legislative Decree No 154 of 28 December 2013, which also added Article 38 *bis*.

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shares similarities with child participation. In judicial proceedings, it results in the strengthening of the child's right to be heard: read together, such evolutions contribute to achieving the goal of considering children not as mere recipients of protection, but as effective rights holders⁵.

In general, ordinary courts (*tribunali ordinari*) deal with parental responsibility issues, mainly in the framework of separation and divorce proceedings (custody, placement, maintenance), while juvenile courts (*tribunali per i minorenni*) deal with requests for limitation and loss of parental responsibility (so-called *de potestate* proceedings).

Juvenile courts are specialised courts in each district court of appeal (29 in total)⁶. Each juvenile court is a collegiate body made up of four judges: two professional judges (the president and a side judge) and two "honorary magistrates" (a man and a woman), who are professionals with jurisdictional functions (honorary judges are appointed among psychologists, attorneys, pedagogues, anthropologists). Each juvenile court has its own public prosecutor, who has a leading controlling function in civil proceedings.

In 2016, a draft law⁷ envisaged the abolition of juvenile courts and the creation, instead, of specialized sections within ordinary courts. The bill provoked a strong reaction from the civil society⁸ and from the Italian Authority for Children and Adolescents⁹. In May 2017, the Commissioner for Human Rights of the Council of Europe sent a letter to the President of the Italian Senate underlining that the draft law under consideration had the potential to weaken the "*well-established system for the*

⁵ On the Italian juvenile system in the field of civil justice as a 'child-friendly' one, see E. D'Alessandro, 'Verso una giustizia "a misura di minore" nella giustizia civile: garanzie e giusto processo', in Autorità garante per l'infanzia e l'adolescenza (ed.), *La Convenzione delle Nazioni Unite sui diritti dell'infanzia e dell'adolescenza. Conquiste e prospettive a trent'anni dall'adozione* (2019) 334, available (with English abstracts) at: <https://www.garanteinfanzia.org/pubblicazioni>).

⁶ Royal Law-Decree No 1404 of 20 July 1934, converted into Law No. 835 of 27 May 1935. The list of Italian juvenile courts is available here: <http://www.tribmin.milano.giustizia.it/it/Content/Index/28721>. Ordinary courts are currently 145: after 2022, according to Legislative Decree No 162/2019, they will be 135.

⁷ Draft Law No 2284 of 10 March 2016.

⁸ Among others, see Associazione italiana dei magistrati per i minorenni e per la famiglia (A.I.M.M.F.), *Sulla soppressione dei Tribunali e delle Procure per i minorenni e l'introduzione di sezioni specializzate presso i Tribunali ordinari*, 20 February 2016: <https://www.minoriefamiglia.org/index.php/documenti/progetti-di-riforma/641-sulla-soppressione-dei-tribunali-e-delle-procure-per-i-minorenni-e-l-introduzione-di-sezioni-specializzate-presso-i-tribunali-ordinari-20-2-16>.

⁹ *Autorità garante per l'infanzia e l'adolescenza*. It is the national body aimed at safeguarding the effective implementation of the Convention of the Rights of the Child of 1989 in Italy. All information about the Authority is available at: <https://www.garanteinfanzia.org>.

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*protection of children's rights in Italy, and thus, undermine Italy's ability to comply fully with its international commitments in this field*¹⁰.

Child participation in Family Law in Italy is experiencing considerable developments at the legislative and judicial level (see *infra*, para. 4). In judicial proceedings, such evolutions contribute to achieving the goal of considering children not as mere recipients of protection, but as effective rights holders. The need to give children information is mentioned in one of the judgments marking this change: it affirms that children should receive, in order to be heard, “relevant and appropriate information” (“*informazioni pertinenti e appropriate*”). The decision at issue is judgment 27 July 2007, No. 16753 of the Italian Corte di Cassazione.

In a more recent decision, the Corte di Cassazione claimed that hearing minors is the best way to inform them about the proceeding in question, which is their fundamental right¹¹.

In the Italian legal system, the link between the child's right to be heard and his/her right to be informed results in a general provisions included in Article 336-bis of the Civil Code, according to which the judge gives the child all the information regarding the nature of the proceeding and the consequences of the hearing. This should be read in light of supranational provisions (see *infra*, para. 3).

2. The evolution of the right to be heard in the Italian legal system: legislative provisions concerning the right to participation of the child and the right to receive information.

The child's right to be informed and heard in the Italian legal system: the Italian Constitution and the Italian Civil Code

In the Italian legal system, the right of the child to be heard and to participate in civil proceedings is protected on multiple levels: the Constitution, the Civil Code, the Code of Civil Procedure, Law No. 898 of 1 December 1970, Law No. 184 of 4 May 1983, Decree-Law No. 132 of 12 September 2014 (which was converted into Law No. 162/2014), Legislative Decree No. 142 of 18 August 2015¹².

Although the legal sources referred to do not constitute an exhaustive list of every possible case where the child is heard by a civil judge in Italy, we consider them the most significant ones. They provide

¹⁰ The letter of Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, of 9 May 2017, is available at <https://rm.coe.int/letter-from-the-council-of-europe-commissioner-for-human-rights-nils-m/16807122cb>.

¹¹ Corte di Cassazione, judgment 7 May 2019, No. 12018: informing the child “*costituisce una modalità, tra le più rilevanti, di riconoscimento del suo diritto fondamentale ad essere informato e ad esprimere le proprie opinioni nei procedimenti che lo riguardano, [...]*” (“*represents a modality, among the most relevant ones, of implementation of his or her fundamental rights to express an opinion in proceedings concerning him or her*”).

¹² Legislative Decree No. 142/2015 specifically concerns children seeking asylum in Italy.

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a clear indication of how children's right to be heard is enshrined in Italian law. They also indicate that the Italian legislator doesn't seem to have focused enough on the child's right to receive relevant and adequate information prior to being heard and after the conclusion of the proceeding.

The child's right to be heard falls within the scope of Article 31 of the Italian Constitution, according to which the Republic protects "*children and the young by adopting necessary provisions*"¹³. Moreover, the right at hand seems to fall within the scope of Article 2 (regarding "*the inviolable rights of the person*"), Article 21 (freedom of expression) and Article 32 (right to health) of the Constitution.

The Italian Civil Code (1942) has been deeply reformed over the years, especially in the provisions on Family Law. Two legislative acts have been of paramount importance as regards the child's right to be heard: Law No. 219 of 10 December 2012 and Legislative Decree No. 154 of 28 December 2013. They added – among others – the following provisions to the Civil Code: Article 315-bis and Article 336-bis.

Before moving on to them, it is important to note that the Civil Code had formerly been amended by Law No. 54 of 8 February 2006, which led to Article 155-sexies (then repealed by Legislative Decree No. 154/2013). It introduced explicit reference to children's right to be heard. This came as no surprise, since Law No. 54/2006 was meant to put children's protection first.

The aforementioned Law also introduced the exercise of joint parental responsibility as a general rule¹⁴. As affirmed by the Corte di Cassazione in judgment 18 June 2008 No. 16593, Law No. 54/2006 was intended to lay down children's right to keep a healthy and harmonious relationship with both their parents, to ultimately pursue their best interest.

Both Articles 315-bis and 336-bis of the Civil Code are considered to be of general application: it means that they should apply in any civil proceeding whose effects, direct or indirect, affect a minor¹⁵.

¹³ See the English version of the Italian Constitution published on the website of the Senate of the Republic.

¹⁴ See the version of Article 155 of the Civil Code resulting from Law No. 54/2006.

¹⁵ Among those authors stating that Articles 315-bis and 336-bis of the Civil Code are of general application, see: BALLARANI G., *Contenuto e limiti del diritto all'ascolto nel nuovo art. 336-bis c.c.: il legislatore riconosce il diritto del minore a non essere ascoltato*, in *Dir. fam. pers.*, 2014, p. 841; CIANCI A.G. et al., *Nuovo titolo IX del Libro I rubricato "Della responsabilità genitoriale e dei diritti e doveri del figlio"*, in BIANCA M. (ed), *Filiazione, Commento al decreto attuativo. Le novità introdotte dal d.lgs. 28 dicembre 2013, n. 154*, Milan, 2014, p. 128, 134; DANOVÌ F., *L'ascolto del minore nel processo civile*, in *Dir. fam. pers.*, 2014, p. 1592; GALGANO F., *Diritto privato*, Padua, 2019, p. 892; GALANTI L., *Il minore come parte: finalmente il riconoscimento della Cassazione*, in *Riv. trim. dir. proc. civ.*, 2017, p. 349; LOMBARDI R., *L'ascolto del minore nei procedimenti di separazione e divorzio su accordo delle parti tra fonti sovranazionali e diritto interno*, cit.; LUPOI M.A., *Il procedimento della crisi tra genitori non coniugati avanti al tribunale ordinario*, in *Riv. trim. dir. proc. civ.*, 2013, p. 1289; MALFA V., *L'ascolto del minore alla luce della legge n.219/2012*, in *Iura & Legal Systems*, 2015, p. 15.

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That said, Article 336-bis is of special importance since it sets out some fundamental rules about how to hear the child. In Italy, these rules have led to some protocols applied locally¹⁶.

Article 315-bis, para. 3, lays down that children have the right to be heard in all the matters and proceedings concerning them when they are at least 12 years old, or even younger if capable of judgment.

Moving on to Article 336-bis, its para. 1 affirms that children are heard about all the matters and proceedings concerning them when they are at least 12 years old, or even younger if capable of judgment. Children are heard by the President of the Court or by the delegated judge, except when this clashes with their best interest or is manifestly unnecessary. In those cases, the judge needs to explain his/her position¹⁷.

According to para. 2 of the same provision, who hears the child is the judge, possibly with the assistance of experts (like psychologists, social assistants or other professionals). The child's parents, their lawyers, the child's special curator – when appointed – and the public prosecutor can take part in the hearing as long as the judge allows them. The goal of this provision is to make sure that children won't feel pressured when expressing their views.

Para. 2 of Article 336-bis must be combined with Article 38 of the Implementing provisions for the application of the Civil Code: if the child is heard in a protected space, the parties' representatives, the child's special curator and the public prosecutor (but not the parents) won't need the above-mentioned authorisation.

As stated earlier, according to para. 3 of Article 336-bis, the judge gives the child all the information regarding the nature of the proceeding and the consequences of being heard, before this happens. Minutes – or a video recording of the act – must be produced.

When analysing Article 336-bis under the guidance of legal theory, some aspects seem worthy of particular attention.

¹⁶ See further in this paragraph. These protocols have been mentioned by a number of authors, as: SILIBERTI A., *Ascolto del minore in sede di separazione: il giudice deve motivare la decisione di non disporre l'ascolto diretto*, cit.; IANNICELLI M.A., *La crisi della coppia genitoriale e il "diritto" del figlio minore di essere ascoltato*, in *Famiglia*, 2016, p. 87; MICELA F., *Interesse del minore e principio del contraddittorio*, in *Minori giust.*, 2011, p. 145.

¹⁷ “[...] Se l'ascolto è in contrasto con l'interesse del minore, o manifestamente superfluo, il giudice non procede all'adempimento dandone atto con provvedimento motivato”.

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Firstly, the age limit (to inform and then) to hear the child shouldn't be interpreted strictly. What makes the hearing necessary is not the child's age in itself, but his/her capacity of judgment¹⁸.

Capacity of judgment (“*capacità di discernimento*”) means that children understand what is necessary for their own sake and are capable of making decisions independently, at least to a certain extent¹⁹. Another definition of “capacity of judgment” focuses on children's ability to express their desires, opinions, aspirations independently²⁰. Supranational provisions contain further definitions: the child is capable of judgment when “*capable of forming his or her own views*” or when he/she has “*sufficient understanding*”²¹.

According to some decisions of the Corte di Cassazione (see in particular judgments 16 February 2018, No. 3913 and 17 April 2019, No. 10774²²), the judge always needs to explain the choice not to hear a minor, regardless of his/her age. A lack of justification would amount to violating both the adversarial principle and the principle of fair trial²³.

Nevertheless, in other judgments the Corte di Cassazione expressed a different view on the subject: the judge has no obligation to explain his/her choice not to hear a child under the age of 12, unless specifically asked²⁴.

According to one interpretation, the more the child is close to the age of 12, the more is detailed the justification needed from the judge when the hearing is omitted²⁵. According to another interpretation, it is however not possible, in practice, to assess whether or not children are capable of judgment without listening to them²⁶.

¹⁸ On the importance of the child's capacity of judgment (which could be considered as a sort of “safeguard clause”), see GALANTI L., *Il minore come parte: finalmente il riconoscimento della Cassazione*, in *Riv. trim. dir. proc. civ.*, 2017, p. 349.

¹⁹ For this definition of capacity of judgment, see ITALIA E., *L'ascolto del minore*, cit., p. 716 (which quotes the definition developed by the Italian Forensic Psychology Association, Note 7); DI NAPOLI E., MAOLI F., *Child Participation in Family Law Proceedings: Italy*, in SCHRAMA W., MOL C., BRUNING M., FREEMAN M., TAYLOR N., *International Handbook on Child Participation in Family Law*, on press.

²⁰ IANNICELLI M.A., *La crisi della coppia genitoriale e il “diritto” del figlio minore di essere ascoltato*, cit., p. 95.

²¹ See respectively the UN Convention on the Rights of the Child and the European Convention on the Exercise of Children's Rights.

²² See *infra*, para. 4.

²³ See the view expressed by the Italian Corte di Cassazione (in judgment 21 October 2009, No. 22238); *infra*, para. 4.

²⁴ See in particular: Corte di Cassazione, judgment 7 March 2017, No. 5676; Corte di Cassazione, judgment 9 August 2019, No. 21230 (*infra*, para. 4).

²⁵ IANNICELLI M.A., *La crisi della coppia genitoriale e il “diritto” del figlio minore di essere ascoltato*, cit., p. 96.

²⁶ GALANTI L., *Il minore come parte: finalmente il riconoscimento della Cassazione*, cit., p. 356.

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Secondly, it should be determined when the right to be heard can be disregarded (besides when children lack capacity of judgment). As said, according to Article 336-bis, para. 1, the judge can omit the hearing when it clashes with the minor's best interest or is clearly unnecessary. Hearing children could be in contrast with their best interest when they are physically or emotionally vulnerable²⁷. It is not sufficient, however, that the judge refers to a generic condition of psycho-physical stress due to the parents' clash²⁸.

The hearing seems unnecessary when the proceeding only concerns property or economic issues, when the matter is irrelevant for the child, when his/her opinion has already been expressed in the same proceeding – or in another one regarding the same matters – or when the child's opinion is requested about uncontested facts.

Furthermore, children shouldn't be heard when they refuse to do so. Being heard is their right – as stated in Article 315-bis – but this would no longer be the case if they were obliged to express themselves.

Following an interpretation, in practice it is hardly possible to violate the child's best interest by hearing him/her²⁹. In many cases, assessing children's point of view (rather than having a traumatising effect) gives them an opportunity to share their opinions and feelings about the situation they are in. Pursuing the child's best interest shouldn't be an excuse for depriving him/her of the procedural safeguards provided by law, as stated in the above-mentioned Guidelines on child-friendly justice³⁰.

Thirdly, it is necessary to shed light on who hears the child and what he/she is informed about. As mentioned earlier, Article 336-bis sets out that it's the judge who carries out the hearing, possibly with the assistance of experts like psychologists, social assistants, other professionals. This provision is aimed at establishing direct contact between the judge and the minor. It also requires the judge to inform the child about the nature of the proceeding and the effects of the hearing. In particular, children should know that the final decision won't rest with them³¹.

²⁷ IANNICELLI M.A., *La crisi della coppia genitoriale e il "diritto" del figlio minore di essere ascoltato*, cit., p. 98.

²⁸ Corte di Cassazione, judgment 27 July 2017, No. 18649 (infra, para. 4).

²⁹ MAZZA GALANTI F., *La tutela e l'ascolto dei figli minorenni nelle controversie separative in regime di affidamento condiviso*, in *Minori giust.*, 2018, p. 23.

³⁰ TOMMASEO F., *Il processo civile familiare e minorile italiano nel contesto dei principi europei*, in *Dir. fam. pers.*, 2012, p. 1265.

³¹ On how minors shouldn't feel responsible for the judge's decisions after being heard, see MARTINELLI P., *La professionalità mite del giudice delle relazioni*, in *Minori giust.*, 2015, pp. 133-145. On how this aspect should be explained carefully when informing the child, see MAZZA GALANTI F., *La tutela e l'ascolto dei figli minorenni nelle controversie separative in regime di affidamento condiviso*, cit., p. 30.

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Someone has claimed that children must be informed by others besides the judge: their parents, their relatives and third parties (like the public prosecutor, experts, social service workers, judicial assistants, professionals, and the child's special curator)³².

Fourthly, under Italian law hearing a child isn't the same as examining a witness³³. As said, the hearing is a right and pursues the child's best interest, in accordance with supranational provisions like Article 3 of the UN Convention on the Rights of the Child. The last remark leads to the following conclusion: the judge doesn't always have to abide by what children claim to want.

On the one hand the judge is compelled by law to hear the child and to provide an explanation when this doesn't happen, on the other he/she can disregard children's desires when they are against their best interest³⁴. Articles 315-bis and 336-bis should thus be interpreted in accordance with case law and, in particular, with what claimed by the European Court of Human Rights in the judgment *C. v. Finland*³⁵.

The ECtHR didn't share the view of the Supreme Finnish Court, which supported two children's desire to live with their dead mother's partner rather than with their father. The Strasbourg Court found that the decision didn't pursue the minors' best interest, since it didn't consider the possibility that they had been manipulated. Besides, it deprived the children of a relationship with their father. In the Court's view: “[...] *the decision-making procedure failed to strike a proper balance between the respective interests and [...] there has been a violation of Article 8 of the Convention in that respect*”³⁶.

In addition to Articles 315-bis and 336-bis, a further provision of the Civil Code deserves special attention: Article 337-octies, which some have criticised. Before coming to that, it should be noted that Article 315-bis has been criticised too, essentially because it doesn't refer to the child's right to

³² BALLARANI G., *Contenuto e limiti del diritto all'ascolto nel nuovo art. 336-bis c.c.: il legislatore riconosce il diritto del minore a non essere ascoltato*, cit., p. 851.

³³ DANOVI F., *L'ascolto del minore nel processo civile*, cit. On the specificity of the child's hearing if compared to other similar acts, see PELLICCIOTTA S., *Sottrazione internazionale di minori e mediazione*, in *Riv. trim. dir. proc. civ.*, 2017, p. 763, spec. p. 766 (“*L'ascolto del minore costituisce una figura sui generis*”).

³⁴ With regard to this matter in international child abduction cases, see LUPOI M.A., *La sottrazione internazionale di minori: gli aspetti processuali*, in *Riv. trim. dir. proc. civ.*, 2014, p. 111.

³⁵ Judgment of the European Court of Human Rights of 9 August 2006, *C. v. Finland*, app. No. 18249/02 (infra, para. 4).

³⁶ *Ibidem*, para. 59. Concerning this judgment, see RUO M.G., *Ascolto e interesse del minore e “giusto” processo: riflessioni e spunti dalla giurisprudenza della Corte europea dei diritti dell'uomo*, in *Minori giust.*, 2008, pp. 115.

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be informed. More specifically the provision doesn't require that – prior to the hearing – he/she is informed in a child-friendly language about the proceeding and its outcome³⁷.

Article 337-octies regards the child's hearing in case of conflicts between the parents³⁸. The first issue is that the provision seems to put emphasis on the judge's powers (see its title: "*Poteri del giudice e ascolto del minore*").

Secondly, according to Article 337-octies, the judge orders that the child is heard ("*il giudice dispone l'ascolto del figlio minore*"). The focus appears therefore to be, once again, on the judge rather than on the child and his/her rights³⁹.

The Civil Code contains further provisions about the child's right to be heard; some of them are listed below.

Book I, Title VI, Chapter V of the Civil Code (relating to dissolution of marriage and separation of the spouses), Article 155: regarding separation, this provision makes reference to Title IX, Chapter II of the Civil Code (see in particular Article 337-octies)⁴⁰.

Book I, Title VII, Chapter IV (relating to recognition of children born out of wedlock), Articles 250, 252 and 262:

Article 250, para. 4: when one parent wants to recognise a child and the other is opposed to this possibility, the judge orders that the child is heard when he/she is at least 12 years old, or even younger if capable of judgment⁴¹.

Article 252, para. 5: in case a child is going to live with one parent (the parent having recognised him/her), who has got another family, the judge hears the other children – if they disagree with the change – when they are at least 12 years old, or even younger if capable of judgment.

³⁷ RECINTO G., *Legge n. 219 del 2012: responsabilità genitoriale o astratti modelli di minori di età?*, cit., p. 1482.

³⁸ Article 337-octies belongs to Title IX, Chapter II, of the Civil Code, relating to parental responsibility after separation of the spouses, dissolution of marriage or cessation of its civil effects, annulment or nullity of marriage or after proceedings concerning children born out of wedlock.

³⁹ On this aspect, see (among others) VIRGADAMO P., *L'ascolto del minore in famiglia e nelle procedure che lo riguardano*, in *Dir. fam. pers.*, 2014, pp. 1656. On Article 337-octies of the Civil Code containing an exception to Article 316-bis, see CIANCI A.G. et al., *Nuovo titolo IX del Libro I rubricato* "Della responsabilità genitoriale e dei diritti e doveri del figlio", cit., p. 134 ("*salvo quanto disposto all'art. 337-octies*").

⁴⁰ See Note 34.

⁴¹ In this case, the obligation to hear the child would be particularly stringent (ITALIA E., *L'ascolto del minore*, cit., p. 726).

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Article 262, para. 4: when a parent recognises his/her children born out of wedlock, the judge decides which surname they will be given after hearing them when they are at least 12 years old, or even younger if capable of judgment.

Book I, Title VII, Chapter V (relating to declarations of paternity/maternity issued by a judge), Article 273, para. 2: before the judge issues a declaration of paternity/maternity, it is necessary to obtain the child's consent if he/she is at least 14 years old.

Book I, Title IX, Chapter I (relating to declarations of parental responsibility and to children's rights and duties), Articles 316 and 336:

Articles 316, para. 3: in case parents disagree with how to exercise parental responsibility, the judge must hear their children when they are at least 12 years old, or even younger if capable of judgment.

Article 336, para. 2: in certain proceedings, like the ones relating to the loss/reinstatement of parental responsibility, children are heard when they are at least 12 years old, or even younger if capable of judgment.

Book I, Title X, Chapter I, Section II (relating to the appointment of the child's guardian), Article 348, para. 3: before appointing a guardian, the judge hears the child when he/she is at least 12 years old, or even younger if capable of judgment.

Book I, Title X, Chapter I, Section III (relating to the exercise of guardianship), Article 371, para 1, No. 1: in case important decisions about children's lives are taken – like decisions regarding the place of living, their education or work – the judge hears them when they are at least 10 years old, or even younger if capable of judgment.

Book I, Title XI (relating to the child's custody), Article 402, para. 1: in case of children in institutional care, the judge can decide – under certain conditions – to appoint the institution as their legal guardian.

This provision doesn't refer to the child's right to be informed and heard about the consequences of such a decision, which seems inconsistent with (for example) Article 348 of the Civil Code.

Concluding remark: in light of the foregoing, it should be pointed out that the above-mentioned provisions don't make explicit reference to children's right to receive information.

The Code of Civil Procedure

Book I, Title III, Chapter I (relating to the parties), Article 78: in case of emergency, when a minor doesn't have someone representing him/her, it is possible to appoint a special curator.

The provision doesn't say if the child should be informed and heard before the special curator is appointed.

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Book II, Title I, Chapter II, Section III, Para. 8 (relating to testimonial evidence), Article 248: children who are under the age of 14 can only be heard when this is necessary, due to specific circumstances. Do they receive adequate information prior to the hearing?

Book IV, Title II, Chapter I (separation of the spouses), Article 708 and 709-ter:

Article 708, para. 3: in case the spouses don't want to reconcile, the President of the Court issues an order to take all temporary and urgent measures in the interest of the spouses themselves and their children. The President previously hears the spouses and their representatives.

The provision doesn't say if, on that occasion, children are heard as well.

Article 709-ter, para. 2: concerning the exercise of parental responsibility, when parents' behaviour goes against their children's best interest (for example, by violating custody arrangements), the judge can amend former decisions.

Does the judge inform and hear the children before that?

Book IV, Title II, Chapter IV (relating to decisions affecting minors or incapacitated persons), Article 732, para. 2: when the court takes a decision affecting a minor – or an incapacitated person – in closed session, the judge supervising cases concerning guardianship gives an opinion.

Is the child heard before the opinion is given?

Concluding remark: as the above shows, it would be desirable that the Code of Civil Procedure was more specific about the need to inform and hear a child before a decision involving him/her is taken.

Law No. 898 of 1 December 1970

According to Article 4, para. 8, of this law (relating to divorce): in case the spouses don't want to reconcile, the President of the Court issues an order to take all temporary and urgent measures in the interest of the spouses themselves and their children, to appoint the examining magistrate and to set a date for the hearing before him/her. The President previously hears the spouses, their representatives and the children when they are at least 12 years old, or even younger if capable of judgment.

Concluding remark: unlike Article 708 of the Code of Civil Procedure, this provision specifies that children must be heard. It doesn't however say anything about the need to inform them before the hearing takes place.

Law No. 184 of 4 May 1983

Law No. 184/1983 (law relating to adoption and child custody), as amended, contains a number of provisions about the child's right to be heard; some are listed below.

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Title I-bis (relating to child custody), Article 4: according to para. 1 of this provision, before local social services order child custody (in the context of “*affidamento familiare*”), parents’ consent is required and the child is heard when he/she is at least 12 years old, or even younger if capable of judgment.

According to para. 5-quater of the same provision, in case the foster family wants to adopt the child (see para. 5-bis), he/she is heard under the same conditions stated above. Under these same conditions, children are heard before the judge supervising cases concerning guardianship asks the juvenile court – if necessary – to take further measures in their interest (see para. 6).

Title II, Chapter I (relating to adoption), Article 7, para. 3: under the same conditions stated in Article 4, the child is heard about the possibility of being adopted. According to para. 2 of the same provision, his/her consent is required when he/she is at least 14 years old.

Title II, Chapter II (relating to declaration of adoptability), Articles 10, 15, 19 and 21:

Article 10, para. 5: in case of neglected minors, when the court confirms, amends or revokes urgent decisions in this regard, they should be heard under the same conditions stated in Article 4.

Article 15, para. 2: before the juvenile court declares that a minor is adoptable, it hears him/her under the same conditions stated in Article 4.

Article 19: due to a declaration of adoptability, the exercise of parental responsibility is suspended. Therefore, the juvenile court appoints a guardian and takes further measures in the child’s interest. It should be pointed out that Article 19 doesn’t mention the child’s right to be informed and heard about the effects of the above measures. The same remark applies to a decision revoking adoptability (case referred to in Article 21).

Title II, Chapter III (relating to pre-adoption custody or “*affidamento preadottivo*”), Articles 22 and 23:

Article 22, para. 6: before the juvenile court orders pre-adoption custody in regard to a child, he/she is heard under the same conditions stated in Article 4. A minor above the age of 14 also expresses his/her consent.

Article 23, para. 1: before the juvenile court revokes, if necessary, a decision ordering pre-adoption custody, the child in question is heard under the same conditions referred to in Article 4.

Title II, Chapter IV (relating to the adoption decision), Article 25, para. 1: one year after a child’s custody is ordered, following a declaration of adoptability, the juvenile court hears him/her under the same conditions stated in Article 4. If the child is 14 years old, his/her consent is also required.

Title III, Chapter I (relating to international adoption), Article 32, para. 1: when the necessary conditions are met, the Commission for international adoptions declares, in regard to a child, that
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adoption suits his/her best interest. In this case, the child is granted an authorisation to enter Italy and a permanent residence permit.

It should be noted that this provision lacks reference to children's right to be informed and heard before the Commission takes the above measures⁴².

Title IV, Chapter I (relating to adoption in special cases), Article 45, para. 2: in case a child is adopted without a declaration of adoptability (see Article 44), he/she is heard under the same conditions stated in Article 4.

Concluding remark: as can be seen, the provisions mentioned above don't make explicit reference to children's right to receive prior information.

Law No. 64 of 15 January 1994

There is a specific provision on children's participation in international child abduction proceedings, where the relevant legal framework is represented by the 1980 Hague Convention on the civil aspects of international child abduction⁴³ and, as concerns abductions occurring within the European Union, the Regulation No 2201/2003⁴⁴. With the Law No 64/1994, Italy ratified the 1980 Hague Convention and introduced the necessary implementing rules governing the procedure for return of the child. According to Article 7(3), the juvenile court shall hear the child "if appropriate". While the provision does not explicitly state that the hearing is mandatory (nor qualifies it as a right of the child), the latter has been given a flexible interpretation by Italian courts over the years on the basis of the evolving understanding of the fundamental right of the child to be heard⁴⁵.

On this topic, the decision of the Corte di Cassazione, judgment 14 February 2014, No. 3540⁴⁶ results of particular interests: in a case of international child abduction, where the Hague Convention of 1980 and the Council Regulation No. 2201/2003 were applicable, the Court expressly stated that the respect

⁴² In other words, Law No. 184/1983 doesn't say that the child should be informed and heard before the Commission grants him/her an authorization to enter Italy and a permanent residence permit: and yet these measures have significant effects on his/her life. However, Article 34, para. 1, of the law at issue affirms that, in the context of international adoption, the child having entered Italy has the same rights as Italian children in the case referred to in Article 4. Among them, the right to be heard if he/she is at least 12 or – if younger – when he/she has capacity of judgment.

⁴³ Convention on the Civil Aspects of International Child Abduction, 25 October 1980, available at <http://www.hcch.net>.

⁴⁴ 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, in OJ L 338, 23.12.2003.

⁴⁵ Most recently, Corte di Cassazione, 4 April 2019, No 10874. On the same terms, Corte di Cassazione, 4 June 2019, No 15254.

⁴⁶ For the maxim of the decision, see the project database (at fn. 1).

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of Article 12 of the Convention on the Rights of the Child of 1989 and Articles 3 and 6 of the Strasbourg Convention of 1996 “*requires that the child receives all the relevant and appropriate information, according to his age and his degree of development*” - provided that those information are not harmful for his or her wellbeing.

Concluding remark: the provision mentioned above don't make explicit reference to children's right to receive prior information, even though courts have mentioned it making reference to Article 12 of the Convention on the Rights of the Child of 1989 and to Articles 3 and 6 of the Strasbourg Convention of 1996.

Decree-Law No. 132 of 12 September 2014 (converted into Law No. 162/2014)

This legislative act aims at simplifying the procedure relating to – among others – separation of the spouses, dissolution of marriage or cessation of its civil effects, when the parties are willing to find an agreement.

According to Article 6, para. 2, of Decree-Law No. 132/2014⁴⁷, the Prosecutor of the Italian Republic approves the agreement that the parties have found under their lawyers' guidance – “*convenzione di negoziazione assistita*”⁴⁸ – if it pursues children's best interest (in case they are involved).

In contrast, when the agreement doesn't suit children's best interest, the Prosecutor of the Italian Republic sends it to the President of the Court, who sets a date for a hearing involving the parties.

Concluding remark: the provision doesn't say if children are informed and heard before the Prosecutor of the Italian Republic approves the agreement (in the first case) or at the hearing involving the parties (in the second case).

Legislative Decree No. 142 of 18 August 2015 (regarding the specific case of a foreign minor seeking asylum in Italy)

According to Article 18, para. 2: in order to pursue his/her best interest (for example, through family reunification), the child is heard considering his/her age, level of maturity and personal development. According to para. 2-bis of the same provision (inserted by Law No. 47 of 7 April 2017): unaccompanied minors receive emotional and psychological support at any stage of the proceeding. This support is provided by persons designated by the child himself/herself or chosen under certain conditions, with his/her consent.

⁴⁷ As amended by Law No. 162/2014.

⁴⁸ For the expression “*Prosecutor of the Italian Republic*”, see https://www.giustizia.it/giustizia/it/mg_2_1_4_2_2.wp (last consulted on 25.11.2020).

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According to para. 2-ter, unaccompanied minors have the right to take part in the proceeding through their legal representatives and to be heard⁴⁹. To this end, a cultural mediator is appointed.

Concluding remark: we could argue that the law at issue contains the obligation to prior inform unaccompanied children on the basis of two elements. First of all, it is necessary to psychologically support them during the proceeding; secondly, they have the right to participate in such a proceeding and to be heard. Nevertheless, Article 18 lacks any express reference in this regard.

Provisions relating to the child's right to be informed outside judicial proceedings

In light of the above, children's right to be informed in civil proceedings appears to be only an incidental question, dealt with by law in connection with the right to be heard. The same could be observed about case law (see *infra*, para. 4).

However, Italian law contains some provisions focusing on the child's right to be informed, with particular reference to two fundamental rights: data protection and health.

The right to data protection was deeply reformed, in the European Union, by Regulation (EU) 2016/679⁵⁰. In Italy, this regulation led to Legislative Decree No. 101 of 10 August 2018, which amended Legislative Decree No. 196 of 30 June 2003.

Among the provisions of the General Data Protection Regulation on the data subject's right to information when he/she is a minor⁵¹, Recital 58 and Article 12 should be mentioned.

According to Recital 58: “[...] *Given that children merit specific protection, any information and communication, where processing is addressed to a child, should be in such a clear and plain language that the child can easily understand*”.

According to Article 12, para. 1, the information about the data processing shall be given to the data subject “*in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child [...]*”.

Moving on to children's right to be informed about their health, reference should be made, in particular, to Law No. 219 of 22 December 2017 on informed consent and the so-called “*biotestamento*” (which states the person's will in regard to medical treatment).

⁴⁹ Concerning the right to be heard in regard to foreign minors, see DI LELLA F., *I minori stranieri non accompagnati tra vulnerabilità e resilienza*, in *Famiglia*, 2019 (online).

⁵⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), in OJ L 119, 4.5.2016. EU Regulations, as is well known, have general application, are binding in their entirety and directly applicable in the Member States (see VAN RAEPENBUSCH S., *Droit institutionnel de l'Union européenne*, Bruxelles, 2016, pp. 400-402).

⁵¹ For the definition of “data subject”, see Article 4, No. 1, of the General Data Protection Regulation.

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According to Article 3, para. 1, of the law at issue, value is given to the child's abilities to understand and to make decisions. Depending on those abilities, children are informed about possible actions to be taken concerning their health, so that they can express their will⁵².

Concluding remarks: in our view, these provisions constitute a benchmark to appreciate that the Italian legislator could have addressed in a more specific and adequate way the child's right to information in the context of civil proceedings.

However, in spite of the shortcomings stated above, in recent years there has been a significant change in the relevance of minors' right to be consulted on certain matters. It suffices to recall that Legislative Decree No. 154/2013 replaced (in Italian Family Law) "parental authority" with "parental responsibility"⁵³. On this basis, it could be argued that Italian law no longer sees minors as subject to their parents' authority. In contrast it sees them as – vulnerable persons but – independent actors with their own views, feelings and wishes, to be taken into account depending on their level of maturity. Therefore, on the one hand legal systems should grant children the protection they need, on the other children shouldn't be deprived of their right to be asked what they think about significant events in their lives⁵⁴.

In line with this idea, the Italian legislator could consider improving the existing provisions on the child's right to be heard in civil proceedings, by stressing the need to prior inform him/her in an appropriate way.

Protocols and guidelines adopted by civil courts and juvenile courts in Italy

The lack of specific indications by the legislator on the modalities of child participation (as well as on the need to provide the child with information concerning the audition) has suggested the adoption, by certain civil courts and juvenile courts, of Protocols on the hearing of the child.

Firstly, it is worth highlighting that the cited Protocols have been adopted in relation with the audition of the child in proceedings. Therefore, when it comes to the right to information, the latter is considered only in connection with the audition of the child.

Secondly, not every Protocol contains indications on the opportunity to provide the child with pertinent information about the content, modalities, reason and outcomes of the audition.

⁵² *"La persona minore d'età [...] ha diritto alla valorizzazione delle proprie capacità di comprensione e di decisione, [...]. Deve ricevere informazioni sulle scelte relative alla propria salute in modo consono alle sue capacità per essere messa nelle condizioni di esprimere la sua volontà"*.

⁵³ Respectively, *"potestà genitoriale"* e *"responsabilità genitoriale"*. On the second concept being inserted by Legislative Decree No. 154/2013, see CIANCI A.G. et al., *Nuovo titolo IX del Libro I rubricato "Della responsabilità genitoriale e dei diritti e doveri del figlio"*, cit., p. 89.

⁵⁴ On children's freedom of self-determination, see IRTI C., *Persona minore di età e libertà di autodeterminazione*, in *Giust. civ.*, 2019, pp. 617.

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When the right to information is mentioned in the Protocols, it is sometimes stated through a citation of Article 12 of the Convention on the Rights of the Child, or Article 3 of the Strasbourg Convention of 1996, with no further indications. Some Protocols expressly mention the need to provide the child adequate information about the audition (and prior to the audition), but this assessment is not correlated to any indication on the concrete modalities with which the information is provided. No specific indication is given in this regard, with the consequence that the matter is left to the sensitivity and willing of the judge, the lawyer, the parents or other professionals involved. This is the approach, for instance, of the Courts of Messina, Torino and Rome. The latter also emphasizes the lack, in the Italian legal system, of institutional figures that can represent the interests of the child in civil proceedings. The Protocol of Rome also states that the judge should always inform the fact that his or her opinion is only one of the elements that will be considered for the purposes of the final decision. In many cases, the Protocols confirm the practice to assign to the judge the duty to give information to the child, prior to proceed with the audition. However, it is not specified whether the information should be provided days or hours before the audition, or if it is sufficient to provide information just before the audition. The Protocols of the courts in Tuscany and the Protocol of the courts in Milan also attribute to the judge the duty to give the child proper information about the audition (and prior to the audition), about the reason for his or her involvement in the proceeding, about the consequences and impact for the final decision. In this case as well, the Protocols do not give further details about the content of the information and the modalities through which the information is transmitted to the child. The Protocol of the courts of Palermo states that information can be provided by the judge “during the audition”.

An interesting practice concerns the Protocol of the court of Pordenone, that provides for the appointment of a “*Consulente Tecnico per l’Ascolto*”, which is a professional expert that conducts the audition of the child on behalf of the judge. The Protocol mention the necessity to inform the child on the modalities and on the scope of the audition, as well as its consequences.

3. Relevant supranational provisions for the Italian legal system

As already mentioned in the previous paragraphs of the present report, the Italian legal system respects the fundamental rights of the child, as expressed in the Convention on the Rights of the Child of 1989. The child’s fundamental right to participate and express his/her views in proceedings concerning him/her is one of the guiding principles of the Convention (as stated in art. 12), and it consists in one of the main preconditions to ensure that the child’s best interests are taken in primary considerations in all cases concerning them.

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The Convention on the Rights of the Child consider adequate information essential in this respect⁵⁵. The UN Convention lays down that: “*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 [...]*” (Article 12, para. 1). It also affirms that children’s right to freedom of expression includes freedom to receive information (Article 13, para. 1), in the light of the fundamental acknowledgement that individual provisions of the UN Convention can only be understood and implemented when read and interpreted in conjunction with each other⁵⁶.

Nevertheless, other than expressly stated in Article 13 of the Convention, the child’s right to participation in legal proceedings encompasses the right to receive adequate information before, during and after the proceeding. According to the Committee for the Convention on the Rights of the Child, the child’s right to information is an essential precondition for the realization of the child’s right to express his or her views⁵⁷. In order to this right to be fulfilled, the child must have access to all necessary information about the nature of the decision and the decision-making process, about the possible consequences and about the modalities in which the hearing or conversation takes place⁵⁸. Providing information to children also fulfils their best interests, since it serves as a toll to reduce the stress, anxiety and other forms of harm that may derive from the contact of children with the justice system: children should be given the instrument to cope better, through a correct involvement that consent them to understand better the decisions that are taken⁵⁹.

The right of children to receive information in legal proceedings can also be distilled from other sources of international and regional human rights. At the regional level, the European Convention on the Protection of Human Rights (ECHR) does not contain a separate article on child’s right to

⁵⁵ LANSDOWN G., *Every Child’s Right to be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment No. 12*, p. 22; RECINTO G., *Legge n. 219 del 2012: responsabilità genitoriale o astratti modelli di minori di età?*, in *Dir. fam. pers.*, 2013, p. 1475; SEVESO L., *La sottrazione internazionale di minori: alcuni aspetti processuali*, in *Minori giust.*, 2009, p. 101.

⁵⁶ As remarked by LUNDY L., ‘Voice’ Is Not Enough: Conceptualizing Article 12 of the United Nations Convention on the Rights of the Child, in *British Educational Research Journal*, 2007, p. 932.

⁵⁷ General Comment No. 12 (2009) of the Committee on the Rights of the Child, point 25: “*The realization of the right of the child to express her or his views requires that the child be informed about the matters, options and possible decisions to be taken and their consequences by those who are responsible for hearing the child, and by the child’s parents or guardian. The child must also be informed about the conditions under which she or he will be asked to express her or his views. This right to information is essential, because it is the precondition of the child’s clarified decisions*”. See also points 41 and 45.

⁵⁸ VANDENHOLE W., G.E. TÜRKELLI, S. LEMBRECHTS, *Children’s Rights. A Commentary on the Convention on the Rights of the Child and its Protocols*, Cheltenham, 2019, p. 146.

⁵⁹ PARKES A., *Children and International Human Rights Law: the Right of the Child to be Heard*, 2013, New York, p. 92.

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participate, but this right has been incorporated into art. 8 according to the interpretation given by the European Court of Human Rights (see *infra*, para. 4).

As concerns the international provisions to which Italy is bound, it is relevant to cite the European Convention on the exercise of children rights, concluded in Strasbourg on 25 January 1996 under the auspices of the Council of Europe⁶⁰. The Convention has confirmed the statements of Article 12 of the Convention on the Rights of the Child and has introduced specific procedural right to whom the child is the holder. According to Article 3, the 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*”⁶¹. According to Article 6 of the same convention, the judicial authority shall “*ensure that the child has received all relevant information*” before taking a decision.

The system of ratification envisaged by the 1996 Convention is peculiar in the sense that States are required to specify, in the instrument of ratification, at least three category of family proceedings to which the Convention is to apply. In this regard, the Law 77/2003 has included within the scope of application of the Convention: i) the proceedings concerning the intervention of the judge in case of disagreement between the parents exercising parental responsibility (Article 145 Civil Code); ii) the proceedings for the denial of paternity (Articles 244 and 247 Civil Code); iii) the proceedings to challenge the recognition of paternity (Article 264 Civil Code); and iv) the proceedings concerning the administration of the child’s assets by the parents (Articles 322-323 Civil Code). However, a decision of the Corte di Cassazione of 2007 is rather interesting in the part in which it has attributed a value of general principle to the rules of the Strasbourg Convention of 1996⁶². As a consequence, according to the court, even international child abduction proceedings are subject to the rules of the Strasbourg Convention concerning the hearing of the child and the right of the child to receive adequate and pertinent information about the proceeding. Information that should be modulated

⁶⁰ Entered into force on 1 July 2000. Text of the Convention and status table available at <https://www.coe.int>. The Convention has been ratified in Italy with the Law 20 March 2003, No. 77.

⁶¹ Article 2 of the Strasbourg Convention provides the following definition of “*relevant information*”: “*information which is appropriate to the age and understanding of the child, and which will be given to enable the child to exercise his or her rights fully unless the provision of such information were contrary to the welfare of the child*”.

⁶² Corte di Cassazione, judgment 27 July 2007, No. 16753.

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appropriately according to the age and maturity of the child, and should nevertheless be omitted if they could have dangerous consequences on the child's wellbeing.

Furthermore, the right of the child to be heard, as well as the right to receive information, have constituted the object of two sets of guidelines, developed by the Committee of Ministers of the Council of Europe and by the International Association of Youth and Family Judges. The Council of Europe's Guidelines on child-friendly justice (adopted in 2010) state that: "*Children should be provided with all necessary information on how effectively to use the right to be heard [...]*"⁶³.

The above has been commented by a number of authors⁶⁴. One of them (E. Italia) affirms that the link between children's right to receive information and their right to be heard in judicial proceedings also results from the Italian Forensic Psychology Association Guidelines on the child's hearing⁶⁵.

The IAYFJM guidelines extensively address the right to information⁶⁶, also stressing how the child should be correctly informed about the decisions that are made, in a language that he or she can understand.

The existing EU acquis in the field of children's rights builds on those international provisions: as known, Article 3(3) of the Treaty of the European Union explicitly recognises the promotion of children's rights in internal and external affairs as an objective of the EU, as well as Article 24 of the EU Charter of Fundamental Rights. It is natural that the EU instruments in the area of civil cooperation in civil matters are strictly connected with aspects related to fundamental rights of the child. The analysis of the national legislation and practice impacts on EU private international law instruments in the field of family law: indeed, not all of those instruments impose direct duties to hear the child or do not address the opportunity or the methods for child participation in judicial proceedings. What is certain is that fundamental rights of the child must be respected by European judicial authorities and legal practitioners in all actions concerning the child, transnational cases included.

⁶³ See the English version of the Guidelines, available at the website of the Council of Europe, p. 28. On how these Guidelines highlight children's right to receive information prior to being heard in judicial proceedings, see RUO M.G., *Giusto processo civile minorile e spazio giuridico europeo, indicazioni della Corte Europea dei diritti dell'uomo e Linee Guida del Consiglio d'Europa per una Giustizia Child Friendly*, in *Dir. fam. pers.*, 2013, p. 297.

⁶⁴ Besides RECINTO and RUO (Notes 3 and 5), see LOMBARDI R., *L'ascolto del minore nei procedimenti di separazione e divorzio su accordo delle parti tra fonti sovranazionali e diritto interno*, in *Famiglia*, 2019 (online); SILIBERTI A., *Ascolto del minore in sede di separazione: il giudice deve motivare la decisione di non disporre l'ascolto diretto*, in *ilFamiliarista.it*, 2018 (online); ITALIA E., *L'ascolto del minore*, in *Fam. dir.*, 2020, p. 713.

⁶⁵ Available at <https://aipgitalia.org/> (last consulted on 25.11.2020).

⁶⁶ See the para. 2.3.3 of the IAYFJM Guidelines.

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4. Relevant case law

National case law⁶⁷

Looking at the Italian case law of courts when children are involved in civil proceedings, research shows that very few decisions address explicitly the child's right to receive adequate information in proceedings. This shows that the issue is not frequently raised as a relevant point of discussion and objections are not raised in courts when the child does not receive information about the proceeding.

The numbers of the decisions, whilst being quantitative data, might be a qualitative one as well, in that it could be the index of the attitude of courts "not to raise" the problem at all. Moreover, according to these judgments, courts seem to consider it an incidental question to inform children in the context of civil proceedings concerning them: this need appears to be mentioned only in connection with children's right to be heard.

A change in the Corte di Cassazione's view on the issue was marked by: Corte di Cassazione, judgment 16 April 2007, No. 9094; Corte di Cassazione, judgment 27 July 2007, No. 16753.

Before this change, the Corte di Cassazione affirmed – for example in judgment 7 December 1999, No. 13657 – that it was within the judge's discretion whether the child was heard or not⁶⁸. It should be mentioned, however, that even in those years Italian judges paid some attention to the child's opinion in the context of Family Law. With regards to that, see Court of Naples, judgment 10 December 1981; Corte di Cassazione, judgment 15 January 1998, No. 317; Corte di Cassazione, judgment 9 November 2004, No. 21359⁶⁹. Concerning the Italian Constitutional Court⁷⁰, see judgment 30 January 2000, No. 1⁷¹, according to which – in case of questions related to "parental authority" – the child capable of judgment is a party to the proceeding⁷². It is thus necessary that the adversarial principle applies in regard to him/her (in the Constitutional Court's view, Article 12 of the Convention on the Rights of the Child completes the Civil Code "*with the view to consider the child as a part in the proceeding, with the necessity to apply the adversarial principle*")⁷³.

⁶⁷ Available in the project's database (see fn. 1).

⁶⁸ MALFA V., *L'ascolto del minore alla luce della legge n.219/2012*, in *Iura & Legal Systems*, 2015, p. 15.

⁶⁹ Ibidem.

⁷⁰ The name of the court is "*Corte costituzionale*"; in the present paragraph, it will be referred to as the "Constitutional Court".

⁷¹ See Note 82.

⁷² On the concept of "parental authority", see Note 45.

⁷³ On the importance of the judgment in question, see (among others) LABRIOLA M., *L'avvocato del minore*, in *Familia*, 2019 (online).

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Going back to the Corte di Cassazione, according to judgment 27 July 2007, No. 16753, on the one hand being heard is children's right, on the other children should receive, in order to be heard, “*relevant and appropriate information*” (“*informazioni pertinenti e appropriate*”)⁷⁴.

Corte di Cassazione (United Chambers), judgment 21 October 2009, No. 22238⁷⁵: according to this judgment, hearing a child is necessary when his/her custody is at stake. Omitting the hearing without adequate justification would amount to violating both the adversarial principle and the principle of fair trial (“*Costituisce quindi violazione del principio del contraddittorio e dei principi del giusto processo il mancato ascolto dei minori*”)⁷⁶.

Corte di Cassazione, judgment 14 February 2014, No. 3540: in a case of international child abduction, where the Hague Convention of 1980 and the Council Regulation No. 2201/2003 were applicable, the Court expressly stated that the respect of Article 12 of the Convention on the Rights of the Child of 1989 and Articles 3 and 6 of the Strasbourg Convention of 1996 “*requires that the child receives all the relevant and appropriate information, according to his age and his degree of development*” - provided that those information are not harmful for his or her wellbeing.

Corte di Cassazione, judgment 7 March 2017, No. 5676: hearing a child grants him/her the opportunity to be informed and to express himself/herself. Both these possibilities constitute a fundamental right, which pursues the child's best interest (“*L'ascolto costituisce una modalità, tra le più rilevanti, di riconoscimento del diritto fondamentale del minore ad essere informato ed esprimere la propria opinione [...] nei procedimenti che lo riguardano, costituendo lo strumento peculiare di partecipazione alle decisioni che lo investono e al conseguimento del suo preminente interesse*”).

Nevertheless, according to the same judgment, the judge has no obligation to explain his/her choice not to hear a child under the age of 12, unless specifically asked (“*non si ravvisa l'obbligo endoprocedimentale del giudice [...] di motivare ancorché senza alcuna sollecitazione di parte, sulla valutazione discrezionale relativa all'omesso ascolto*”). The Corte di Cassazione affirmed the same in judgment 9 August 2019, No. 21230 (see *infra*).

Corte di Cassazione, judgment 27 March 2017, No. 7762: hearing a child party to the proceeding – about a matter affecting him/her – is an essential step to be taken, resulting in the judge needing to take into account the outcome of the hearing (“*l'imprescindibilità dell'audizione [...] non solo consente di realizzare la presenza nel giudizio dei figli, in quanto parti 'sostanziali' del procedimento [...], ma impone certamente che degli esiti di tale ascolto si tenga conto*”).

⁷⁴ *Supra*, para. 2.

⁷⁵ For the maxim, see the project's database (at fn. 1).

⁷⁶ *Supra*, para. 2.

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This judgment makes reference to Corte di Cassazione, judgment 9 November 2004, No. 21359 (supra) and Corte di Cassazione, judgment 7 October 2014, No. 21101 (infra).

Corte di Cassazione, judgment 24 May 2018, No. 12957: in case of separation of the spouses, a child less than 12 – who has some capacity of judgment – must be heard, under penalty of nullity, on the matters involving him/her. If the child is not heard, the judge will have to explain it (*“Ritiene la giurisprudenza di legittimità che nel giudizio di separazione personale tra coniugi, l’audizione del minore infradodicesimo capace di discernimento – direttamente da parte del giudice ovvero, su mandato di questi, da parte di un consulente o del personale dei servizi sociali – costituisce adempimento previsto a pena di nullità ove si assumano provvedimenti che lo riguardino, salvo che il giudice non ritenga, con specifica e circostanziata motivazione, l’esame manifestamente superfluo o in contrasto con l’interesse del minore, Cass. civ. sez. I n. 19327 del 29 settembre 2015”*).

Corte di Cassazione, judgment 13 February 2019, No. 4246 (in line with Corte di Cassazione, judgment 7 March 2017, No. 5676): hearing a child – who is at least 12, or even younger when he/she has some capacity of judgment – grants him/her the opportunity to be informed and to express himself/herself. Both these possibilities amount to a fundamental right, which pursues the child’s best interest (*“Ne consegue che l’ascolto del minore di almeno dodici anni e anche di età minore ove capace di discernimento, costituisce una modalità, tra le più rilevanti, di riconoscimento del suo diritto fondamentale ad essere informato e ad esprimere le proprie opinioni nei procedimenti che lo riguardano, nonché elemento di primaria importanza nella valutazione del suo interesse”*).

Corte di Cassazione, judgment 7 May 2019, No. 12018: in the Court’s view, hearing a child – who is at least 12, or even younger if capable of judgment – in a proceeding involving him/her is the best way to respect his/her fundamental right to be informed about it (*“costituisce una modalità, tra le più rilevanti, di riconoscimento del suo diritto fondamentale ad essere informato e ad esprimere le proprie opinioni nei procedimenti che lo riguardano”*)⁷⁷.

Further judgments of the Corte di Cassazione on the issue (in chronological order)

Judgment 26 March 2010, No. 7282.

Judgment 16 June 2011, No. 13241.

Judgment 17 May 2012, No. 7773.

Judgment 8 March 2013, No. 5847.

Judgment 15 March 2013, No. 6645.

Judgment 15 May 2013, No. 11687.

⁷⁷ Supra, para. 2.

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Judgment 7 October 2014, No. 21101.

Judgment 26 March 2015, No. 6129.

Judgment 29 September 2015, No. 19327.

Judgment 27 July 2017, No. 18649.

Judgment 16 February 2018, No. 3913.

Judgment 13 December 2018, No. 32309.

Judgment 17 April 2019, No. 10774.

Judgment 9 August 2019, No. 21230.

Constitutional Court

Constitutional Court, judgment 30 January 2002, No. 1⁷⁸: has declared that the Convention on the Rights of the Child of 1989 (and in particular its Article 12 on the right to be heard) has a self-executing character and is therefore directly applicable in the Italian legal system without the need to adopt specific rules for its implementation.

Supranational case law

The supranational case law mentioned in this paragraph includes some judgements of both the European Court of Human Rights and the EU Court of justice that are relevant for the Italian legal system.

Whilst most of the ECtHR decisions below focus on the act of hearing a child in a proceeding involving him/her (or, more broadly, on the relevance of a child's opinion in this context), only a small percentage of them deal expressly with the importance of prior informing him/her. Judgment of 16 December 1999, *T. v. The UK* and judgment of 24 September 2007, *W.S. v. Poland* belong to this small percentage (*infra*).

The second one actually refers to how a child should be heard in a non-invasive way in a judicial proceeding, rather than to the need to inform him/her. However, one of the methods suggested by the court consists in hearing the child with the assistance of a psychologist: it seems reasonable to think that giving the child adequate information about what the conversation entails forms part of the appointed professional's duties. In our view, by referring to it the Court stressed the significance of informing the child about the possible effects of the hearing.

⁷⁸ For the maxim, see the project's database (at fn. 1).

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Nevertheless, in view of the foregoing we could argue that the ECtHR case law has not yet paid sufficient attention to the problem of the child's right to be informed in the context of judicial proceedings.

Moving on to the Court of justice, only one of the judgments below regards the act of hearing a child in a judicial proceeding (linked to EU Regulation 2003/2201), without addressing the need to prior informing him/her.

The rest of the EU Court case law referred to concerns a broader question: the necessity to interpret Regulation 2003/2201 in the light of the best interests of the child. This regulation contains Article 11, according to which the child must be “*given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity*”⁷⁹. In light of the best interest principle, this means that the judge hears the child every time it is beneficial for him/her, and that the child receives relevant and appropriate information prior to the hearing.

European Court of Human Rights case law (in chronological order)⁸⁰

Judgment of 23 September 1994, Hokkanen v. Finland, app. No. 19823/92: according to para. 61, “[...] *the Court of Appeal came to the conclusion that the child had become sufficiently mature for her views to be taken into account and that access should therefore not be accorded against her own wishes [...]. The Court sees no reason to call this finding into question*”.

The Court confirmed that the child, who was 12 years old when the case was dealt with at a national level⁸¹, was mature enough for her refusing contact with her father to be taken into consideration.

Judgment of 9 June 1998, Bronda v. Italy, app. No. 22430/93: according to para. 62, “[...] *while a fair balance has to be struck between S. 's interest in remaining with her foster parents and her natural family's interest in having her to live with them, the Court attaches special weight to the overriding interest of the child, who, now aged fourteen, has always firmly indicated that she does not wish to leave her foster home. In the present case, S. 's interest outweighs that of her grandparents*”.

In the Court's view, it was necessary to give value to a child's view about her custody; at the time of the judgment, she was 14 years old. Her opinion consisted in a firm refusal to live with her grandparents, since she wished to stay at her foster home.

Judgment of 16 December 1999, T. v. The UK, app. No. 24724/94: according to para. 84, “[...] *The Court does [...]* agree with the Commission that it is essential that a child charged with an offence is

⁷⁹ Article 11 (referring to the “return of the child”), para. 2, of the regulation at issue.

⁸⁰ The date mentioned always refers to the final decision.

⁸¹ For more details about this aspect, see para. 37 of the judgment.

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dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings”.

Even though it regards a criminal law case, this judgment is relevant for the present analysis. The Court underlined the necessity to take into account, in case of a child charged with an offence, his/her age, level of maturity and “intellectual and emotional capacities”. The Court also emphasised the need to foster the child’s understanding of the proceeding and his/her participation into it: by mentioning this need, it seems that the Court made indirect reference to the significance of informing the child about each step of the proceeding.

Judgment of 8 July 2003, Sahin v. Germany, app. No. 30943/96: according to para. 73, “*As regards the issue of hearing the child in court, the Court observes that as a general rule it is for the national courts to assess the evidence before them, including the means used to ascertain the relevant facts [...]. It would be going too far to say that domestic courts are always required to hear a child in court on the issue of access to a parent not having custody, but this issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned*”.

On the one hand the ECtHR considered it excessive to always hear a child in regard to his/her relationship with the parent not having custody. On the other the Court thought the hearing was a possibility, by affirming that the decision whether to hear a child or not depends on the specific circumstances of the case at issue, like his/her age and level of maturity.

Judgment of 8 July 2003, Sommerfeld v. Germany, app. No. 31871/96: according to para. 72, “[...] *the Court notes that the girl was thirteen years old when she was heard by the District Court judge on the question of access [...]. The same judge had already questioned her, at the ages of ten and eleven, in the context of the first set of proceedings [...]. Having had the benefit of direct contact with the girl, the District Court was well placed to evaluate her statements and to establish whether or not she was able to make up her own mind. On that basis the District Court could reasonably reach the conclusion that it was not justified to force the girl to see her father, the applicant, against her will*”.

Basing on the above-mentioned paragraph of the judgment, it could be argued that for a judge to evaluate the child’s view on a certain matter, it is necessary to have direct contact with him/her.

Judgment of 22 September 2004, Pini et al. v. Romania, apps. Nos. 78028/01 and 78030/01: according to para. 157, “*It must be pointed out that in the instant case the children rejected the idea of joining their adoptive parents in Italy once they had reached an age at which it could reasonably be considered that their personality was sufficiently formed and they had attained the necessary maturity to express their opinion as to the surroundings in which they wished to be brought up*”.

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According to para. 164, “[...] *The children’s consistent refusal, after they had reached the age of 10, to travel to Italy and join their adoptive parents carries a certain weight in this regard. Their conscious opposition to adoption would make their harmonious integration into their new adoptive family unlikely*”.

In a case of international adoption, the Court judged that the children’s opinion – children who had reached the age of 10 – was significant to assess the probability of their integration into a new adoptive family.

Judgment of 9 August 2006, C v. Finland, app. No. 18249/02⁸².

Judgment of 25 April 2007, Eski v. Austria, app. No. 21949/03: according to para. 40, “*The Court further observes that the district court granted the adoption after having heard evidence from the child, her adoptive father and the child's mother. On that occasion the child, then aged nine and a half, stated that she considered her adoptive father as her father and supported the adoption*”.

In this judgment, the ECtHR gave value to the fact that the national court had heard the child about her mother’s husband adopting her; the child supported the adoption, while her biological father was opposed to it.

Judgment of 24 September 2007, W.S. v. Poland, app. No. 21508/02: according to para. 61, “[...] *the Court observes that it has not been shown or argued that the authorities envisaged or made attempts [...] to test the reliability of the victim in a less invasive manner than direct questioning. This could have been done, for example, by more sophisticated methods, such as having the child interviewed in the presence of a psychologist and, possibly, also her mother, with questions put in writing by the defence, or in a studio enabling the applicant or his lawyer to be present indirectly at such an interview, via a video-link or one-way mirror*”.

Although it regards the case of a child victim of a crime, this judgment is useful to understand the Court’s view about how a child should be heard in the context of a judicial proceeding. Some possible ways to do it without being invasive are mentioned, like hearing the child in a protected space.

Judgment of 20 June 2011, Plaza v. Poland, app. No. 18830/07: according to para. 86, “[...] *The Court is of the view that the approach of the domestic courts, which considered that it was of the greatest relevance to the custody and access issues to establish the psychological situation of the child and take her wishes into consideration [...], cannot be open to criticism*”.

The Court appreciated the decision made at national level, regarding a minor who refused contact with her father, since this decision took into account her point of view on the issue (in the same vein,

⁸² Supra, para. 2.

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see judgment of 28 November 2011, Sbârnea v. Romania, app. No. 2040/06, para. 131, in relation to the action of social services).

Judgment of 1 May 2018, M.K. v. Greece, app. No. 51312/16: according to para. 91, “[...] *la volonté exprimée par un enfant ayant un discernement suffisant est un élément clé à prendre en considération dans toute procédure judiciaire ou administrative le concernant*”⁸³.

This judgment is relevant for the purposes of this paragraph since the child’s opinion is defined as a “key element” to be taken into account during the proceeding, when he/she is sufficiently mature.

EU case law

As stated above, among the decisions of the Court of justice mentioned in this paragraph, only one refers to the act of hearing the child: judgment of 22 December 2010, Joseba Andoni Aguirre Zarraga v Simone Pelz, Case C-491/10 PPU.

According to its para. 66: “[...] *whilst it is not a requirement of Article 24 of the Charter of Fundamental Rights and Article 42(2)(a) of Regulation No 2201/2003 that the court of the Member State of origin obtain the views of the child in every case by means of a hearing, and that that court thus retains a degree of discretion, the fact remains that, where that court decides to hear the child, those provisions require the court to take all measures which are appropriate to the arrangement of such a hearing, having regard to the child’s best interests and the circumstances of each individual case, in order to ensure the effectiveness of those provisions, and to offer to the child a genuine and effective opportunity to express his or her views*”.

According to para. 68: “*It follows that, before a court of the Member State of origin can issue a certificate which accords with the requirements of Article 42 of Regulation No 2201/2003, that court must ensure that, having regard to the child’s best interests and all the circumstances of the individual case, the judgement to be certified was made with due regard to the child’s right freely to express his or her views [...]*”.

According to Article 42 of Regulation 2003/2201, when a child is brought abroad (to “*a Member State other than the Member State where the child was habitually resident*” before being abducted⁸⁴), in case his/her return is “*entailed by an enforceable judgment given in a Member State*”⁸⁵, this judgment is automatically recognised by another Member State when the decision “*has been certified*

⁸³ An official English version of the judgment is not available.

⁸⁴ Article 11, para. 1, of the regulation at issue.

⁸⁵ Article 42, para. 1, of the regulation at issue.

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*in the Member State of origin*⁸⁶. The certificate referred to is issued if – among various conditions – *“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”*⁸⁷.

According to the judgment in comment, Article 42 of the regulation doesn't imply the obligation for the judge to always hear the child, since it exists a *“certain degree of discretion”*. However, when the hearing takes place, it is necessary that the child is put in the position to freely express himself/herself.

Further decisions of the Court of justice on the need to interpretate Regulation 2003/2201 in accordance with the child's best interest

Judgment of 22 December 2010, Barbara Mercredi v Richard Chaffe, Case C-497/10 PPU: in para. 46, the Court of justice stated the relevance of the child's best interest when determining his/her habitual residence (*“Since the articles of the Regulation which refer to ‘habitual residence’ make no express reference to the law of the Member States for the purpose of determining the meaning and scope of that concept, its meaning and scope must be determined in the light of the context of the Regulation's provisions and the objective pursued by it, in particular the objective stated in recital 12 in the preamble to the Regulation, that the grounds of jurisdiction established in the Regulation are shaped in the light of the best interests of the child”*).

Judgment of 1 October 2014, E. v B., Case C-436/13: *“With respect to the objectives pursued by Regulation No 2201/2003, it should be noted that recital 12 in the preamble thereto provides that the grounds of jurisdiction established in that regulation in matters of parental responsibility are shaped in the light of the best interests of the child”* (para. 44). The same was argued by the Court of justice in judgment of 12 November 2014, L v M, Case C-656/13, para. 48.

Judgment of 9 October 2014, C v M, Case C-376/14 PPU: when determining the child's habitual residence, it is necessary to respect his/her best interest and, to this end, to take into account and balance all the circumstances of the case at issue (see para. 56). In the same vein, see judgment of 15 February 2017, W and V v X, Case C-499/15 (para. 60) and judgment of 28 June 2018, HR, Case C-512/17 (para. 40).

⁸⁶ Ibidem.

⁸⁷ Article 42, para. 2, a), of the regulation at issue.

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5. The effectivity of the hearing as dependent on the right to receive adequate information: gaps and deficiencies in the Italian legal system

From the above analysis, it results that the right of the child to receive appropriate information in civil proceedings is not enshrined in many legal provisions, even in those concerned with child participation.

The Italian legal system has accepted and implemented the indications of international conventions on the need to hear children before taking any decision concerning them. However, an analogous attention does not seem to reach the right of the child to be receive adequate information before, during and after judicial proceedings.

Firstly, it seems that the few legal provisions concerned with information to children are the ones that regulate the hearing of the child in proceedings (as the mentioned Article 336-bis of the Civil Code, which is a provision of general application for all proceedings “concerning” the child). Children’s right to information is considered in very few provisions, which are not specifically dedicated to the enjoyment of such right, but rather mention it within the right of the child to be heard during the proceeding. Thus, it seems that the Italian legal system considers the right to information to be especially important in case the judge hears the child – an approach that should certainly be welcomed, yet it does not express a general consideration for the right to information in its autonomy. Secondly, and concurringly, a very few case law address explicitly the child’s right to receive adequate information in proceedings. As previously highlighted, this occurrence shows that the issue is not frequently raised as a relevant point of discussion and objections are not raised in courts when the child does not receive information about the proceeding. Since the case law does not address this point, that could be the index of the attitude of courts “no to raise” the problem at all.

The analysis of current practices in Italy have somehow confirmed the aforementioned consideration, as it will be seen in the following paragraph. What is important to understand, in our opinion, is the importance of the information stage on the effectiveness of the hearing of the child. Participation of children in proceedings is not sufficient *per se* to pursue the child’s best interests, rather it may be even harmful for the child if the child is not adequately prepared to this important stage of the proceeding and does not receive information⁸⁸. It seems that some progress can be done in this regard

⁸⁸ Despite the indications given in the General Comment No. 12 (2009) of the Committee on the Rights of the Child, point 16: “*States parties have to ensure that the child receives all necessary information and advice to make a decision in favour of her or his best interests*”.

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as concerns the implementation of the rights of the child in civil proceedings: this paves the way to further discussion at the international and European level.

6. Analysis of the current practices in Italy

The questionnaires from lawyers and judges gave some interesting insights to the research, especially as concerns the current best practices that are currently on-going in Italian civil proceedings and the perception that legal practitioners have on the existence, content and importance of children's right to information.

General section: The children's right to information in civil proceedings

In the General Section of the questionnaire, the scope was to have a general idea on the perception of judges and lawyers on the existence of a general right of the child to receive adequate information in civil proceedings – especially when EU instruments in the field of civil cooperation in civil matters were concerned. Respondent were asked whether the Italian legal system includes a general obligation to provide written or oral information to children, in the disputes involving them or capable to affect their life and future. Indeed, answers to this question were generally oriented towards considering the information phase as a part of the child's hearing during the proceeding.

Only three of the respondents declared that there is a general obligation to provide information to children in the Italian legal system, stated by the Civil Code (336-bis of the Civil Code). One of those respondents stated that this duty is upon the child's parents (referring to Article 315-bis) and upon the judge if the child is heard by the court (with the duty to provide information on the nature of the proceeding and on the effects of the audition). Another respondent stated that the right to information derives directly from Article 12 of the Convention on the Rights of the Child of 1989 and from the Strasbourg Convention on the Exercise of Children's Rights, which also impose that the information shall enable the child to understand the effects of the decision and the impact of the latter over his or her life. It was highlighted that the rules expressing the children's right to information do not give much indication on the content or the extent of those information.

Four respondents reported that there is no general rule to inform the child in the Italian legal system, even if information are provided when the child is heard by the judge. This was indicated as the moment of the judicial proceeding when the child is provided information. This means that the information is given orally to the child, most of the time during the audition or shortly before the



audition. One of the respondents stated that the right of the child to information indirectly derives from Article 12 of the Convention on the Rights of the Child of 1989.

According to other nine respondents, there is no general obligation to provide information to the child in civil proceedings. Nevertheless, three of the answers specified that the child is usually given information. One respondent stated that, in this context, *“the information provided to the child is usually generic and they are oriented towards the purpose of reassuring the child that is about to experience the audition”*.

From the experience of practitioners, it was also possible to gain the general perception that the duty to inform the child is strictly interconnected with the right of the child to be heard, in the sense that the (few) provisions addressing the right to information are mainly concerned with the child's hearing. Unsurprisingly, when asked whether the Italian legal system provides for an obligation to inform the child also *“where there is no obligation for the judge to hear the child”*, the almost totality of respondents answered negatively. Only one answer stated that there is general obligation to provide information to the child, even though the relevant legal provisions were not indicated.

No clear pattern seems to subsist according to differences in information according to the age of the child and as concerns the content of the information.

Another question was aimed at understanding whether children are informed before the start of the proceeding and, in this case, how long before this information takes place. Answers to this question are interesting in the fact that seven respondents declared that the child is never given information *before* the start of the proceedings. Three respondents declared that the child is barely informed in this preliminary stage, and five other respondents stated that the child is “sometimes” informed. In only one case, the respondent stated that the child is always informed before the start of the proceeding.

When asked how long before the proceeding children are provided the information, all respondents stated that *“there is no fixed rule in this regard”*.

As concerns the information during the course of the proceedings, the majority of respondents stated that the child is “sometimes” (8) or “barely” (5) provided information *during* the proceeding. Only two respondents stated that the child is “often” provided information.

The rate and extent of information given to the child is lower when it comes to communicate the outcome of the proceeding: according to five respondents, the child is “barely” given information at this final stage. Three respondents stated that the child is “sometimes” given information. Six respondents stated that the child is never given information after the end of the proceeding.

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Another question on the general characteristic of the Italian legal system concerned the existence of a professional that has the duty to help the child in expressing his/her opinion in civil proceedings. What emerges from the analysis of the Italian legal system is that there is a lack of an established institutional figure that has the duty to help the child in expressing his or her opinion. A special curator of the child may be appointed in certain situations of high conflict or when there is no parent that can exercise parental responsibility over the child. However, this role does not seem to encompass also the specific duty to facilitate the participation of the child in the proceeding (even if this duty could be inferred by the fact that the special curator protects the interests of the child). In certain cases, practitioners have made reference to the special curator, to social workers or the community personnel, or to a psychologist.

Another data that emerged from the answers is that in the Italian judicial system, parents are not usually prepared by the judge or other public institution on how to assist their children and to explain them the situation or the outcome of the proceedings. Only in one case, it was explained that parents receive suggestions and advice from the judge or from the special curator on how explain the situation to children and how to communicate the outcome of the proceeding. Therefore, this aspect seems to be left, to a larger extent, to the responsibility of the parents (or to the sensitivity of the lawyer of one of the parents).

A lack of diffused and consolidate practice also concerns the possibility for the child involved in civil proceedings to have access to child-friendly materials. The majority of respondents answered that those materials are never provided in courts or by the institutions involved in civil proceedings. Only in one case it was stated that those materials are “often” at disposal of the child (respondent referred to short movies or brochures); in four cases, the respondents stated that those materials are “barely” found.

A very important data, that is relevant for cross-border proceedings involving children, is the jeopardized presence of tools and services for children that do not understand the local language. Two respondents didn't answer to this question. The other respondents were almost equally distributed: six stated that no, the child is not provided this assistance; six answers were positive and made reference to translation services and/or cultural mediators. This is an aspect that would need to be implemented for the purposes of a child-friendly justice in the context of cross-border proceedings.

As concerns children with special needs, information does not result to be adequately provided by public institutions in every case: two respondents didn't answer to this question. In four cases the answer was positive: children with special needs are provided with the assistant of a psychologist

(two answers) or the proceeding is assigned to a honorary judge (who is usually a professional having
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specialized scientific knowledge in dealing with children). Three respondent stated that “sometimes” this type of service is provided. One respondent’s answer was “barely” and reference was made to the assistance of a psychologist and to the usage of I.T. aids. Six respondents declared that “no”, children with special needs are not provided adequate information.

Proceedings on parental responsibility and rights of access

This section of the questionnaire was dedicated to proceedings on matters of parental responsibility, which therefore fall into the scope of application of Regulation (EC) No. 2201/2003 (as well as the Regulation (EC) 2019/111 that will enter into force in 2022). This section is of direct interest for the application of EU instruments in the field of judicial cooperation in civil matters.

From the answers collected, it results that the child is usually heard in parental responsibility proceedings before issuing a decision on the merits. The majority of respondents explained the conditions that Italian law impose in order to admit a child’s audition: the child shall be above twelve years of age or capable of discernment; the audition shall not be manifestly superfluous, and shall not constitute a harmful situation for the child.

Respondents were also asked who is charged with the hearing of the child. Almost all the answers were oriented towards the judge proceeding directly to hear the child, eventually with the assistance of a psychologist or a social assistant. In general, all respondents stating that the audition is directed by the judge, the assistance of a psychologist or a social assistant is discretionary and based on a prudent assessment of the judge when the case presents delicate aspects of child protection. One respondent stated that the judge proceeds alone, in any case. Only one of the respondents envisaged the possibility that the audition is conducted directly by the psychologist or the social assistant. However, in that questionnaire, all the three possible answers (judge, psychologist, social assistant) were marked. In one case, it was declared that the child is not heard in civil proceedings on parental responsibility.

All respondents but two declared that, in parental responsibility proceedings, parents are not usually allowed to attend the hearing, when the audition of the child is performed. This is in line with the research conducted on the Protocols adopted by certain courts and juvenile courts, which are in principle contrary to parent’s participation during child’s auditions.

When the child is heard, the majority of respondents (ten out of sixteen) stated that the child is always provided information before the audition. In two cases, it was stated that the child is often provided information in this stage. In two cases, it was stated that this preliminary phase of information occurs sometimes. In one case, the answer was “barely”.

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The characteristics of the preliminary phase of information seems to be, in this case, very well defined. There are two typical scenarios, to which almost all respondents referred to:

- The child is provided information about the hearing a few days before, usually by the parents or the social worker, or
- The judge provides the child with information shortly after the audition, or at the initial stage of it.

One respondent did not answer this question.

From all the answers collected, it was possible to infer that there are no general rules on *how* the information is provided. As already explained, it results that information is usually given to the child before the audition. This means that the information phase may occur shortly after the audition (or, in some cases, a few days before). Doubts may be raised if the preliminary stage of information, shortly after the audition, may qualify as a proper preparation of the child or rather a part of the audition itself, to which the child is present without a prior knowledge of the situation. In the latter scenario, preparation of the child inevitably falls upon the responsibility of the parents or the social worker.

Respondents were asked whether the child is usually provided information in presence of a person they trust: also in this regard the practice of Italian courts does not follow a clear path. It seems that the presence of a person of trust may be necessary or recommended if the circumstances require so, but it does not happen on a fixed basis. Most of the answers referred to a parent (or a tutor/curator), a psychologist or a social assistant (likely to be already involved in the proceeding).

The content of the information provided to the child is various and mixed according to the different experiences. The child may receive information about the reasons of the hearing (6 answers), the presence of other persons at the audition (9), the functions of the professionals attending the audition (5), the extent of disclosure of the child's declarations (6), the availability of procedural safeguard (2), the behavioural rules that the child needs to respect during the hearing (1), the rights of the child (9), the background information about the case (8), the hearing possible outcomes (6).

An important information that results to be usually provided by the child is the following: children are effectively informed that their opinion is important, but they won't be responsible for the final outcome of the proceedings. In twelve cases out of sixteen, respondents stated that the child is "always" informed that his or her opinion won't determine the outcome of the proceedings. In two cases, it was stated that the child is "often" reassured about this important aspect.

On the other hand, at the end of the audition, the child does not always receive feedbacks and information about the audition itself and about the following steps of the proceeding. This does not

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seem to be a usual practice of Italian courts. In nine cases, respondents stated that the child is “never” provided with this kind of information. Three times the answer was “barely”, and three times the answer was “sometimes”. Only in one case, the answer was “often”.

The final stage of proceedings may also present delicate profiles when it comes to informing the child about the final decision on the merits. While there is no specific rule in this regard, the practice seem to put this responsibility outside of courts: in four cases the respondent stated that the child is not informed at all about the decision. In nine cases, this duty is left to the parents or to the child’s special curator. In five cases, answers mentioned the social worker or the psychologist involved in the case of a particular child. It appears that the judge does not have a role in this regard. The reported answers show that there is no fixed rule about the modalities with which this kind of information may be provided.

International child abduction

This section makes reference to international child abduction proceedings and to return proceedings. The section comprehends proceedings for the return of the child under the 1980 Hague Convention, and also return applications following a decision of non-return, according to art. 11 of the Regulation (EC) No 2201/2003.

The hearing of the child – as well as the necessary procedural guarantees – may be difficult in the context of child abduction proceedings, where the court has to act expeditiously and shall take a decision on (non-)return within six weeks. Providing assistance and proper information to the child could in general constitute an even greater challenge for courts and practitioners, since the collaboration of the parent that is taken care of the child is not always guaranteed. Also, the high degree of urgency of those proceedings may constitute another important obstacle.

The jeopardized practice of Italian courts as concerns children’s hearing in child abduction proceedings is already known and has been subject of extensive research⁸⁹. The reported answers somehow confirm this trend. When asked if the child is heard in abduction proceedings, in seven cases respondents said that the child is usually heard if he or she is above twelve years of age or capable of discernment. In three cases, the answer was “no”. In three cases, the answer was “sometimes”, (in one case: i.e. when it is necessary to ascertain the conditions of the child).

In Italy, return proceedings for cases of international child abduction are of competence of the juvenile court. In this context, it is possible to appoint an honorary judge that has specific

⁸⁹ Among others, see the results of the VOICE project cited at fn. 2.

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competences in treating children. In the light of this, it may be unnecessary for the judge to be assisted by a psychology or a social assistant (honorary judges usually *are* psychologists or social assistants, as well as psychiatrics or other professionals in the field). This may be one of the reasons why, in return proceedings, it seems to be the judge alone to conduct the hearing (seven answers). This not excludes the assistance of another professional, if the judge considers this advisable (this was reported in four answers). In return proceedings, parents do not usually attend the audition of the child (thirteen answers).

As concerns the modalities with which the child may be provided information before the hearing, the answers reflect a practice that is somehow analogous to parental responsibility proceedings. In eight cases, respondents have stated that the child is “always” or at least “often” provided information before the audition, usually a few days before the hearing or within the same day. In two cases, the child results to be “sometimes” informed before the audition. The judge is the subject that usually do this, orally (this answer recurred four times). In other cases, it was stated that the information is provided by the parents, or by the social worker, or by the Central Authority involved in the abduction case.

In international child abduction proceedings, there seems to be no established practice in the Italian judicial system as concerns the content of the information that may be provided to the child. This content is not predetermined by law, nor by any instrument of soft law. Considering the answers above, according to which it is usually the judge to give information to the child, it is possible to infer that the content of the information is decided by the judge itself on a case by case basis. The child may receive information about the reasons of the hearing (7 answers), the presence of other persons at the audition (4), the functions of the professionals attending the audition (6), the extent of disclosure of the child’s declarations (3), the availability of procedural safeguard (1), the behavioural rules that the child needs to respect during the hearing (1), the rights of the child (8), the background information about the case (7), the hearing possible outcomes (6).

In child abduction proceedings and when the child is heard, judges and lawyers seem quite sensitive in the necessity to inform the child that his or her opinion is important, but he or she won’t be responsible for the final outcome of the proceedings. In five cases out of nine (other answers left blank), respondents stated that the child is “always” informed that his or her opinion won’t determine the outcome of the proceedings. In four cases, it was stated that the child is “often” reassured about this important aspect.

When a decision of return is issued, there is no consolidated practice in the Italian legal system towards informing the child about the final outcome of the proceeding. In particular, when the child

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has to return to the country of habitual residence following a judicial order, the fact that the child is informed is not institutionalized within the proceeding: only in three cases, respondent declared that the information is provided. In one cases, it was reported that the information is usually provided by the judge or by the parents. In one case, reference was made to the social services. In four cases, no answer was given. There also are answers that may indeed raise some concern. In six cases, it was stated that the child is not informed at all about the decision of return. In two cases, it was explicitly stated that the child is informed “*at the moment of the enforcement*” of the return order, by the Prosecutor or by the police or by the social worker. In one case, it was specified that the information is provided only at the enforcement stage “*in order to avoid double abductions*”. There are no relevant legal provisions on this aspect in the Italian legal system.

The absence of a specific obligation to inform the child about the imminent return may result in a lack of preparation of the child before the enforcement. Ten respondents to the survey declared that the child is never prepared and informed about the enforcement. One respondent didn't answer to this question. This shall raise the doubt about a strong gap in this regard, in the Italian legal system. In one case, the respondent explained that the child may be informed “in writing” by the social services about the imminent enforcement of a return order. In one case, it was stated that the child is prepared by the police or by the social workers at the moment of the enforcement, “*in order to avoid double abduction*”.

Maintenance proceedings

The general obligation to enable children's participation in all proceedings affecting them is also relevant in the context of support and family maintenance. However, as in other contexts, it is always necessary to ascertain whether the matter under discussion “affects” the child and, subsequently, that the child is capable of forming their own views. Under these conditions, art. 12 of the Convention on the Rights of the Child of 1989 also applies in cases of maintenance and to proceedings under the Regulation (EC) No. 4/2009. It should also be borne in mind that it is not unusual that maintenance issues are discussed heard by the court in the context of a family dispute in a broader sense, *i.e.* in the context of divorce, separation or parental responsibility.

When proceedings on maintenance or child support are celebrated outside a divorce/separation/marriage annulment proceeding (*i.e.* autonomous maintenance proceedings), practice seems to show that the child is not usually heard: the almost of answers collected has expressed a negative position in this sense. In three cases, it was stated that sometimes the child may indeed be heard and informed before the hearing. In one case, no explanation was given as concerns

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the person who may provide those information, nor the how and when of informing the child. In another case, the respondent stated that the child is given information concerning the reason of the hearing, the presence of persons other than the judge during the audition, the content of his or her rights and the relevant information about the object of the proceeding. In the third case, the respondent stated that the child is given information concerning the reason of the hearing, the presence of persons other than the judge during the audition, the function of the professionals that are present during the audition, the rights of the child and the consequences of the audition for the purposes of the final decision. Those information are provided orally before the audition.

Special representative or special curator of the child

The answers to this Section were quite homogeneous in demonstrate a knowledge of the institute of the special curator. In the Italian legal system there is no figure such as the *guardian ad litem* as happens in certain Nordic countries, but the special curator can be appointed in the abovementioned situations and he or she has the duty to protect the interests of the child.

The special curator of the child is appointed in case of emergency, where the child is not represented by someone who holds parental responsibility. Those are cases of emergency of particular conflict, in which it is necessary to provide the child a person who represents his or her best interests. According to art. 78 of the Civil Code: *“In case of emergency, when a minor doesn't have someone representing him/her, it is possible to appoint a special curator”*.

In general, the child has the right of separate representation (through a special curator) where there is a situation of relevant conflict and when the parents are in conflict of interests. A part from actions oriented towards the establishment of parenthood, or the contestation of the parent-child relationship (that are not relevant for the purposes of this research), all the answers collected made reference to all cases in which there is a strong conflict between the parents. This may occur in the hypothesis of limitation or termination of parental responsibility, as well as when it is necessary to take measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

In absence of specific provisions in this regard, legal practitioners seem divided in understanding the existence of a particular duty to inform the child during a civil proceeding, which is upon the special curator. Eight respondents answered “no”, while other six answered “yes”. Two respondents declared that they didn't know the answer. No specific legal provision address the fact that the representative may have the duty to prepare the child for the hearing. From the answers collected, it does not seem

that the special curator has a specific duty to provide adequate information to the child: this may
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happen as a consequence of a free choice of the curator. One respondent also noticed that the special curator rarely has a direct contact with the child alone, rather is helped by a social worker.

Training needs

The professionals addressed by the survey have been asked whether, in their professional experience, have even attended trainings on specific topics related to child participation, child protection and the right to information.

The results show that there are some cases in which professionals are provided with specific trainings on “*children’s rights and/or how to protect and fulfil the best interests of the child in civil proceedings*” (thirteen affirmative answers). Some respondents have also declared to have participated in trainings concerning “*child-friendly behaviour to related to children involved in proceedings*” (ten positive answers). However, when it comes to more specific trainings such as “*child-friendly language for informing children*” or “*how to explain to parents how to inform their children about proceedings*”, most of the respondents answered negatively.

What do you think can be done in order for children to receive complete and adequate information about the proceeding that concerns them in your country?

In this question, all answers are relevant and are reported below:

- To institute specific professional (within the organization of social workers) with the specific role to provide information to the child in civil proceedings (similar suggestions were found in other two questionnaires).
- The institution of a specific professional appointed with the management of every situation in which the child is in direct contact with the court, and appointed with the duty to provide information (two answers).
- A more comprehensive and clear legal framework.
- A more comprehensive and clear legal framework that expressly states the rights of the child and the duties of the judge, the lawyer and the special curator, as well as the social workers and that defines the modality of information (three answers).
- Common guidelines for courts and practitioners.
- Better preparation of legal practitioners interfacing with the child.
- A specification by way of law of the duties of information for parents (provided only generically by art. 315 - bis, third paragraph, Civil Code).

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- I believe that the information on the proceedings concerns only the case of the audition of the child and the subsequent measure and that an expert in communication with the minor is necessary to perform this informative function.

Is there any other aspect that has been omitted in this survey and that you think is relevant for the purpose of this research?

Three suggestions have been received:

- To take into greater consideration the fact that there are honorary judges in juvenile courts, that have a specific training in the matters concerning the child (they usually are psychologist, psychiatrics, social workers, educators, criminologists, and sociologists).
- The transparency and the competence in the way a judge has a contact with a child during an audition.
- The need to set up more training for lawyers (three answers).

7. Conclusions

In Italy, the legal status of children has evolved considerably in the recent decades. The initiatives taken at the local level are due to the influence of the international community, which is more and more attentive to the needs of children and has taken concrete initiative to better their conditions in different areas. In particular, those initiatives have taken in great consideration the necessity to protect the child from the harm that could derive from the contact with the justice system. The latter represents a delicate environment for the child: often, this is the place where important decisions about the child's future are taken. At the same time, the contact between the child and the justice system can potentially influence the future perception that the child has on the public authority.

The transposition of the principles and standards set at the international and regional level are not always easy to implement at the local level: domestic law is not always ready to take in full consideration the instances of the international community. International standards need to find their way into policies, legislation and daily practice. The analysis of the Italian legal system in the field of children's right to information has shown that many initiatives can still be promoted to improve the contact of the child with the justice system. Indeed, implementing the right to information requires concrete initiatives that go beyond the mere recognition of the right itself in a legislative instrument. Providing information to the child before, during and after a judicial proceeding consists in setting up a series of concrete measures and, most of all, in specialized training for judges and other practitioners.

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From the present analysis, it is possible to draw a few preliminary conclusions that may serve as a basis for subsequent research and for future action.

In Italy, children do not have a statutory right to receive information about the procedures in which there are involved: Article 336-bis of the Civil Code establishes this right with reference to every procedure concerning the child, thus having a general scope of application, but there are several limitations of subjective and objective nature in the enjoyment of such right. Firstly, it should be noticed that Article 336-bis establishes the right of the child to be heard in civil proceedings concerning him or her, but such right is limited to children above twelve years of age or capable of discernment. It is within those limits that the right to information is consecrated, being instrumental to a better implementation of the right to be heard. Therefore, it shall be concluded that the right to information is not consecrated as a general right of the child *per se*, but only as it serves the right to be heard. Secondly, the rule establishes a precise objective delimitation in the content of the information, since the obligation to inform only encompasses “*the nature of the proceeding and the effects of the hearing*”.

A limited awareness of the fundamental right of the child to be informed (in its well-rounded and comprehensive content and relevant) may also emerge from the fact that a very few case laws address explicitly the child's right to receive adequate information in proceedings. As previously highlighted, this occurrence shows that the issue is not frequently raised as a relevant point of discussion and objections are not raised in courts when the child does not receive information about the proceeding. Since the case law does not address this point, that could be the index of the attitude of courts “no to raise” the problem at all.

Taking into account the aforementioned characteristics and content of the relevant legal provisions and case law, it is not surprising that legal practitioners addressed by the survey have often declared that the Italian legal system does not foresee a general obligation to inform the child in civil proceedings, even if sometimes reference was made to Article 12 of the UN Convention on the Rights of the Child. The right to information is rather perceived as a corollary of the right to be heard: when asked whether the Italian legal system provides for an obligation to inform the child also “*where there is no obligation for the judge to hear the child*”, the almost totality of respondents answered negatively.

Uncertainty emerges also as concerns the timing, the concrete modalities (also as concerns the subject that has the duty to inform the child) and the content of the information. A first, general, data that is valid as a general indicator on the overall situation of the Italian legal systems is that the duty to inform the child is not specifically assigned to a professional or a legal practitioner involved in

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judicial proceedings affecting the child. Even if in Italy there is a specific institute that consent to appoint a special curator for the child – in situations where there is a conflict of interests between the child and his or her parents – it is not clear whether the special curator has a specific duty to inform the child before, during and after the proceeding. This may happen as a consequence of a responsible choice of the special curator.

In parental responsibility proceedings, falling under the scope of application of Regulation (EC) No 2201/2003 (as well as the Regulation (EC) 2019/111 that will enter into force in 2022), the information stage is perceived as directly connected to the audition of the child. A positive aspect is that the child is usually provided information before the audition. However, the typical scenarios show that this is usually done a few days before the audition or shortly after the audition (if not at the initial stage of the latter), raising doubts as the efficacy of this practices as an effective tool for child preparation, that may consequently fall upon the responsibility of the parents or the social workers. Moreover, an irregular practice emerges as concern the content of the information provided to the child.

On the other hand, at the end of the audition, the child does not always receive feedbacks and information about the audition itself and about the following steps of the proceeding. This does not seem to be a usual practice of Italian courts. The final stage of proceedings may also present delicate profiles when it comes to informing the child about the final decision on the merits. While there is no specific rule in this regard, the practice seems to put this responsibility outside of courts.

No sensitive differences in the described practice seems to emerge from the analysis of international child abduction proceedings, either as concerns the timing and modalities in which the child is provided information or having regard to the content of the latter. If child abduction proceedings fall under the competence of the juvenile court, thus benefitting from the specialized background of honorary judges that are usually involved in those cases, the jeopardized practice of Italian courts has concerns the audition of abducted child (with all the practical difficulties underlying those kind of cases) may have detrimental effects also on the right to information. A relevant data emerges from the phase that goes after the child's audition and after the decision is taken, showing a low degree of awareness as concerns the importance of child's involvement and preparation in this stage of the proceeding. In this context, a particular attention should be given to practitioners' testimonies stating that, when the enforcement of a return order is necessary, the child is prepared by the police or by the social workers at the exact moment of the enforcement, "*in order to avoid double abductions*".

Child-friendly or child-sensitive measures to fulfil and implement the right to information are less frequently in place, this circumstance stemming as a direct consequences of a lack of recognition in

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the legislation and the case law and having as an effect a lack of practical measures that may constitute a guidance for lawyers, judges and other practitioners involved in cross-border civil proceedings. The research, considering the current practices existing in Italy as described by the professionals involved, revealed a jeopardized (if non existing) guidance or codes of conduct for judicial or other competent authorities to ensure that children receive information. This emerges, *inter alia*, from the protocols adopted by civil and juvenile courts, that sometimes expressly mention the need to provide the child adequate information about the audition (and prior to the audition), but without describing any concrete modality on how to provide the information. The creation of guidelines on best practices for legal practitioners may therefore constitute an opportunity to fulfil the needs emerged in the research, that has also been specifically expressed through the need to foster a more comprehensive and clear legal framework, as well as a better preparation of the legal practitioners interfacing with the child.

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