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## PRIVATE INTERNATIONAL LAW AND INTERNATIONAL CIVIL PROCEDURE

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### Children's right to information in civil proceedings: current practice and future perspectives in the EU area of freedom, security and justice

Francesca Maoli\*

#### 1. Background

The application and development of the EU instruments in the area of civil cooperation in civil matters is strictly connected with aspects related to fundamental rights of the child<sup>1</sup>. While EU legislative acts have not intervened on substantial family law – lacking the competences in this field<sup>2</sup> – there has been a growing interaction between private international law and human rights law<sup>3</sup>. Therefore, children's rights are now a hot topic in the field of judicial cooperation in civil matters.

As is known, over the years the European Union has built a structured policy line for the protection of children's rights. The latter represent a core aim and objective for EU institutions and Member States, as stated by Article 3 TEU. Moreover, children's rights are a core part of

the EU acquis for the protection of fundamental rights<sup>4</sup>, as contained not only in international conventions that are part of the common constitutional traditions of the Member States (and therefore constitute general principles of EU law), but also in Article 24 of the EU Charter of fundamental rights.

The recent EU Strategy on the Rights of the Child<sup>5</sup> represents the latest milestone in a long process of progressive involvement of EU institutions in the field. One of the objectives foreseen by the Strategy is the promotion of a child-friendly justice system where children are able to «[p]articipate effectively and be heard»<sup>6</sup>. The Strategy confirms that the EU action is inspired, sustained and guided by the 1989 United Nations Convention on the Rights of the Child (hereinafter, the UNCRC)<sup>7</sup>. The UNCRC is an integral part of the EU primary hard law as an effect of the incorporation of children's rights into the Treaties. According to Article 6 TEU, fundamental rights – and there-

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\* Francesca Maoli is Contract research fellow in European Union law at the University of Genoa. The work presents part of the research undertaken under the Minor's Right to Information in EU civil action – Improving children's right to information in cross-border civil cases – MiRI, Project funded by the European Union Justice Programme 2014-2020, JUST-JCOO-AG-2018 JUST 831608 (coordinated by the University of Genoa). The present work has been subject to blind review, and the content represents the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

<sup>1</sup> On the topic P. FRANZINA, *The Place of Human Rights in the Private International Law of the Union in Family Matters*, in E. BERGAMINI, C. RAGNI (eds), *Fundamental Rights and the Best Interest of the Child in Transnational Families*, Cambridge-Antwerp-Chicago, 2019, p. 145.

<sup>2</sup> See L. CARPANETO, F. PESCE, I. QUEIROLO, *La "famiglia in movimento" nello spazio europeo di libertà e giustizia*, Torino, 2019, p. 11.

<sup>3</sup> On the relationship between private international law and human rights law, see L.R. KIESTRA, *The Impact of the European Convention on Human Rights on Private International Law*, The Hague, 2014, p. 1; J.J. FAWCETT, M. NÍ SHÚILLEABHÁIN, S. SHAH, *Human Rights and Private International Law*, Oxford, 2016, p. 1.

<sup>4</sup> E. CANETTA, N. MEURENS, P. McDONOUGH, R. RUGGIERO, *EU Framework of Law for Children's Rights*, study requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Brussels, 2012, p. 19, available online at [https://www.europarl.europa.eu/RegData/etudes/note/join/2012/462445/IPOL-LIBE\\_NT\(2012\)462445\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/note/join/2012/462445/IPOL-LIBE_NT(2012)462445_EN.pdf) (last accessed 18 June 2021).

<sup>5</sup> European Commission, *Communication of 24<sup>th</sup> March 2021 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions. EU Strategy On The Rights Of The Child*, COM(2021) 142 final, available at [https://ec.europa.eu/info/sites/info/files/1\\_en\\_act\\_part1\\_v7\\_0.pdf](https://ec.europa.eu/info/sites/info/files/1_en_act_part1_v7_0.pdf) (last accessed 18 June 2021).

<sup>6</sup> European Commission, *EU Strategy for the Rights of the Child*, cit., p. 13.

<sup>7</sup> Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entered into force on 2 September 1990.

fore the rights consecrated in the UNCRC – are general principles of EU law<sup>8</sup>.

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 UNCRC, as stated in its Article 12. 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. The same principle is confirmed in Article 24 of the EU Charter of fundamental rights<sup>9</sup>, on the basis of which EU instruments in the field of judicial cooperation in civil matters have explicitly recognized that a child is to be given the opportunity to be heard in legal proceedings<sup>10</sup>.

However, while EU Regulations in matters of parental responsibility and other related matters introduced some important procedural changes that impact upon children involved in family proceedings, the very same instruments did not impose any change to domestic child consultation procedures. The principle of the procedural autonomy of Member States has required a delicate balance between the formulation of specific duties for national judicial authorities and the need to leave a margin of appreciation to domestic law. As a consequence, given the fragmentation in substantive law of the different Member States, significant divergence exists between the Member States in procedures for hearing children. On the other hand, even if the Regulations do not seek to establish uniform substantive and procedural rule, they have been drafted with the intent to protect the fundamental rights of the child, and should nevertheless be interpreted in the light of those principles<sup>11</sup>.

In this context, one of the aspects that is necessary to take into consideration is the provision of information to children involved in civil proceedings in family matters<sup>12</sup>. The child's fundamental right to participate and express his/her views in the aforementioned proceedings cannot be effectively exercised if the child does not receive adequate knowledge and support about the situation.

<sup>8</sup> See G. BIAGIONI, *The Convention on the Rights of the Child and the EU Judicial Cooperation in Civil Matters*, in *Diritti Umani e Diritto Internazionale*, 2021, p. 365.

<sup>9</sup> It is explicitly stated in the Explanations to the Charter of Fundamental Rights of the European Union (OJ C 303, 14.12.2007, p. 25) that art. 24 is "[b]ased on the New York Convention on the Rights of the Child and ratified by all Member States, particularly Articles 3, 9, 12 and 13 thereof". Therefore, according to art. 53 of the EU Charter, the provision has to be interpreted in conformity with the UNCRC.

<sup>10</sup> On the topic B. UBERTAZZI, *The Hearing of the Child in the Brussels IIa Regulation and its Recast Proposal*, in *Journal of Private International Law*, 2017, p. 568; T. KRUGER, F. MAOLI, *The Hague Conventions and EU instruments in private international law*, in W. SCHRAMA, M. FREEMAN, N. TAYLOR, M. BRUNING (eds), *International Handbook on child participation in family law*, Cambridge, 2021, p. 78.

<sup>11</sup> See H. STALFORD, *The CRC in Litigation Under EU Law*, in T. LIEFAARD, J. E. DOEK (eds), *Litigating the Rights of the Child. The UN Convention on the Rights of the Child in Domestic and International Jurisprudence*, p. 211.

<sup>12</sup> On the right of the child to information in the judicial context, see H. STALFORD, L. CAIRNS, J. MARSHALL, *Achieving Child-Friendly Justice through Child Friendly Methods: Let's Start with the Right to Information*, in *Social Inclusion*, 2017, p. 208; H. STALFORD, K. HOLLINGSWORTH, *"This Case is About You and Your Future": Towards Judgments for Children*, in *Modern Law Review*, 2020, p. 1030.

According to the General Comment to Article 12 UNCRC drafted by the UN Committee on the Rights of the Child<sup>13</sup>, the right to be heard includes the provision of information to the child as an essential precondition for the child to effectively express his or her views and to take clarified decisions. More specifically, «[T]he 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»<sup>14</sup>.

However, this procedural passage is not always considered in other international or European legal instruments: even if Article 12 UNCRC is itself legally binding for contracting states and should be interpreted according to the General Comment, the importance of providing information to children seems sometimes disregarded in practice.

## 2. Methodology

In this context, the research project MiRI "*Minor's Right to Information in EU civil actions*", co-funded by the European Union (JUST-AG-2018/JUST-JCOO-AG-2018-831608)<sup>15</sup>, has focused on the right of the child to receive adequate and reliable information during the course of (cross-border) civil proceedings in family matters. The human rights perspective has been integrated into the context of cross-border civil proceedings in which a child may be involved, with particular reference to the scope of application of EU regulations in matters of parental responsibility, international child abduction, placement of children and maintenance. The aim of the research was to achieve a "European" view of the topic and of the current practice in EU Member States, in order to create a set of Guidelines on cross-border best practices on children's right to information, to be disseminated and made available for practitioners in the European Union.

The research has been conducted by the University of Genoa (Project Coordinator), the University of Valencia, the Turiba University in Latvia, the Institute of Private International Law in Bulgaria, Defence for Children International – Italy and the European Association for Family and Succession Law. At the first stage, the legal research focused on an analysis of legal provisions, case law and current practice in six Member States (Italy, Spain, Portugal, Latvia, Bulgaria and France). In Italy, the research was two-stream, since it also comprised parallel research on the role of service providers. The research has been facilitated

<sup>13</sup> UN Committee on the Rights of the Child, General Comment No 12 (2009): The Right of the Child to Be Heard, UN Doc. CRC/C/GC/12 of July 20th, 2009, available at <https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf> (last accessed 22 June 2021).

<sup>14</sup> UN Committee on the Rights of the Child, General Comment No 12, cit., para. 25.

<sup>15</sup> More information about the MiRI project, including all the materials and research reports, as well as the case law database, is available on the official webpage: <https://dispo.unige.it/node/1159>.

through the use of a questionnaire for practitioners jointly developed by all partners and translated into local languages. One questionnaire was drafted for lawyers and judges, while a separate questionnaire was destined for service providers in Italy. The results of the local research have been illustrated in national reports developed by the partners.

At the second stage of the research, on the basis of the results of the national investigations, the project consists of the development of common best practices on children's right to information in civil cases, so as to create a set of Guidelines that might or should be applied in all EU Member States. The objective is to achieve a higher level of harmonisation and integration between national systems, both from a procedural and a substantive perspective. The Guidelines are based on a critical study of EU rules of private and procedural international law in family matters, to determine if more efficient best practices can be adopted by judges, legal practitioners and other authorities in different Member States.

### 3. Parental responsibility

Cross-border parental responsibility proceedings are subject to Regulation (EC) No. 2201/2003 (Brussels II-*bis*)<sup>16</sup>, that addresses the issue of child participation in some of its provisions. Leaving aside international child abduction proceedings – that will be subject to separate considerations – the Regulation states that a decision in matters of parental responsibility may not be recognized in another Member State if the child has not been given the opportunity to be heard during the proceeding, except in a case of urgency (Article 23, lit. b)). However, the hearing is still subject to the «[f]undamental principles of procedure of the Member State in which recognition is sought»: it is the violation of those principles that can justify the refusal of recognition.

Therefore, the hearing of the child does not find a uniform discipline in the Brussels II-*bis* Regulation and is still subject to domestic rules. The same is true for other procedural rights of the child – being connected or not with the right to be heard. On the other hand, the Regulation shall be interpreted in accordance with the fundamental rights' instruments to which member States and EU institutions are subject: if Article 24 EU Charter does not impose an absolute obligation to hear the child, it provides for the child to be offered a genuine opportunity to express his or her views<sup>17</sup>. Moreover, the provision of information is a fundamental precondition for the child to have a genuine opportunity to be heard.

The latter aspect is not always considered by domestic legislation. The analysis undertaken on the Member States involved in the research shows that the law rarely mentions the right to information. When this right is mentioned, it is often conceived as strongly related with the hearing of the child in the proceeding: this is the case, for instance, in the Italian legal system, where the right to information is mentioned in Article 336-*bis* of the Civil Code on the right of the child to be heard<sup>18</sup>.

In practice, there may be cases in which the importance of informing children is recognized. It should be noticed that the aforementioned practice is still very fragmented and often depends on the sensitivity of justice professionals involved in the specific case. Again, the most recurring hypothesis is the one in which the child receives information in order to be prepared for the hearing by the judicial authority. Moreover, many differences concern the content of the information: this is not a negative indicator *per se*, but the absence of a clear legal obligation in this sense (eventually establishing the need to modulate the information according to the age and maturity of the child) may result in jeopardised information to the child and in a lack of effectiveness in the enjoyment of such right.

In this context, the recast Regulation (EU) No. 2019/1111 (Brussels II-*ter*)<sup>19</sup> makes a great step forward in the enhancement of the fundamental rights of the child<sup>20</sup>, and with specific reference to the child's right to be heard. Already in recital 12, with a meticulous choice of words, it is stated that «[t]his Regulation clarifies the child's right to be provided with an opportunity to express his or her views in proceedings to which he or she is subject». Even more relevant is the new Article 21 of the Regulation, which introduces a specific and general obligation to hear the child in any parental responsibility proceedings<sup>21</sup>.

On the other hand, it should be highlighted that the Brussels II-*ter* Regulation specifies that there are some cases in which it might be reasonable to omit the hearing of the child. The fact that the child has not been given an op-

<sup>16</sup> 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 (OJ 2003 L 338, p. 1)

<sup>17</sup> On art. 24 of the EU Charter, see R. LAMONT, *Article 24*, in S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds), *The EU Charter of Fundamental Rights. A Commentary*, Oxford, 2014, p. 678.

<sup>18</sup> See E. DI NAPOLI, F. MAOLI, *Child Participation in Family Law Proceedings: Italy*, in W. SCHRAMA, C. MOL, M. BRUNING, M. FREEMAN, N. TAYLOR (eds), *International Handbook*, cit., p. 219.

<sup>19</sup> Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (OJ 2019 L 178, p. 1). See C. HONORATI, *La proposta di revisione del regolamento Bruxelles II-bis: più tutela per i minori e più efficacia nell'esecuzione delle decisioni*, in *Rivista di Diritto Internazionale Privato e Processuale*, 2017, p. 247; L. CARPANETO, *La ricerca di una (nuova) sintesi tra interesse superiore del minore «in astratto» e «in concreto» nella riforma del Regolamento Bruxelles II-bis*, in *Rivista di Diritto Internazionale Privato e Processuale*, 2018, p. 944; L. CARPANETO, *Impact of the Best Interests of the Child on the Brussels II ter Regulation*, in E. BERGAMINI, C. RAGNI (eds), *Fundamental Rights and Best Interests of the Child*, cit., p. 265; C.E. TUO, *Superiore interesse del minore e regolamenti UE di diritto internazionale privato della famiglia*, in *Nuova giurisprudenza civile commentata*, 2020, p. 676.

<sup>20</sup> B. MUSSEVA, *The recast of the Brussels IIa Regulation: the sweet and sour fruits of unanimity*, in *ERA Forum: Journal of the Academy of European Law*, 2020, p. 138.

<sup>21</sup> D. DANIELI, *I diritti dei minori nei casi di sottrazione internazionale: esigenze di tutela dei diritti fondamentali nel nuovo regolamento Bruxelles II-ter*, in *Ordine Internazionale e Diritti Umani*, 2020, p. 651.

portunity to express his or her views still integrates a ground for the refusal of recognition or enforcement of a decision on parental responsibility (art. 39, para. 2). However, this ground shall not operate *i*) in proceedings concerning the property of the child or *ii*) in cases where there were serious grounds to be taken into account and, in particular, the urgency of the case.

The new discipline still leaves to domestic law the concrete discipline of the child's hearing, preserving the procedural autonomy of Member States<sup>22</sup> specifying that the opportunity of the child to express his or her views is established «[i]n accordance with national law and procedure». On the other hand, the Regulation expressly mentions the need to interpret its own provision in accordance with human rights law, making an express reference to Article 24 of the EU Charter, the UNCRC and the ECHR<sup>23</sup>. The existence of this express link may lead domestic courts (as well as the Court of Justice) to take into serious consideration the right of the child to be heard, as well as the need to provide an adequate preparation for children before the hearing, especially if the child is to be given a “genuine and effective” opportunity to be heard as stated in Article 21 of the Brussels II-ter Regulation<sup>24</sup>. There is an opportunity to further explore this matter under the application of the new Regulation from August 1st, 2022 onwards.

#### 4. International child abduction

With specific reference to international child abduction proceedings, the Brussels II-bis Regulation introduced a specific obligation for domestic judicial authorities dealing with proceedings for the return of the child. The Regulation states that the child shall be given the opportunity to be heard unless this appears inappropriate having regard to his or her age or degree of maturity (Article 11, para 2)<sup>25</sup>. As is known, the Regulation incorporates the discipline of the 1980 Hague Convention on the civil aspects of international child abduction<sup>26</sup>.

Moreover, the hearing of the child is one of the conditions for issuing the certificate allowing the recognition and enforcement of the privileged decisions, namely the

judgments on the rights of visit and on the return of the child after wrongful removal or retention (Articles 41 and 42)<sup>27</sup>. The certificate allows for the automatic recognition and enforcement of those decisions in another Member State, without the need for any intermediate procedures, but it will be issued by the court of origin only if the child was given the opportunity to be heard, unless a hearing was considered inappropriate having regard to his or her age or degree of maturity<sup>28</sup>. The provision is based on the principle of mutual trust between Member States<sup>29</sup>.

The entry into force of the Brussels II-ter Regulation will determine some innovations as concerns child participation in abduction proceedings. Firstly, Article 26 of the new instruments recalls that the obligation to hear the child (according to the aforementioned Article 21) also applies to child abduction. Secondly, it is worth remembering that the Regulation adopts a softer approach as concerns the ground of refusal of recognition/enforcement of decisions based on the fact that the child has not been given an opportunity to be heard: the hearing may reasonably be omitted, in particular in a case of urgency<sup>30</sup>.

The same considerations made with reference to parental responsibility proceedings apply: the hearing of the child does not find a uniform discipline in the Regulation and is still subject to domestic rules; the same is true for the provision of information to the child; nevertheless, the Regulation shall be interpreted in accordance with the fundamental rights' instruments.

Indeed, the participation rights of the child are at an even greater risk of being compressed in international child abduction proceedings: those situations are characterised by urgency, the proceedings are summary in nature and the dialogue between the child and the judicial authority may be very difficult due to the contingency and gravity of certain abduction cases. Children may have a limited understanding of the situation and are likely to experience a lack of clear communication<sup>31</sup>. At the same time, the research undertaken under the MiRI project highlighted a low de-

<sup>22</sup> D.U. GALETTA, *Procedural Autonomy of Member States: Paradise Lost? A Study on the 'Functionalized Procedural Competence' of EU Member States*, Berlin-Heidelberg, 2010, p. 2.

<sup>23</sup> See recitals 19, 39, 71, 83 and 84 of the Brussels II-ter Regulation.

<sup>24</sup> On information as a fundamental component for a genuine and effective child participation see L. LUNDY, *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. 937.

<sup>25</sup> E. PATAUT, *Article 11*, in U. MAGNUS, P. MANKOWSKI (eds), *Brussels II Bis Regulation*, Munich, 2012, p. 128.

<sup>26</sup> P. MCELEAVY, *The New Child Abduction Regime in the European Union: Symbiotic Relationship or Forced Partnership?*, in *Journal of Private International Law*, 2005, p. 5; M.C. BARUFFI, *Uno spazio di libertà, sicurezza e giustizia a misura di minori: la sfida (in)compiuta dell'unione europea nei casi di sottrazione internazionale*, in *Freedom, Security and Justice*, 2017, p. 2; K. TRIMMINGS, *Child Abduction within the European Union*, Oxford, 2013, p. 181; L. CARPANETO, *In-Depth Consideration of Family Life v. Immediate Return of the Child in Abduction Proceedings within the EU*, in *Rivista di Diritto Internazionale Privato e Processuale*, 2014, p. 931.

<sup>27</sup> On the discipline of the certificate for privileged decisions, see *ex multis* B. UBERTAZZI, *The Hearing of the Child*, cit., p. 585.

<sup>28</sup> On the topic see CJEU 22 December 2010 – Case C-491/10 PPU – *Aguirre Zarraga = unalex EU-325*.

<sup>29</sup> K. LENAERTS, *The Best Interests of the Child Always Come First: the Brussels II bis Regulation and the European Court of Justice*, in *Jurisprudencija*, 2013, p. 1316; L. WALKER, P. BEAUMONT, *Shifting the Balance Achieved by the Abduction Convention: The Contrasting Approaches of the European Court of Human Rights and the European Court of Justice*, in *Journal of Private International Law*, 2015, p. 239; A. DUTTA, A. SCHULZ, *First Cornerstones of the EU Rules on Cross-Border Child Cases: The Jurisprudence of the Court of Justice of the European Union on the Brussels IIa Regulation from C to Health Service Executive*, in *Journal of Private International Law*, 2014, p. 26; T. KRUGER, L. SAMYN, *Brussels II bis: Successes and Suggested Improvements*, in *Journal of Private International Law*, 2016, p. 157.

<sup>30</sup> Art. 39, para 2 of the Brussels II-ter Regulation.

<sup>31</sup> Those have been the findings of a research conducted within the EU co-funded project “INCLUDE - Including children for a better and more child-friendly case-handling, procedure and enforcement of decision in cross-border family disputes”, aimed at identifying the needs of children in terms of participation in procedures related to international parental abductions. Materials about the project are available online at <https://missingchildreneurope.eu/include/> (last accessed 23 June 2021).

gree of awareness of legal practitioners as concerns the importance of the child's involvement and preparation in the enforcement phase of return decisions.

On the other hand, the gravity of certain situations makes it even more crucial to pursue the best interests of the child: it being understood that the child should be heard before a decision on (non-)return is taken, the importance of the information stage should not be disregarded as well. The provision of information to the child is an integral part of a safe and fruitful child participation.

Both the hearing of the child and the provision of information may prove difficult in the context of the so-called "second chance procedure" or "trumping order" under Article 11, para. 6-8 of the Brussels II-*bis* Regulation and Article 29 of the Brussels II-*ter* Regulation<sup>32</sup>. In those proceedings, the child is not present in the same country of the judicial authority that will take the decision. Both Regulations only make general recommendations: in Brussels II-*ter*, it is suggested that use is made of videoconference or other communication technology<sup>33</sup>, but it does not provide further indications. However, it is important to highlight that the new second chance procedure regulated by Article 29 Brussels II-*ter* Regulation is a proceeding on the «[s]ubstance of rights of custody»<sup>34</sup>: therefore, it may be important to acquire the point of view of the child when the preconditions are right and the child is to receive adequate information and preparation if a return order is to be enforced. It would be advisable to adequately prepare children for the enforcement, through correct information and through the intermediation of professionals such as social workers or psychologists. This would significantly reduce the risk of physical or psychological harm and would make enforcement procedures more child-friendly.

## 5. Maintenance

Regulation No. 4/2009 on maintenance matters<sup>35</sup> does not contain precise references to children's rights in gen-

eral – and to children's right to be heard and to receive information in particular. It may happen that autonomous proceedings on maintenance issues related to a child is filed outside of separation or divorce proceedings. The Regulation does not prescribe the duty for judicial authorities of the Member States to hear the child and does not provide for a specific ground of refusal of recognition/enforcement of a decision if the child was denied the right to be heard within the proceedings.

However, those proceedings are also capable of affecting children's life and Article 12 UNCRC also applies to support and family maintenance. Therefore, also in view of considering children as capable of participating in the decisions that will affect their lives (when participation does not clash with their best interests), a specific provision on the hearing of children involved in maintenance proceeding – as well as on their right to receive information – could be part of a possible recast of the Regulation at hand.

As in other proceedings, and for the purpose of giving the child an opportunity to express his or her views, also in maintenance cases, it will be necessary to establish whether the matter under discussion "affects" the child. In some cases, hearing the child in maintenance proceedings may also be superfluous. On the other hand, the opportunity to hear the child should not be disregarded and – for this purpose – adequate preparation of the child may be useful for acquiring fruitful participation in line with the child's best interests.

## 6. Conclusions: the Guidelines

The EU action in the field of judicial cooperation in civil matters is more and more oriented towards the promotion of a child-friendly justice. The instruments adopted have given increased attention to the position of the child involved in judicial proceedings and to child participation. Even if the principle of the procedural autonomy of Member States is still respected, there is growing intervention of the EU lawmaker<sup>36</sup>.

Like the right to be heard, also the right of the child to information is at greater risk of being compressed in cross-border situations, especially where the lack of cooperation between judicial authorities and other authorities involved may undermine its effectiveness. The implementation of this right relies a lot on the cooperation between the judicial and administrative authorities of the States involved: this is particularly relevant when the principle of proximity (that inspires, for instance, the discipline on jurisdiction of the Brussels II-*bis* and Brussels II-*ter* Regulations) does not operate fully and the child is not present in the same State of the judicial authority that will adopt the decision.

For those reasons, a human-rights oriented interpretation of EU instruments should be accompanied by concrete measures and guidance for judicial/administrative authori-

<sup>32</sup> S. CORNELOUP, T. KRUGER, *Le règlement 2019/1111, Bruxelles II: la protection des enfants gagne du terrain*, in *Revue critique de droit international privé*, 2020, p. 215; M.C. BARUFFI, *A Child-Friendly Area of Freedom, Security and Justice: Work in Progress in International Child Abduction Cases*, in *Journal of Private International Law*, 2018, p. 393; D. DANIELI, *I diritti dei minori nei casi di sottrazione internazionale*, cit., p. 656.

<sup>33</sup> Recital No 59 of the Brussels II-*ter* Regulation.

<sup>34</sup> Recital No 48 of the Brussels II-*ter* Regulation specifies that "[I]n the course of these proceedings, all the circumstances, including, but not limited to, the conduct of the parents, should be thoroughly examined, taking into account the best interests of the child".

<sup>35</sup> Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (OJ 2009 L 7, p. 1). On the Regulation see F.C. VILLATA, *Obblighi alimentari e rapporti di famiglia secondo il Regolamento n. 4/2009*, in *Rivista di Diritto Internazionale*, 2011, p. 731; H. MUIR WATT, *Aliments sans frontières. Le règlement CE n° 4/2009 du 18 décembre 2008 relatif à la compétence, la loi applicable, la reconnaissance et l'exécution des décisions et la coopération en matière d'obligations alimentaires*, in *Revue Critique du Droit International Privé*, 2020, p. 457; P. BEAUMONT, B. HESS, L. WALKER, S. SPANCKEN (eds), *The Recovery of Maintenance in the EU and Worldwide*, Oxford, 2014; F. PESCE, *Le obbligazioni alimentari tra diritto internazionale e diritto dell'Unione Europea*, Rome, 2013.

<sup>36</sup> For a general overview of the topic, see T. KRUGER, *The Disorderly Infiltration of EU Law in Civil Procedure*, in *Netherlands International Law Review*, 2016, p. 1.

ties and legal practitioners, in order to make the fundamental rights of the child more structured in practice. It is important to raise the awareness of practitioners on already existing obligations under human rights law. From this perspective, a good solution would be to improve the training of justice professionals dealing with children<sup>37</sup>, setting common EU standards in this regard, as well as to promote the creation of practical instruments and guidelines.

The Guidelines created within the MiRI project focus on the right of the child to receive information in civil pro-

ceedings, but are aimed at addressing the specific issues that characterize cross-border disputes. For this reason, the structure and the content of the Guidelines have been created with specific attention given to the difficulties that occur when the child is (eventually) localised in a Member State other than the one in which the judicial proceedings is brought.

<sup>37</sup> As highlighted by the 2021 *EU Strategy on the Rights of the Child*, cit., p. 13.

## The right of the child to information in cross-border civil proceedings Guidelines on cross-border best practices

One of the goals of the research project “*Minor’s Right to Information in civil actions (MiRI) – Improving children’s right to information in cross-border civil cases*” (JUST-JCOO-AG-2018-831608, coordinator: University of Genoa, Italy) was to develop a set of Guidelines on best practices to improve the right of the child to receive adequate information within the civil proceedings in which she or he is involved. The present Guidelines – which are the main outcome of the MiRI project and have been drafted based on the main criticalities examined – are aimed at improving the situation of children involved in cross-border family proceedings, in order to enhance and protect their fundamental rights as enshrined in international instruments on children’s rights and as part of the *EU aquis* on the rights of the child.

The efforts of the international community towards a global recognition of the fundamental rights of the child has allowed a greater acknowledgment of the necessity to provide a special protection for children. This necessity is well acknowledged in the context of the European Union, that recognizes the need to protect human rights in general and the rights of children in particular, and where the creation of a child-friendly justice represents an important element of the EU action in the field. In this context, the international and regional legal framework on children’s rights inspires, guides and influences the EU instruments adopted in the field of family law, with particular reference to the field of judicial cooperation in civil matters, where there has been a growing interest in enhancing the protection of the rights of the child, which may be at higher risk of violation in cross-border situations.

In particular, the right of the child to be heard and participate in any judicial proceedings in which his or her

rights or interests are at stake is one of the cornerstones of the creation of a child-friendly justice. However, a meaningful and safe participation of the child in the civil proceedings in which she or he is involved is not possible if he or she does not receive adequate information. A child-friendly justice system cannot be effectively implemented if the provision of information to children is disregarded: this aspect is critical in order to ensure that children have a correct perception of the judicial proceedings. Children cannot realize their rights without receiving reliable and comprehensible information before, during and after the proceedings.

To the extent possible, and with the goal to keep this instrument accessible, transparent and flexible, each guideline is accompanied by a comment, offering a direct succinct explanation from a theoretical and practical perspective that grounds the corresponding suggestion, and by an indication of a possible action to be adopted by the relevant targeted group to settle the main criticalities encountered.

The present document is included in the final publication of the MiRI Project. The hope is that those Guidelines will be disseminated and made available for practitioners in the European Union with the aim to contribute to building and consolidating a child-friendly justice.

### *Guideline 1*

Children involved in judicial proceedings in civil matters have the right to receive adequate information during any stage of the proceedings. In particular, they shall receive information before, during and after the judicial proceedings, in a manner and a language that they understand. The

information shall be aimed at facilitating the understanding of the proceedings and at pursuing the participation rights of the child.

*Comment:*

The right to receive adequate information is a fundamental right of the child involved in civil proceedings, as stated, *inter alia*, by Articles 12 and 13 of the 1989 United Nations Convention on the Rights of the Child (hereinafter, UNCRC), as well as by Article 3 of the 1996 European Convention on the Exercise of Children's Rights. Since the focus of the present Guidelines are civil proceedings in family law, the meaning of the term «involved» shall be considered broadly, since it is likely that a proceeding addressing the future of the family relationships or any other issue that may arise deriving from family bond will affect the child. As it will be further explored in the present Guidelines, the right to information includes a wide range of elements on which the child should be informed, at different stages of the proceedings (before, during and after). In fact, the right to information is part of the so-called *participation rights* of the child, according to which the child's involvement in proceedings affecting him or her is perceived as a continuous process of active involvement.

The right of the child to information is a component of child-friendly justice: this term identifies the action of the international community aimed at making justice systems more oriented towards the respect and the effective implementation of all children's rights, focusing on their needs.

**Guideline 2**

Children should always have the possibility to choose the way in which they are involved in judicial proceedings and whether or not to receive (certain) information.

*Comment:*

Children are considered active participants in any issue (or proceedings) concerning them. This should imply that they should be able to have a voice as concerns the modalities of their involvement. As a form of their participation, this opportunity should nevertheless be conveyed by the assistance of adults, who should guide children in the expression of their needs.

Since the provision of information is a right of the child, the latter should be able to choose whether or not to take advantage of this right, if he or she has the capacity of understanding, as well as the age and maturity to formulate this choice. Children should be able to withdraw from any court-related activity at any time. This also implies that children should be given enough time to consider their involvement and whether and how they want to receive information.

**Guideline 3**

The best interests of the child shall be the guiding principle in determining whether the child shall be effectively receive information about the civil proceedings in which he or she is involved. In particular, the opportunity to provide information to the child shall be evaluated in the light of his or her capacity of discernment. Children shall not receive information on the proceedings if this may be dangerous or prejudicial to the child. The information shall always be adapted to children with special needs.

*Comment:*

The best interests of the child is one of the fundamental pillars of the UNCRC and applies to any situation involving children (Article 3 UNCRC). The best interests of the child shall always be paramount and is relevant in relation with any other principle and provision stated by the Convention. The right of the child to information shall therefore be implemented in conjunction and accordingly with the best interests of the child. This means that even the opportunity to provide information to the child shall be evaluated in the light of the child's best interests: there are situations in which – according to the circumstances of the case at hand – it is in the best interests of the child not to receive information (or certain information) about the judicial proceedings.

At the same time, the opportunity to inform the child shall be evaluated in the light of his or her capacity of understanding. However, the latter should not justify any automatism or rigid limit (for instance, on the basis of age) imposed by States for excluding the provision of information to the child. It should be presumed that any child has the capacity to understand the provided information, if the latter is adapted according to his or her age, maturity, gender, culture, and language.

**Guideline 4**

For the purpose of implementing the right of the child to information, Member States shall pursue a clear allocation of responsibilities among competent authorities and practitioners dealing with civil proceedings in family law that affect children. In particular, national legislation and practice shall pursue a correct definition of roles among judges, lawyers, social services and other professionals involved in those proceedings. Cooperation mechanisms among those actors shall be laid down, promoted and disseminated.

*Comment:*

According to national civil procedure, judicial proceedings involving children may provide the involvement of different professionals and competent authorities. The judicial authority may have the possibility to involve other professionals such as service providers and psychologists. However – as shown by relevant research – the coordination between those subjects is not always performed in the most efficient way. The uncertainty as concerns the role, the competences and the duties of the judicial authorities as



well as service providers may consist in jeopardized protection for children involved in judicial proceedings. This field requires more attention, in order to support the development of child-sensitive cooperation protocols and make them fully operational in practice, strengthening the knowledge of service providers in this field and providing joint transdisciplinary and multi-professional training to this end.

Therefore, Member States shall be invited to take care of this aspect through all possible means: legislative initiatives, as well as the promotion of protocols between courts and service providers, shall introduce cooperation mechanisms in order to better fulfil the best interests of the child. This, in order to attribute specific competences according to the expertise and the resources of different professional figures.

#### *Guideline 5*

Member States shall implement instruments and methods of preparation for parents, other holders of parental responsibility or legal representatives of children involved in civil proceedings in family matters, in order to ensure that children can enjoy their right to be informed about the proceedings.

#### *Comment:*

Contracting States to the UNCRC are bound to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the UNCRC (Article 4 UNCRC), and in order to make its principles and provisions widely known, by appropriate and active means, to adults as well as to children (Article 42 UNCRC).

Article 5 UNCRC provides that the direction and guidance from parents, legal representatives or guardians are important to support a child in exercising their rights with gradually increasing autonomy, as the child grows up and develops his or her capacities. Moreover, although with specific reference to the child's right to be heard (Article 12 UNCRC), the Committee on the Rights of the Child has indicated in its General Comment No. 12 that the duty to provide information to the child also falls on the child's parents or guardian.

Parents, legal representatives and/or guardians – where present – are likely to be the subjects with which the child interacts on a daily basis. Moreover, they are likely to be the intermediaries between the child and the judicial authorities in the course of judicial proceedings. Therefore, their role cannot be disregarded when implementing children's right to receive adequate, relevant and reliable information about the proceedings. A meaningful child participation also goes through a correct awareness raising, preparation and knowledge of those subjects on the rights and needs of the child. They should be enabled to collaborate and act in synergy with judicial authorities and service providers in this regard.

#### *Guideline 6*

Judges, lawyers and service providers (social workers, psychosocial practitioners, and other child-care staff) shall provide support to parents or legal representatives of children involved in civil proceedings in family matters, explaining to them the reasons underlying the proceedings and the matters at stake, and how to inform the children on the outcomes of the proceedings.

However, the fact that the parents will receive information should not mean that direct provision of information to the child is not necessary.

#### *Comment:*

As already mentioned above (Guideline No. 5), the role of parents and legal representatives of children is of crucial importance, because they are likely to be the subjects with which the child interacts on a daily basis. When a judicial (or administrative) proceeding is ongoing, a meaningful child participation also includes correct preparation of parents and legal representatives, in order to make sure that they collaborate and act in synergy with judicial authorities and service providers.

It may be necessary to explain to parents and legal representatives that consulting children within the proceedings can be essential to understand how services can become meaningful for them, how to support them so that they trust and collaborate with service providers and in proceedings. Judicial authorities and service providers should be sensitive about the fact that parents/legal representatives may not understand why children have to be involved in the proceedings and to be informed about them. It is the role of public authorities to provide parents/legal representatives with the adequate knowledge and tools to involve children. Moreover, since parents/legal representatives have a direct contact with children, they may be the best persons to convey information to them in certain situations. Therefore, parents/legal representatives may be seen as a resource for meaningful child participation, if the context allows this.

In any event, judicial authorities and service providers shall make sure that the child is informed (if the conditions for child information occur): providing information to parents/legal representatives does not automatically mean that the child is informed as well. Children enjoy an autonomous right to information that shall not be substituted by the provision of information to their parents/legal representatives.

#### *Guideline 7*

When the national law of Member States provides for the appointment of a special curator/guardian *ad litem*/representative of the child, to represent the views and interests of the child within the proceedings, those subjects shall be clearly appointed with the duty to provide information to the child before, during and after the civil proceedings in which he or she is involved.

*Comment:*

The national law of the Member States provides for the opportunity, the conditions and modalities for the appointment of a special curator/guardian *ad litem* or representative of the child. This, of course, also applies when the child is involved in a civil proceeding in family matters.

Research has shown that the role and the duties of those subjects are not always well defined by national law. Moreover, a specific and clear duty to provide information to the child is rarely provided by the law, as it often depends on the sensitivity of the legal professional on a case-by-case basis.

There is an opportunity to strengthen the role of the special curator/guardian *ad litem* /representative of the child in this regard. Those professionals shall be aware that a direct contact and interaction with the child is crucial for the promotion of his or her well-being and best interests, and that they are in an optimal position in order to make children more (and correctly) involved in judicial proceedings.

**Guideline 8**

Member States should promote the creation of protocols containing specific guidelines for practitioners on how to deal with children involved in civil proceedings in family matters. Such protocols should be practical in nature and be adapted to the local rules and practice existing in national courts. They should also provide for practical forms of collaboration among judges, lawyers, social workers and all other professionals working for and with children in the context of civil proceedings in family matters.

*Comment:*

The present Guidelines are aimed at constituting a practical tool for judicial authorities and legal practitioners dealing with children involved in civil proceedings. However, child participation in all its different implications is broadly disciplined by national procedural law – taking into account the specificity of each national legal system and local rules and practice. Therefore, the Guidelines – other than subject to direct implementation – may constitute a starting point for the creation and strengthening of local best practices on child participation in general, and on children’s right to information in particular.

Local protocols shall take into account, *inter alia*:

- The responsibility and role of judicial authorities, service providers and other professionals involved in civil proceedings in family matters that affect children, through an effective allocation of competences (see also Guideline No. 4);
- The availability of child-friendly tools and materials to provide information to children (see also Guideline No. 16);
- The limits to children’s right to information, stressing the importance for justice professionals to carefully evaluate whether and how the infor-

mation provided is respectful of the child’s best interests;

- The need to provide children with information before, during and after the judicial proceedings;
- The modalities of preparation of the child before his or her hearing by the judicial authority or other competent professional, in order to make sure that the child is enabled to freely express his or her views with full understanding (see also Guideline No. 20 ff.);
- The modalities in which the final decision can be communicated to children;

The need to prepare children before the enforcement of any decision – especially if the displacement of the child abroad is needed, with the determination of the justice professional or service provider that will be responsible to provide information to children in this regard (see also Guideline No. 15);

**Guideline 9**

Member States should promote adequate training for judges, lawyers, social workers and all other professionals dealing with children in the context of civil proceedings in family matters.

*Comment:*

The importance of a specific and multidisciplinary training for justice professionals and service providers has been recognized since a long time (see also the latest EU 2021 Strategy on the Rights of the Child, in which the Commission committed to «*contribute to training of justice professionals on the rights of the child and child friendly justice*»). Dealing with children, as well as respecting their rights and promoting their best interests, requires specialist training and high-quality preparation.

Justice professionals and service providers should be sensitized to child participation and to the importance of the provision of information. They should be able to assess whether the information serves the best interests of the child, and they should be able to modulate the content and modality of the information to the age, maturity, gender and culture of the child. They should be sensitive to different cultures and backgrounds.

When providing information to children, it is essential to communicate well and to understand the feedbacks that the child gives back (with verbal and non-verbal communication). In this, multidisciplinary training is especially useful when justice professionals have received a purely legal education.

**Guideline 10**

The content of the information provided to the child shall be adapted to the age and degree of maturity of the

child. The information shall be reliable and relevant and shall always correspond to the best interests of the child.

*Comment:*

The provision of information is fundamental for the promotion and implementation of the procedural rights of the child, but at the same time not all information necessarily has to be shared with children: some information may be harmful to their wellbeing and it may not be in the child's best interests to receive it. Therefore, legal practitioners and judicial authorities should be able to evaluate when there is a genuine opportunity to provide information to the child, being the provision not in contrast with his or her best interests.

At the same time, making the information compatible with the best interests of the child means that the information shall be adapted to the age and degree of maturity of the child. For this reason, the provision of information shall not be standardized, but shall be adapted to each child. Moreover, adapting the content and modality of information to the age or maturity of the child ensures that the child will be able to effectively comprehend the information.

The need to adapt the information to the age and degree of maturity of the child is expressly stated by the 1996 European Convention on the Exercise of Children's Rights, that has been ratified by 20 Member States of the Council of Europe so far and constitutes an initiative for the implementation of the UNCRC. The Convention states the right of each child affected by a judicial proceeding in family matters to receive information (Article 3), qualifying the latter as any "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".

**Guideline 11**

Children should always be able to ask for clarification on the information provided. For this purpose, children shall always be able to identify the person responsible to provide such clarifications.

*Comment:*

An effective provision of information to the child, given in the context of a judicial proceeding, should include the possibility for the child to ask for clarifications at any stage of the proceeding. For this purpose, national judicial systems should provide an institutionalized modality for children to ask for clarifications, e.g. by clearly allocating this responsibility to a specific subject or institution, or by providing a call center or any other means aimed at facilitating children in their dialogue with the judicial system.

**Guideline 12**

Before the beginning of civil proceedings in family matters that will affect his or her life, the child has the right to receive reliable, relevant and clear information on:

- the reasons underlying the proceedings;
- the nature, scope and purpose of the proceedings;
- the location of the proceedings;
- the expected duration of the proceedings;
- the possible outcomes of the proceedings;
- who is(are) the person(s) who will be involved in the proceedings and will adopt the final decision;
- his or her rights (or duties) within the proceedings (e.g. the right to be heard);
- how to access the documentation and legal reasoning of the proceedings;
- how to access available legal remedies;
- the possibility and the modalities of expression of his or her views.

*Comment:*

Children involved in civil proceedings in family matters must be properly provided with all the information that is relevant to their status. Information should be provided on various issues and elements, of which the present Guideline represent an open-ended list. In particular, when it is in their best interests, children shall receive information about the reasons why a judicial proceeding will be opened, what are the scope and purpose of the proceedings, who are the persons involved in the proceedings (the judge(s), the service providers and other relevant actors), the role that the child may have within the proceedings – with particular reference to the exercise of his or her right and the possibility to be heard within the proceedings, how to access information and ask for clarifications, the expected duration of the proceedings and the possible outcomes. The time factor is essential in this regard: it is advisable that children receive information well in advance before the beginning of the proceedings, when the circumstances allow for it, in order to be adequately prepared.

The provision of relevant and adequate information is particularly important for children involved in cross-border civil proceedings, especially in the hypothesis that the proceedings are on-going in a State other than the State of habitual residence of the child (see also Guideline No. 17). In that case, providing the child with the abovementioned information contributes to increasing the trust of the child in the judicial authority that will take a decision about his or her life.

**Guideline 13**

During the course of civil proceedings in family matters that will affect his or her life, the child has the right to receive reliable, relevant and clear information on the developments of the proceedings in all their different stages.

*Comment:*

The concept of child participation encompasses the involvement of children in the decision-making process that affects their life. This is a process of *active* involvement, which should not be limited to the mere acquisition of the child's opinion, but should be taken into consideration in all stages of the proceedings.

The child must be provided with reliable, relevant and clear information during all the stages of the judicial proceedings, being properly updated on its progress. Accordingly, providing information to children should not be limited to the preparation that children may receive before an audition before the judicial authority (or other delegated professional). It represents a fundamental component of child participation and a way to pursue the child's best interests. The delivery of child-friendly information has the advantage to make the judicial environment less intimidating for the child and increases the chances that the final decision will be accepted by the child and will have less impact on his or her life.

**Guideline 14**

Children involved in judicial proceedings should be freely assisted by an interpreter if they cannot understand or speak the language used.

*Comment:*

If the child involved in a civil proceeding cannot understand or speak the language used by judicial authorities (orally and in the legal documents of the proceedings), the provision of quality interpretation is directly connected to the right to information and to be heard as a procedural safeguard. As a consequence, interpretation shall be offered and provided in a systematic way and free of charge for the users.

Language shall never constitute a barrier between the child and the judicial authority that is asked to take a decision about his or her life. This is particularly evident in the context of cross-border proceedings, where judicial authorities shall have special sensitivity about possible language barriers.

**Guideline 15**

After the end of a civil proceeding in family matters, the child shall be informed about its outcome in a language and in a modality that he or she understands. Judgments affecting children should be duly reasoned and explained to the child in child-friendly language. This is particularly important for those decisions in which the child's views and opinions have not been followed.

*Comment:*

It is not uncommon that judgments are drafted in a language that is incomprehensible to children. This may be due to legal requirements as concerns the formal and substantial aspects of the judgment. However, when a child is

the final recipient of the judicial measure, he or she should be put in the condition to understand its content and consequences.

A legal decision affecting his or her future is likely to be a critical milestone in the child's life. The way a judgment is communicated to the child contributes to his or her sense of procedural justice and influences the legitimacy of the decision in the child's eyes. Moreover, the judgment stresses the way in which the child's wishes and views have been accorded (or not) a certain weight. In this sense, the judgment may represent a way to show the child that the obligation stated by Article 12 UNCRC (to give due weight to the child's views) has been respected. This increases the likelihood that the child will accept the decision and comply with it.

There are many ways to communicate a judgment or other legal decision to the child. Those modalities can be tailored to the circumstances of the case at hand and to the age or particular needs of the child. For example, judges may write the judgment in a child-friendly language and format, or a specific document explaining the decision may be written specifically for the child (for instance, in the format of a letter or a video-recording addressed to the child). Another option is to develop child-friendly materials and make them available to courts when specific situations need to be explained to the child (for instance, videos or comics). Making this written or oral documentation/information accessible to the child (and his or her representatives), explaining whether and how the opinion of the child has been used within the decision, is a safeguard against tokenistic hearings of children that are merely conducted as a formality.

Moreover, it is on the basis of this information that the child may consider to challenge decisions or court rulings, launch a formal complaint or access legal remedies according to the opportunities offered by the applicable law of civil procedure. To be able to exercise this right, children have to be informed about how to access child-sensitive complaint mechanisms and how to appeal against a court ruling.

**Guideline 16**

When the enforcement of a decision given in family matters involves a child, the enforcement shall be preceded by adequate preparation of the child. The child shall receive accurate, relevant and reliable information on the circumstances of the case, the reasons of the enforcement, the persons that will be involved in the enforcement and any other relevant circumstances. The child shall also be able to ask for clarification at any moment of the enforcement procedure. The information shall be given to the child in due time before the enforcement, in order for the child to be adequately prepared and in order to avoid trauma and possible harm to the child. The information shall be given by a competent professional who has received adequate training in communicating with children. The information

shall be given in a language and modality that the child will be able to understand.

*Comment:*

The enforcement of a decision on parental responsibility, visiting rights, international child abduction, placement or other matters of family law may impact children's life considerably. It may consist in the relocation of the child to another State, or in the handover of a child to a person other than the person with whom the child is residing. Enforcement may even constitute a traumatic event for the child, if not conducted properly and if not preceded by adequate preparation. In this context, the application of coercive measures should always constitute the last resort and those measures should be applied only when they cannot be avoided (see, for instance, the recommendations stated in Recital No. 65 of Regulation (EU) No. 2019/1111). It is up to the national authorities competent for the enforcement to assess what are the instruments to be applied in each individual case – according to the modalities established by national law – and whether the application of coercive measures is necessary.

On the other hand, adequate preparation of the child before the enforcement takes place is considered necessary and appropriate in order to avoid (or to reduce at the minimum) the trauma to which the child may be exposed because of the enforcement. For this reason, the child must receive accurate, relevant and reliable information on the circumstances of the case, the reasons of the enforcement, the persons that will be involved in the enforcement and any other relevant circumstances. The information shall be given in a language and modality that the child understands. The child should also be able to ask for clarifications.

The provision of information to the child in this stage of the proceedings – having regard to the correct timing and modality – favors the achievement of a voluntary compliance by the child and reduces the risk of failure of coercive enforcement due to the objection of the child (e.g. if the child strongly opposes to travel). The involvement of service providers and experts from the psycho-social professions may result in more effective preparation of the child and may contribute to reaching an amicable solution.

*Guideline 17*

Child-friendly information tools and materials shall be consistently available to competent authorities and practitioners, in courts and in any other setting providing for child participation in judicial proceedings. Those materials shall be adapted to the age, maturity, gender and culture of each child and presented in a language that the child will be able to understand. For this purpose, Member States shall use any instrument at their disposal to make sure that these tools are correctly implemented and widely distributed. Those materials should be available in different languages and should be adaptable for children with special needs.

*Comment:*

Enabling the child to exercise their rights (such as the right to be heard) in the context of civil proceedings requires the relevant service providers and judicial authorities to communicate information in a language that the child understands, with due regard to the age, abilities, health and evolving capacities of the child.

The main objective of child-friendly materials is to convey information in a simple and direct language that is immediately understandable for children.

Child-friendly information can be delivered in different forms: in written form, in brochures handed out to children, through illustrations, pictures, drawings, videos, through social media presence of service providers, drop-in centres or others, in a face-to-face conversation, through the use of videos, as well as through internet-based and digital communication tools or applications.

Since each situation involving children is different, and each child has a different background and needs, more than one modality to convey information should be developed and put at disposal in the judicial setting. In this way, judicial authorities and service providers will be able to choose what is the best tool in each situation.

Child-friendly information tools are materials that are adapted to the child's age, maturity, gender, culture and language. All those elements are essential to be sure that the information (and the correct amount of information) is effectively conveyed to the child according to his or her best interests. In cases of children belonging to minority groups and non-national children, quality interpretation and cultural mediation may be required to prevent discrimination. The Committee on the Rights of the Child (General Comment No. 12) underlines the need to ensure that younger children and children belonging to particularly marginalised and disadvantaged groups require targeted support to overcome any communication barriers and have effective access to information.

*Guideline 18*

When involved in civil proceedings in family matters having cross-border implications, children shall be able to receive adequate information even if they are not physically present in the Member State where the proceedings are taking place. For this purpose, Member States shall implement adequate instruments in their legislation and practice, in order to ensure that children receive adequate information abroad, in a language that they will be able to understand.

Judges, lawyers, social workers and all other professionals shall be aware of the importance of providing information to children at a distance and shall activate any mechanism at their disposal for ensuring that the child receives information if it corresponds to his or her best interests and in accordance with his or her age and maturity.

*Comment:*

The provision of relevant and adequate information is particularly important for children involved in cross-border civil proceedings, especially in the hypothesis that the proceedings are ongoing in a State other than the State of habitual residence of the child. In that case, children may experience a higher degree of uncertainty, because decisions about their lives are taken by a judge / a court which is physically far away from them and unknown. For this reason, the judicial authority and service providers shall ensure that the child is provided with all the relevant information. This can be done through the activation of already existing cooperation mechanisms, such as the European Judicial Network in Civil and Criminal Matters established by Council Decision 2001/470/EC of May 28, 2001, and the system of Central Authorities already established by EU Regulations (such as Regulation No. 2201/2003, Article 53) or by the relevant conventions adopted under the auspices of the Hague Conference on Private International Law (such as the 1996 Hague Convention on parental responsibility and measures for the protection of children).

**Guideline 19**

The right of the child to information in civil proceedings shall receive adequate acknowledgment in the Member State's legislation. When the applicable rules of civil procedure or the applicable EU legislation establish that the child shall have the opportunity to be heard, the law should also expressly state that the child shall be given relevant and reliable information.

*Comment:*

The present Guideline does not contain practical indications for practitioners, but rather a recommendation for Member States. It is aimed at shedding some light on the need for institutional recognition of the need to make judicial systems more child-friendly. Adequate acknowledgement of children's right to information in national legal systems should lead to an increased awareness of legal professionals and judicial authorities on the topic.

**Guideline 20**

When the child is heard within the proceedings, he or she shall receive adequate preparation. The child shall be provided with reliable and relevant information about the proceedings and about his or her right to be heard and express his or her views. Being informed is a precondition for the child's ability to make appropriate decisions. This information is also essential for the child to decide whether or not to be heard within the proceedings.

*Comment:*

Child participation in judicial or administrative proceedings, as developed from the UNCRC onwards, has been based on the evolving concept of children's agency, view-

ing children not only as persons with limited legal capacity and in need of special protection, but also as informed decision-makers and active members of society – and as rights holders. Children are taught to acquire, seek and reflect on information and are expected to form an opinion, and to participate in matters concerning them. Children are encouraged to take responsibility for their actions and to judge what is good for them and others. This means that children are expected to make appropriate decisions, or at least to have a say in a decision that will be taken by adults. The fundamental precondition to formulate an opinion is to receive adequate information about the situation. This is true in the context of civil proceedings, where the hearing of the child by the judge or other professionals is aimed at acquiring the position of children having an active role in their own life.

In order for children to be responsible of their own decisions, they should know that they have the right to be heard in the first place. Moreover, the exact knowledge about the situation that is the object of the judicial proceedings is a fundamental precondition for children to express a coherent opinion – although with the necessary safeguards deriving from the specific context, the capacity of understanding, the age and maturity of the child.

This autonomous dignity given to the child's opinion also means that the child should be able to decide whether or not to share his or her views with the judge or others.

**Guideline 21**

Before the child is heard within the proceedings, he or she should receive information about:

- the identity, role and expertise of the person(s) who will conduct the hearing;
- the possible participation of other persons in the hearing (also through mirrored glasses or video transmissions from another room);
- the date and time, the place and the modalities of the hearing;
- that fact that the hearing should be recorded either through minutes, recording or video-recording;
- the fact that his or her opinion will be made available to the adults who will adopt the final decision;
- the fact that his or her opinion will be shared (through minutes, recordings, video-recordings or other means), with his or her parents and /or the other parties to the proceedings;
- the possible impact of his or her views on the final decision: in particular, the fact that those views may not be followed;
- the fact that even if his or her opinion is important, he or she will not be considered responsible for the final decision.

*Comment:*

The Committee on the Rights of the Child (in its General Comment No. 12) has noted that, in preparation for the hearing of a child in court proceedings, the competent authorities have to ensure that the child is informed about his or her right to be heard, the modalities of the hearing and the way in which the views expressed by the child will be used and taken into consideration. The child has to be informed about the possibility to be heard either directly or through a representative, about the practical aspects of the hearing, such as the date and time, the location, the modalities of the hearing and any participants who are present (or following the hearing through video transmission from another room). The child also has to be informed about the possible consequences of the choices he or she makes and the impact that his or her views may have on decisions and outcomes of the proceedings. Children should understand how much impact they are able to have on decision-making.

*Guideline 22*

The hearing of the child shall take place in an adequate setting, in order for the child to feel free to express his or her opinions.

*Comment:*

According to Article 12 UNCRC, children shall be able to express their views “freely”.

The Committee on the Rights of the Child (General Comment No. 12) stated that «*a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms*».

The child’s capability to narrate in free recall and to resist suggestive questions by an interviewer, however, evolves significantly with age. The capability of children to provide accurate information and disclose what they remember depends on several factors. The location and environment of the place where the interview or hearing takes place are fundamental. A child-friendly place with as little distractions as possible offers the most conducive conditions for interviewing or hearing children in the context of administrative or judicial proceedings. Support services should be available for the child before, during and after the hearing, in accordance with the child’s needs and best interests.

*Guideline 23*

At the beginning of the hearing, the judge or other professional that will conduct the hearing shall make sure that

the child has received adequate preparation before the hearing, and that he or she has received all necessary information.

*Comment:*

When the allocation of competences between justice professionals provides for children to be informed/prepared about the hearing in advance before the hearing takes place, it is advisable that the judge (or other professional conducting the hearing) verifies that the provision of information has effectively taken place. This preliminary phase of the hearing should also be an opportunity for the child to ask for clarification on the information provided.

*Guideline 24*

During the hearing of the child, his or her views should be recorded or written. At the end of the hearing, the judge or other professional conducting the hearing shall examine the recording or read the minutes to the child for his or her approval.

*Comment:*

The recording of the views of the child, expressed during the hearing by the judicial authority or other delegated professional, is advisable because it gives the child the impression that his or her declarations are taken seriously. Moreover, the child has the possibility to verify that the recorded declarations correspond to his or her views. This increases the trust of the child in the judicial authority. The practice to ask children to approve or to sign their declarations has also the effect to make them feel considered and empowered.

*Guideline 25*

After the hearing, the child should receive a feedback about it and about the next steps of the proceedings. This shall be done by the person that has conducted the hearing or by adequately trained professionals (e.g. childcare staff or a psychologist), when it is in the best interests of the child.

*Comment:*

The hearing should not constitute an isolated event for the child. Conceiving child participation as a process of active involvement of the child implies that the child should be able to know the effects and consequences of his participation in the proceedings. For this reason, the hearing of the child by the judicial authority or other delegated professionals shall be followed by a feedback, in which the next steps of the proceedings should also be clarified. In this stage, it could also be explained to the child that his or her opinion will be taken into adequate consideration, but that he or she will not be responsible for the final decision, since the latter will be taken by adults without necessarily follow the wish expressed by the child.