

European Family Law: The Brussels IIa Regulation
Workshop organized by the Academy of European Law (ERA)

Hearing the Child
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Hearing the child – Articles 23, 41 and 42



Children are to be given the opportunity to express a view

- the importance of giving children the opportunity to express their views in proceedings concerning them is shown by
- Article 41, 42: the judge of origin shall issue a certificate only if the child was given the opportunity to be heard
- Article 23/b: a judgement relating to parental responsibility shall not be recognised if the child concerned was not given the opportunity to be heard

Exceptions to the duty to take the views of a child

- main principle: children shall be heard in proceedings that concern them
- exceptions: if inappropriate having regard to the **child's age** and **maturity**
- the Regulation does not lay down criteria for determining the age or degree of maturity required or the procedure for hearing the child

The 1980 Hague Convention on International Child Abduction

Article 13: the judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an *age and degree of maturity* at which it is appropriate to take accounts of his views

The 1989 Convention on the Rights of the Child:

Article 12: State Parties shall provide to the *child who is capable of forming his views* the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body



What does capable of forming his/her views mean ?

Ability to form a view: subjective category: it depends on the individual



Is the child able to comprehend the facts concerning his own life



Is the child able to understand the consequences of his decisions



Is the child able to make a decision at all

Based on the judgments of the Curia of Hungary (1019/2004, 1776/2008, 2049/2009, 418/2001 rulings in principle) the ability to form a view shall be examined individually in each case, considering all circumstances, the child's age is important but not a decisive factor

National laws on child hearing in civil procedures

Germany: the hearing of the child directly by the judge is obligatory if the child can speak (from the age of 2-3), special rooms, special training for judges

Italy: direct hearing by a judge is considered problematic

France: child hearing is obligatory as a main rule, a child may be heard upon his/her request, the judge is not obliged to take into account the opinion of the child

Great Britain: it is strictly forbidden to hear the child in court, only with the help of experts

Hungary: Civil Code – in cases related to custody rights, in justified cases or if requested by the child himself, the court shall hear the child either personally or through an expert. Children over 14- the decision relating to custody rights can only be made upon the child's agreement

The Hungarian Practice

Constitutional Court Decision 1143/B/1998:

the Court shall determine in each case individually whether

- the child – considering his age and maturity – is able to provide relevant information
- the opinion of the child is needed at all

If there is a dispute between the parents about who should exercise custody rights, the court cannot rely on the opinion of the child only and this cannot be decisive in the case

In justified cases the court may be informed about the child's wishes. However, **the court is not bound by these wishes !** In practice: children are mostly heard/examined by psychologist experts and not by the judge

Procedure

- the Regulation does not modify the applicable national procedures on this question
- Courts in the Member States develop their own techniques and strategies for taking the views of children of all ages.
 - hearing the child **directly by the court**
 - by commissioning special **experts**, who then report back to the court.
- it is not possible to take any informed decision on this point without having been able to assess the child as to her or his age and maturity which is the only criterion.
- once the court decides that a child is of sufficient age and maturity to give a view, the court is under an obligation to take the child's views whether directly or otherwise so long as those views require to be heard in proceedings affecting the child.
- Task 1: exchange of views and experiences (group discussion)

How to obtain the views of the child

- In general, listening to the child needs to be carried out in a manner which takes account of the child's age and maturity. Assessing the views of younger children needs to be done with special expertise and care and differently from adolescents.
- It is not necessary for the child's views to be heard at a court hearing, but they may be obtained by a competent authority according to national laws.
- For instance, in certain Member States, the hearing of the child is done by a social worker who presents a report to the court indicating the wishes and feelings of the child. If the hearing takes place in court, the judge should seek to organise the questioning to take account of the nature of the case, the age of the child and the other circumstances of the case. In many courts this is done by setting up an **informal arrangement** whereby the child is heard in a **room other than the court room**. Whatever the situation it is important to enable the child to express his or her views in confidence.

Training in taking the views of the child

- may be carried out by a judge, an expert, social worker, a psychologist or other official
- it is of the essence that that person receives adequate training, for instance how best to communicate with children
- whoever takes the views needs to be aware of the risk that parents seek to influence and put pressure on the child. When carried out properly, and with appropriate discretion, the hearing may enable the child to express his or her own wishes and to release him or her from a feeling of responsibility or guilt.



- Hearing the child may have different **purposes** depending on the type and objective of the procedure. In a proceeding concerning custody rights the objective is usually to assist in finding the most suitable environment in which the child should reside.
- In a case of child abduction the purpose is often to ascertain the nature of the child's objections to return and why they have developed, and also to ascertain whether, and if so in what way, the child may be at risk.
- In the context of the child's hearing in cross-border cases, the use of both **video and teleconferences**, as provided in Article 10(4) of Regulation No 1206/2001, can be an efficient tool in facilitating proceedings in an expedited manner, considering the time limits imposed in Brussels II bis [for example, the **six-week time limit** set out in its Article 11(3)].

**“To be persuasive, We must be
believable,
To be believable, We must be credible,
To be credible, We must be truthful.”**

Edward R. Murrow

Piercarlo Pazé: L'ascolto del bambino

1. The child should be informed that s/he will be heard by an official person, a judge
2. The hearing of the child should take place in an appropriate environment: pleasant room with colourful toys
3. The child should be heard in the presence of the judge only, no one else may be present
4. The judge should introduce her/himself and inform the child about the purpose of the hearing
5. The judge should LISTEN CAREFULLY to the child and should not interrupt him
6. The judge should be honest with the child
7. The judge should use a language that the child understands
8. The judge should NOT formulate his/her questions in advance
9. The judge should NOT influence the child by suggesting an expected answer to Questions
10. The judge should explain the significance of the hearing and that the opinion of the child will be considered when the court makes its decision

**Task 2 : Case C-491/10 PPU (Task no. 15
in the Manual)**

