

## BRUSSELS II *BIS*: THE RIGHT OF THE CHILD TO BE HEARD IN INTERNATIONAL PROCEEDINGS

**Margarite Helena Zoetewey-Turhan,**

*LL.D., Assistant Professor for European Union Law at the Law Faculty of Özyeğin University, Istanbul, Turkey*

### 1. INTRODUCTION

As already discussed in more detail elsewhere in this bundle, the European Union as we know it today, active in policy areas ranging from Competition and Agriculture to Culture and Education, is an international organization with a much broader field of action than the three international organizations on which it is founded. The scope of the ECSC, EEC and EURATOM Treaties, which entered into force in 1952 respectively 1958, were markedly narrower as they established frameworks for the implementation of common *economic* policies in their Member States. However, and especially through the case-law of the European Court of Justice, it soon became clear that even strictly economic policies would have such repercussions on the lives of the citizens of the Member States that involvement of the organizations' legislating bodies to regulate these consequences was essential. It was therefore due to this spill-over effect as well as because of choice that the competences of the organizations grew, officially with the 1992 Maastricht Treaty which established the EU and regrouped the three original European Treaties under the EC, and even more so with the 1998 Amsterdam Treaty. With these new Treaties, citizenship to a democratic Union came to the fore, and with it the legislative activities of the EU in new, non-economic policy fields increased. A product of this activity is the Charter of Fundamental Rights of the European Union, the text of which was accepted by the EU Institutions as early as 2000. This Charter contains rights that all citizens of the EU are entitled to enjoy within the scope of EU law.

Notwithstanding this development, in all acts of the EU and its institutions the importance of the EU's foundation on economic integration and the limita-

tion of its competences to cross-border activities have not ceased to exist. It is not uncommon for a conflict of interest between the rights of EU citizens as protected by the Charter or any other instrument of fundamental rights binding on the EU or its Member States and more 'traditional' EU policies to come about. The existence of such a conflict becomes even more significant if the citizen in question is a minor. It is especially in these areas that a careful drafting of EU legislation and a meticulous interpretation by the Court of Justice is of the greatest interest. One of these areas is the judicial cooperation between Member States and their authorities in matters of parental responsibility, presently regulated by the so-called 'Brussels II *bis* Regulation', the functioning of which has recently been the subject of a public consultation by the European Commission.

This contribution will focus on the Brussels II *bis* Regulation, and will examine the role the protection of the rights of the child plays in this instrument of European Private International Law. Consequently, the similarities and dissimilarities between the EU and ECHR regime with regard to the protection of the rights of the child, and in particular the right to be heard, in international proceedings will be analyzed. An attempt will be made at answering the question of whether the principle of mutual trust on which the EU Private International Law and the EU as a whole is founded, deters the European courts and the ECJ from making a stance for the child's right to be heard in cross-border proceedings, and whether this leads to a difference in the interpretation of the rights of the child by the Court of Justice of the EU and the European Court of Human Rights. Finally, the contribution will be concluded with an assessment of the child-friendliness of the Brussels II *bis* Regulation and its application in practice.

## **2. FREE MOVEMENT OF JUDGMENTS IN THE EU: BRUSSELS I, II AND II *BIS***

The 1958 EEC Treaty, aiming at the creation of a common market in goods, services, labor and capital, already foresaw that the accomplishment of this objective would not be imaginable without the possibility of recognition and enforcement of rights as determined by the judiciary throughout the Member States participating in the EEC. Therefore, Article 220 of the Treaty provided that the Member States were to enter into negotiations with each other with a view to securing the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts and tribunals. As the EEC lacked competence to generate private international law itself, the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters was a regular international treaty between the Member

States, for the interpretation of which the European Court of Justice was given competence in an additional protocol.<sup>1</sup> When the Treaty of Amsterdam awarded the EC competences in the area of Private International Law with Article 65 EC, the Brussels Convention was incorporated into EC law as the Brussels (I) Regulation.<sup>2</sup> However, the Regulation did not apply to disputes on divorce and parental responsibility, which turned out to be a serious gap in EU Private International Law. Citizens of the Member States of the EU increasingly make use of their right to mobility, and consequently the number of intra-EU family relations –and unfortunately, also the number of breakups of such relations- rises.<sup>3</sup>

Where the lack of a regulatory regime with regard to intra-European divorces and separations might have created a serious nuisance for the parties involved, in cases children were involved the situation would be even more precarious. The international legal instruments available in such situations were the 1980 European Custody Convention<sup>4</sup>, the 1980 Hague Convention on Child Abduction<sup>5</sup> and the 1996 Hague Convention on Parental Responsibility and Measures for the Protection of Children<sup>6</sup>. However, before the 1996 Convention could come into force on January 2002, the EU had used its new competences conferred to it by the Amsterdam Treaty and copied most of its provisions into a Regulation. The Brussels II Regulation, which came into force on 1 March 2001, regulated jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for *joint* children.<sup>7</sup> The choice for a Regulation guaranteed an effective and uniform application of the instrument of Private International Law, however since its scope was limited to common children of a married couple and measures

<sup>1</sup> Protocol concerning the interpretation by the Court of Justice of the convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, [1975] OJ L 204/28.

<sup>2</sup> Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012/1

<sup>3</sup> Lenaerts, *THE BEST INTERESTS OF THE CHILD ALWAYS COME FIRST: THE BRUSSELS II BIS REGULATION AND THE EUROPEAN COURT OF JUSTICE*, Jurisprudencija, 2013, Vol. 20 Issue 4, p. 1302.

<sup>4</sup> European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, ETS No. 105.

<sup>5</sup> Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, 1343 UNTS 89.

<sup>6</sup> Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, [2003] OJ L48/3.

<sup>7</sup> Council Regulation No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ [2000] L 160/19.

taken on the occasion of a divorce, it soon proved to be outdated and the need for a modern legal instrument with a broader scope was felt. It was for this reason that Brussels II was replaced by Brussels II *bis* in 2005.<sup>8</sup>

The new Regulation copied most of the provisions of the original Brussels II Regulation, extending however the application of the conflict of laws rules on matters of parental responsibility to *all* children, and not only the children of married spouses, and inserting new provisions regarding abduction of children that are similar to the 1980 Hague Convention. Furthermore, according to its Article 1(1)(b), the rights that Brussels II *bis* confer to children are theirs to exercise in *all* civil matters falling within the scope of the Regulation, and not only in cases concerning the divorce of the parents of these children. Therefore, one of the biggest differences between the Brussels II and the Brussels II *bis* Regulation can be said to be the enhanced rights and visibility of the child in international disputes falling within its scope.<sup>9</sup> It is on this subject that the present contribution will focus.

### 3. THE CHILD'S RIGHT TO BE HEARD

The most important right that the Regulation confers to children that are affected by and/or are the subject of civil proceedings that fall within the scope of the Regulation is the right to be heard. The hearing of the child is a precondition for the abolition of the exequatur procedure for access rights and any decisions regarding the return of the child in abduction cases. Furthermore, the enforcement of a judgment in matters of custody rights may be suspended if one of the parents argues that the child concerned was not given the opportunity to be heard. In the following, the role of the child's right to be heard in these three types of proceedings is examined.

#### 3.1. Judgments on access rights and the child's right to be heard

The Regulation is aimed at ensuring that the child can maintain contact with holders of parental responsibility or other persons<sup>10</sup> who have a right of

---

<sup>8</sup> Council Regulation 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 No. 1347/2000, OJ [2003] L 338/1.

<sup>9</sup> Shannon (Ed.), *FAMILY LAW*, pp. 179 and 181.

<sup>10</sup> According to national law, access rights may be attributed to the parent with whom the child does not reside, to other family members such as grandparents, or third persons; European Commission, Practice Guide for the application of the new Brussels II Regulation, 2005, p. 24.

access,<sup>11</sup> even when these persons live in different Member States of the EU after a separation. Parental responsibility is defined broadly in Article 2(7) of the Regulation as:

*'all rights and duties relating to the person or the property of a child which are given to a natural or legal person by judgment, by operation of law or by an agreement having legal effect'.*

This definition includes therefore also matters such as guardianship or a decision to take the child into care as a protective measure even when such a decision is taken by an administrative body governed by public law.<sup>12</sup>

According to Article 41 of the Regulation, a judgment on access rights, issued by the judge of origin, shall be directly recognized and enforceable in another Member State,<sup>13</sup> as long as the judgment is accompanied by the certificate as provided in Annex III of the Regulation. With the certificate, the judge states among other things that, if the judgment was given in default, the person defaulting was properly informed about the proceedings upon institution thereof, that all parties concerned were given an opportunity to be heard, and, explicitly, that 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.<sup>14</sup> If the judge has made the decision not to hear the child, it is considered *good practice* to include a description of the reasons why such a decision has been made, even though the Regulation does not specify so.<sup>15</sup> No appeal is open against the issuing of the certificate;<sup>16</sup> certificates can only be *rectified* if and in as far as foreseen in the law of the Member State of origin.<sup>17</sup>

As so far no national court has made a reference to the ECJ with regard to the interpretation and/or the exact extend of the duty to hear the child in the con-

---

<sup>11</sup> Access rights are non-exhaustively defined in Article 2(10) of the Regulation as the right to take a child to a place other than his or her habitual residence for a limited period of time, but include all forms of contact with the child, also those by telephone or per e-mail.

<sup>12</sup> See Case C-435/06 ('C'), [2007] ECR I-10141, and Case C-523/07 ('A'), [2009] ECRI-2805, cases in which the Court decided that decisions to take a child into care, taken by social welfare services, also concerned parental responsibility, and that such decisions would therefore fall within the scope of Brussels II bis.

<sup>13</sup> Lowe, Everall and Nicholls, *THE NEW BRUSSELS II REGULATION: A SUPPLEMENT TO INTERNATIONAL MOVEMENT OF CHILDREN* (2005), p. 22.

<sup>14</sup> Article 41(2)(a), (b) and (c), Brussels II bis.

<sup>15</sup> European Commission, *Practice Guide for the application of the new Brussels II Regulation*, 2005, p. 25.

<sup>16</sup> Article 43(2), Brussels II bis.

<sup>17</sup> Article 43(1), Brussels II bis.

text of Article 41 of the Regulation,<sup>18</sup> more light can be shed on this issue by investigating the interpretation of the child's right to be heard in the context of other Articles that provide for the same right.

### 3.2. Recognition of judgments and the child's right to be heard

According to Article 21(1) of the Regulation:

*'a judgment given in a Member State shall be recognized in the other Member States without any special procedure being required'.*

That the general rule of Article 21 of the Regulation is in principle also applicable with regard to judgment relating to parental responsibility is explicitly provided for in Article 28(1) Brussels II *bis*. However, this Article specifies further that either of the interested parties must first apply for a declaration of enforceability in the Member State of enforcement – a procedure that is not necessary for most judgments falling within the scope of the Regulation.<sup>19</sup> At this point, neither the person against whom enforcement is sought, nor the child, is entitled to submit observations to the court in the Member State in which recognition and enforcement is sought.<sup>20</sup>

In principle nevertheless, the court to which is applied for a declaration of enforceability cannot declare the judgment enforceable if –on examination of the judgment- it appears that it was given without the child having been given an opportunity to be heard.<sup>21</sup> This ground for non-recognition of a judgment

<sup>18</sup> An interesting national example of the application of the child's right to be heard in proceedings on access rights is mentioned by Moore, who represented a Polish mother who had been living in England with her daughter for two years. Her former husband and father of the 9 year old daughter was seeking to enforce a Polish contact order in England (17 months after the original contact order was made by the Polish court) via the Central Authorities, pursuant to Article 41 of Brussels II *bis*. Even though the certificate ex Article 41(2) was issued and not rectified -which made the order directly enforceable in England-, the English court decided to take account of the wishes of the child, as it had expressed these in interviews with The Children and Family Court Advisory and Support Service ('Cafcass'), and to put in place a subsequent contact order which superseded the original Polish contact order according to Article 47 of the Regulation. Moore, ENFORCING FOREIGN CONTACT ORDERS: ARTICLE 41 & BRUSSELS II REVISED, Family Law Week, 7 October 2007.

<sup>19</sup> Practice shows that even though the Regulation provides for the direct enforceability of most of the judgments falling within its scope, this often does not happen. In such cases, the parties will have to request a declaration of enforceability in the court designated by the Member State of enforcement; Kruger, INTERNATIONAL CHILD ABDUCTION: THE INADEQUACIES OF THE LAW, p. 136.

<sup>20</sup> European Commission, Practice Guide for the application of the new Brussels II Regulation, 2005, p. 23; Article 31(1), Brussels II *bis*.

<sup>21</sup> Article 23 under (b), Brussels II *bis*.

on parental responsibility only exists however if the fact that the child has not been heard violates fundamental principles of procedure of the Member State in which recognition is sought; therefore, hypothetically, it is possible for a situation to exist in which the child has not been heard before the court in the Member State of origin (X) reached a judgment related to parental responsibility in breach of fundamental principles of procedure of that Member State (X), and this faulty judgment is nevertheless to be recognized and enforced in another Member State (Y), as long as the non-hearing of the child does not violate fundamental principles of procedure in this Member State (Y). The construction of Article 31(2), read in conjunction with Articles 21 and 23 of the Regulation can therefore be interpreted as a typical expression of the principle of mutual trust on which the Regulation is based: The courts and authorities in the Member State of enforcement will have to trust that all procedural safeguards have been heeded by the court in the Member State of origin.

### 3.3. The right of the child to be heard in child abduction cases.

Even though the Regulation takes precedence over the Hague Child Abduction Convention in so far as it concerns matters governed by the Regulation,<sup>22</sup> it was not the wish of the EU legislator to affect the proceedings for the return of an abducted child according to the Convention.<sup>23</sup> On the contrary, the Regulation refers to the procedure of Articles 12 and 13 of the 1980 Hague Convention for the institution of return proceedings at the competent authorities in the Member States. Whereas Article 12 of the Convention contains the principle obligation of the competent authorities to order the return of the abducted child, Article 13 provides that the authorities that have been requested to order the return of the child:

*'may reject the application [...] if it finds that the child objects to being returned [if that child] has attained and age and degree of maturity at which it is appropriate to take account of its views'.<sup>24</sup>*

This rather weak obligation to take the views of the child involved into account when taking a decision on the request for return has been rephrased in the Brussels II bis Regulation, which provides that the child:

*'shall be heard unless this appears inappropriate having regard to his or her age or degree of maturity'.<sup>25</sup>*

<sup>22</sup> Art. 60 under (e), Brussels II bis.

<sup>23</sup> Art. 11(1) and Recital 17, Brussels II bis.

<sup>24</sup> Article 13 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

<sup>25</sup> Article 11(2), Brussels II bis.



The Brussels II *bis* Regulation therefore imposes a stricter duty on the authorities to hear the child involved in an application for its return after abduction.

However, if a Member State authority has refused to order the return of a child under Article 13 of the 1980 Hague Convention, Article 11(8) of the Brussels II *bis* Regulation provides that such a refusal can be overthrown by a later judgment ex Article 40(1)(b) of the Regulation, requiring the return of the child in accordance with Article 42 of the Regulation.<sup>26</sup> Indeed, according to the Court of Justice of the European Union, a *refusal to return a child* in accordance with Article 13 of the Convention is a precondition for the application of Article 11(8) of the Brussels II *bis* Regulation.<sup>27</sup> The return procedure foreseen by the Regulation is one that is completely in the hands of the courts of the Member State of origin: if the court of the Member State of origin issues a certificate endorsing its judgment for the return of the child, this order must then be enforced by the enforcement court in the Member State of refuge without exequatur proceedings.<sup>28</sup> Therefore, a court in the Member State of refuge does not have the possibility to oppose the enforcement of the return order, even if that court has previously found against the return, possibly based on what the child has communicated to the authorities on being interviewed according to Article 13 of the 1980 Hague Convention. However, before taking a decision on the return of the child according to Article 42 of the Regulation, the court of the Member State of origin will have to take the reasons for and evidence underlying the decision of non-return of the court of the Member State of refuge into account.<sup>29</sup> This examination also involves the hearing of the child, according to Article 42(2)(a), unless such a hearing was considered inappropriate having regard to his or her age or degree of maturity. The Regulation thus should provide for an increased opportunity for the child to have its say in the return procedure.

### 3.3.1. Brussels II *bis* and Aguirre Zarraga

Notwithstanding the strict wording of the obligation to hear the child as formulated in Article 42(2)(a) of the Regulation, the objection made by one of the parties that this obligation had been violated by the court issuing a certificate for the return of a child in accordance with the procedure ex. Articles 40 and

---

<sup>26</sup> Dutta and 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, *Journal of Private International Law*, Vol. 10, No. 1, p. 22.

<sup>27</sup> Case C-195/08 (PPU), Rinau, [2008] ECR I-5271, under 59 and 60.

<sup>28</sup> Article 21, Brussels II *bis*.

<sup>29</sup> Case C-211/10 (PPU), Povse v. Alpago, [2010] ECR I-06673, under 59.



42 of the Regulation was by the Court of Justice not considered to constitute a reason for the courts in the Member State of refuge to reject the enforcement of the judgment ordering the return. In the case of *Aguirre Zarraga v Pelz*,<sup>30</sup> the German mother of an eight-year-old girl did not send her back to her father in Spain after having spent a holiday with her in Germany. Seized according to the 1980 Hague Convention, the German courts refused to order the child's return, based on the child's wish to remain with her mother. The father however obtained a certificate ex. Article 42 of the Regulation, attesting that a Spanish court had awarded custody to the father of the child in a final decision on the divorce of the parents of the child. Though before reaching its decision the Spanish court considered it necessary to hear the child personally and to have the child examined by a psychosocial care provider, as the child and her mother remained in Germany and did not attend the planned hearing the court rendered judgment without the child being heard. The mother's appeal against the judgment, requesting that the child be heard on appeal, was dismissed by the appeals court as found that mother and daughter had been duly notified of the hearing and had chosen not to attend the hearing. The Spanish judgment and certificate were therefore forwarded to Germany for enforcement according to German national law.<sup>31</sup>

However, the German court responsible for the enforcement took the complaint of the mother that the Spanish judgment and certificate infringed Article 24(1) of the Charter of Fundamental Rights of the EU and Article 42 of the Regulation, as the child had not been heard by the Spanish court, into account and held that the Spanish judgment was neither to be recognized nor enforced. The father appealed this decision, and the German appeals court referred the case to the Court of Justice of the European Union for a preliminary ruling on the question of whether a court of the Member State of enforcement enjoys the power to review the judgment that it is requested to enforce, if the court handing down the judgment has seriously infringed fundamental rights in coming to the judgment?<sup>32</sup>

The Court of Justice answers the question by first pointing out that the regulation sets up a system whereby the courts of the Member State where the child is habitually resident retains exclusive jurisdiction to decide whether the child is to be returned. The Court consequently finds, interpreting Articles 42 and 43 of the Regulation in the light of recitals 17 and 24 in the preamble to the Regulation, that a judgment, duly certified in accordance with Article 42

<sup>30</sup> Case C 491/10 (PPU) *Aguirre Zarraga v. Pelz* [2010] ECR I-14247.

<sup>31</sup> Article 47, *Brussels II bis*.

<sup>32</sup> *Aguirre Zarraga*, under 37.

of the Regulation, ordering the return of a child handed down by the court with jurisdiction, must be recognized and enforced in any other Member State without the possibility of opposing its recognition.<sup>33</sup> This clear division of jurisdiction between the Member States' courts relies on the conviction that all EU courts apply EU law properly and in line with the Charter of Fundamental Rights. It is therefore for the court that has jurisdiction according to the Regulation to decide how to give shape to the obligation of hearing the child. The Court further held that his obligation, formulated in Article 24 of the Charter of Fundamental Rights and Article 42(2)(a) of the Regulation, does not require that an actual hearing before the court that has jurisdiction takes place, but it calls for the court to take appropriate measures to enable the child to freely express his or her views. If the court of the Member State of origin finds it has fulfilled its obligation under Article 24 of the Charter of Fundamental Rights and Article 42(2)(a) of the Regulation, it is not for the court of the Member State of refuge to decide not to recognize and enforce the court's judgment, merely because it would have interpreted the obligation to hear the child differently. The only legal recourse open to the mother of the child would be the appeal under the domestic law of the Member State of origin, based on an infringement of fundamental rights.<sup>34</sup>

Despite the importance awarded to the child's right to be heard in the Brussels II bis Regulation and the Court's detailed analysis of the effect of the Charter of Fundamental Rights on the Regulation in *Aguirre Zarraga*, the above review of the case law of the Court of Justice of the EU shows that the Court seems to attach greater importance to the effectiveness of the Regulation than the protection of the child's right to be heard. For this reason, the Court has been accused of disregarding the right of the child in this particular case.<sup>35</sup> However, one could defend the approach of the Court by pointing out that the disputed procedure for the return of the child put in motion by the father are all caused by the *wrongful* retention of the child by its mother – which is a prerequisite for the 1980 Hague Convention and the relevant provisions of the Brussels II bis Regulation alike.<sup>36</sup> The wrongfulness of the retention (or indeed removal) of the child refers to the retention of the child by one parent in breach of rights of existing rights of custody of the other parent, or rights of custody that would

<sup>33</sup> *Aguirre Zarraga*, under 48 and 56.

<sup>34</sup> *Idem*, under 72.

<sup>35</sup> Walker and 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, *Journal of Private International Law*, (2011) 7, pp. 231–249.

<sup>36</sup> Articles 2(11) and 11(1) Brussels II bis and Article 3 of the 1980 Hague Convention.

have been exercised by the other parent had the removal not taken place. The Convention and the Regulation are based on the idea that the parent wrongfully removing or retaining its child should not be rewarded for the infringement of the right of the other parent by awarding the courts of the State to which the child has been moved with jurisdiction – neither in substance nor in the return procedure.

The particulars of the return procedure in *Aguirre Zarraga* aside, the Court's decision in this case should not come as a surprise when one considers that the EU's legal system –and especially the part of the system based on judicial co-operation- is based on the existence of mutual trust, which in its turn is based on the assumption that all EU Member States provide an equivalent and effective protection of fundamental rights at EU standards.<sup>37</sup> With its judgment the Court thus sought to confirm the principle of mutual trust between the courts of the Member States.

A more recent decision of the European Court of Human Rights in Strasbourg however made it clear that the Court of Justice of the European Union cannot automatically rely on proceedings before any court of a Member State of the EU to conform to EU standards on fundamental rights.

### 3.3.2. The ECtHR and the child's right to be heard: *Sneersone and Campanella v. Italy*

Unburdened by principles such as mutual trust between Member States and their judiciary or the effectiveness of EU law, the ECtHR may reach conclusions that are sometimes quite the opposite of judgments delivered by institutions of the EU. A case in which litigation took place both under EU law and under the ECHR, and in which conflicting conclusions were reached, was the case of the Latvian Ms. Sneersone's wrongful removal of her son Marko Campanella from Italy. In this case the child was born in 2002 in Italy, a year before his parents separated. His father had almost never been involved in the care of the child, and custody was granted to his mother. When the child was four years old, his mother took him to Latvia for financial reasons, upon which an Italian Court granted custody to the father and ordered for the return of the child according to the 1980 Hague Convention. However, the Latvian courts decided that a return would be against the child's best interests and did not recognize the Italian order. Consequently, the father of the child instituted proceedings for

---

<sup>37</sup> Mitsilegas, THE LIMITS OF MUTUAL TRUST IN EUROPE'S AREA OF FREEDOM, SECURITY AND JUSTICE: FROM AUTOMATIC INTER-STATE COOPERATION TO THE SLOW EMERGENCE OF THE INDIVIDUAL, Yearbook of European Law, Vol. 31, No. 1 (2012), pp. 353-354.

the return of the child under the Brussels II *bis* Regulation before the competent court in Rome. This court judged for a return of the child to Italy, and the mother's appeal of this judgment was rejected by the Rome Court of Appeal without hearing the parties but taking into account their written observations.

In October 2008 Latvia brought an infringement action<sup>38</sup> against Italy before the European Commission, claiming that Italy had infringed the Regulations and had unjustifiably disregarded the earlier judgments of the Latvian courts regarding the return of the child. However, on appraisal of compliance of the Italian courts with the procedure of the Brussels II *bis* Regulation, the Commission found in January 2009 that no violation of EU law had been committed by the Italian authorities.<sup>39</sup> The case was therefore not referred to the Court of Justice of the European Union. Considering the ruling of this Court in *Aguirre Zarraga*, it is not likely that this Court would have come to a conclusion any different from that of the Commission.

Upon receiving the negative answer of the Commission, the mother and child applied to the European Court of Human Rights in Strasbourg in 2009, on the same grounds as Latvia had argued in the infringement procedure before the Commission. The ECtHR reviewed these grounds separately and found, with regard to the disregard of earlier judgments of the Latvian courts that 'a child's return cannot be ordered automatically or mechanically [...] as is indicated by the recognition [...] of a number of exceptions to the obligation to return the child [...], based on considerations concerning the actual person of the child and his environment, thus showing that it is for the court hearing the case to adopt an *in concreto* approach to it'.<sup>40</sup> The Court further held that it is the task of the court hearing the case to strike a fair and proportionate balance between the competing interests at stake – those of the child, of the two parents, and of public order –, within the margin of appreciation afforded to States in such matters.<sup>41</sup> In that respect, the Court found that the reasoning of the Italian courts had been '*rather scant*',<sup>42</sup> and that the courts had failed to properly investigate the effects of the return of the child to Italy, after having been in Latvia for such a long time and considering the nature of the relation with his father before and during the removal.<sup>43</sup> For these reasons, the Court held that the ri-

<sup>38</sup> Then under Article 227 EC, now Article 258 TFEU.

<sup>39</sup> Lopes Pegna, *L'INTERESSE SUPERIORE DEL MINORE NEL REGOLAMENTO NO. 2201/2003*, *Rivista di diritto internazionale privato e processuale*, N. 2-2013, p. 364.

<sup>40</sup> ECtHR, *Case of Sneersone and Kampanella v. Italy*, Application no. 14737/09, 12 July 2011, under 85(vi).

<sup>41</sup> *Idem*, under 91.

<sup>42</sup> *Idem*, under 93.

<sup>43</sup> *Idem*, under 95–98.

ght to *respect for family life*<sup>44</sup> of the child had been violated by the return order issued by the Italian courts.

With regard to the (child's) right to be heard however, the Court reasons in a mere couple of paragraphs that since the mother and father of the child submitted detailed written submissions to the Italian Courts, the procedural fairness requirement of Article 8 of the ECHR has been observed. The Court therefore concluded that there had been a violation of Article 8 merely because the Italian courts had disregarded the reasons the Latvian courts had based their decision to refuse the enforcement of the return order on, and not because of the fact that the applicants had not been invited to a hearing before the Italian courts.

#### 4. CONCLUSION

The above analysis of the content of the child's right to be heard in the context of Brussels II *bis* leads us to conclude that it is misleading to declare that the Regulation confers an absolute right to be heard at court to children in proceedings that fall within the scope of the Regulation. Even though the aim of the Regulation is to uniform the procedural law with regard to the matters falling within the scope of the Regulation, the regulation of child consultation continues to be a matter of national law.<sup>45</sup> As things stand presently, the national laws on child consultation vary significantly. Furthermore, even though in some Member States the national laws favor the active participation of the child in proceedings, practice shows that judges often do allow the children to exercise their right to be heard.<sup>46</sup>

Furthermore, the analysis of the rulings of the ECJ and the ECtHR above shows us that, according to the Courts, the Regulation has done little more than introducing a minimum protection of the child's right to be heard. The two Courts seem to agree that this minimum does not go beyond the right to be given the chance to express their views, preferably by being heard in court,

---

<sup>44</sup> Article 8 ECHR; a return order is normally regarded as a domestic measure hindering the mutual enjoyment by a parent and a child of each other's company (see the ECtHR's ruling in e.g. *Case Raban v. Romania*, Application no. 25437/08, 26 October 2010) which is only justifiable in case it is necessary in a democratic society. In the case of *Sneersone and Campanella*, the Italian courts failed to properly research and demonstrate the necessity of the measure.

<sup>45</sup> Shannon, *THE IMPACT AND APPLICATION OF THE BRUSSELS II BIS REGULATIONS IN IRELAND*, in Boele-Woelki and Gonzalez Beilfuss (Eds), *BRUSSELS II BIS, ITS IMPACT AND APPLICATION IN THE MEMBER STATES*, p. 145.

<sup>46</sup> Reich-Sjögren, *PROTECTION OF CHILDREN IN PROCEEDINGS*, Report prepared on request by the European Parliament's Committee on Legal Affairs, 2010, p. 14

but in any case through an interview with a competent authority such as a court-appointed social worker or psychologist.<sup>47</sup>

Additionally, even though the Regulation emphasizes on the child's right to share its view on the desirable outcome of proceedings in which she or he is involved, this does not mean that the child has an actual say in the conclusion of the case.<sup>48</sup> In abduction cases for example, practice shows that the child's opinion is rarely sufficient to override the Regulation's principle that the child should be returned to its place of residence before abduction.

Therefore, as much as the Regulation's increased focus on the rights of the child is the result of a praiseworthy effort of the European Commission to increase the visibility and decrease the vulnerability of the child in international civil procedures that concern them, one cannot say that the right of the child to make its view known to the judiciary is actually *guaranteed* by EU law. Further legislative and monitoring action is required in order to warrant the hearing of the child, and to ensure that the views expressed by the child are also duly taken into account by the Courts in their decision-making process.

#### Literature:

Dutta and 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 II A REGULATION FROM C TO HEALTH SERVICE EXECUTIVE, *Journal of Private International Law*, Vol. 10, No. 1.

Kruger, INTERNATIONAL CHILD ABDUCTION: THE INADEQUACIES OF THE LAW, Hart Publishing, Oxford 2011.

Lenaerts, THE BEST INTERESTS OF THE CHILD ALWAYS COME FIRST: THE BRUSSELS II BIS REGULATION AND THE EUROPEAN COURT OF JUSTICE, *Jurisprudencija*, 2013, Vol. 20 Issue 4.

Lopes Pegna, L'INTERESSE SUPERIORE DEL MINORE NEL REGOLAMENTO NO. 2201/2003, *Rivista di diritto internazionale privato e processuale*, N. 2-2013.

Lowe, EVERALL AND NICHOLLS, THE NEW BRUSSELS II REGULATION: A SUPPLEMENT TO INTERNATIONAL MOVEMENT OF CHILDREN, Jordan Publishing Limited, London 2005.

---

<sup>47</sup> European Commission, Practice Guide for the application of the new Brussels II Regulation, 2005, p. 43.

<sup>48</sup> Reich-Sjögren, p. 8.

- Mitsilegas, *THE LIMITS OF MUTUAL TRUST IN EUROPE'S AREA OF FREEDOM, SECURITY AND JUSTICE: FROM AUTOMATIC INTER-STATE COOPERATION TO THE SLOW EMERGENCE OF THE INDIVIDUAL*, Yearbook of European Law, Vol. 31, No. 1 (2012).
- Moore, *ENFORCING FOREIGN CONTACT ORDERS: ARTICLE 41 & BRUSSELS II REVISED*, Family Law Week, 7 October 2007.
- Reich-Sjögren, *PROTECTION OF CHILDREN IN PROCEEDINGS*, Report prepared on request by the European Parliament's Committee on Legal Affairs, European Parliament, Brussels 2010.
- Shannon (Ed.), *FAMILY LAW*, Oxford University Press, Oxford 2008 (3<sup>rd</sup> Ed.).
- Shannon, *THE IMPACT AND APPLICATION OF THE BRUSSELS II BIS REGULATIONS IN IRELAND*, in Boele-Woelki and Gonzalez Beilfuss (Eds), *BRUSSELS II BIS, ITS IMPACT AND APPLICATION IN THE MEMBER STATES*, Volume 14 of European family law series, Intersentia, Antwerpen/Oxford 2007.
- Walker and 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*, Journal of Private International Law, (2011) 7.
- Council Regulation No. 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ [2000] L 160/19.
- Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ [2000] L 012/1.
- Council Regulation 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 No. 1347/2000, OJ [2003] L 338/1.
- European Convention of 20 May 1980 on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children, ETS No. 105.
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, 1343 UNTS 89.
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, [2003] OJ L48/3.



European Commission, Practice Guide for the application of the new Brussels II Regulation, 2005.

Protocol concerning the interpretation by the Court of Justice of the convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, [1975] OJ L 204/28.

ECJ, Case C-435/06 ('C'), [2007] ECR I-1014.

ECJ, Case C-523/07 ('A'), [2009] ECR I-2805.

ECJ, Case C-195/08 (PPU), Rinau, [2008] ECR I-5271.

ECJ, Case C-211/10 (PPU), Povse v. Alpago, [2010] ECR I-06673.

ECJ, Case C 491/10 (PPU) Aguirre Zarraga v. Pelz [2010] ECR I-14247.

ECtHR, Case of Sneersone and Kampanella v. Italy, Application no. 14737/09, 12 July 2011.

ECtHR, Case of Raban v. Romania, Application no. 25437/08, 26 October 2010.

## BRUSELJSKA UREDBA II BIS: OTROKOVA PRAVICA IZRAZITI SVOJE MNENJE V POSTOPKU S ČEZMEJNIM ELEMENTOM

**Margarite Helena Zoeteweyj-Turhan,**

*doktorica pravnih znanosti, docentka za pravo Evropske unije na Pravni fakulteti Univerze Özyeğin, Istanbul, Turčija*

Eden od ciljev Bruseljske uredbe II bis iz leta 2005 je zagotoviti, da bodo otroci lahko uresničili svoje pravice v postopkih s čezmejnimi elementom, ki jih zadevajo. Med otrokovimi pravicami v postopku je posebej pomembna pravica otroka, da izrazi svoje mnenje. Ta pravica ima osrednjo vlogo v treh vrstah postopka, za katere se uporablja Bruseljska uredba II bis: pomembna je za izvedbo eksekvturnega postopka, za izdajo odločb v postopku za vrnitev otroka v primeru ugrabitve, pa tudi za izvršitev odločb v zadevah vzgoje in varstva otroka.

Sposobnost otroka, da pove svoje mnenje, se po Bruseljski konvenciji II bis presoja glede na njegovo starost in stopnjo zrelosti. Kadar se sodnik v skladu z otrokovo starostjo in zrelostjo odloči, da ne bo pridobil otrokovega mnenja, je primerno, da navede razloge za svojo odločitev. To zahteva tako imenovana »dobra praksa« pri uporabi Bruseljske uredbe II bis, čeprav uredba določbe s tako zahtevo ne vsebuje.

Kljub pomembnosti otrokove pravice izraziti svoje mnenje, vsaka nemožnost otroka izraziti svoje mnenje še ne pomeni kršitve evropskega zasebnega prava. To, da otrok ni imel možnosti izraziti svojega mnenja, je na primer ovira za priznanje tuje sodne odločbe glede starševske odgovornosti le, če to dejstvo krši temeljna procesna načela države priznanja. Pravica izraziti svoje mnenje v postopkih, za katere se uporablja Bruseljska uredba II bis, zato ni absolutna. Na ta način otrokova pravica izraziti svoje mnenje kljub prizadevanjem Bruseljske uredbe II bis, da bi poenotila procesno pravo v postopkih, za katere se uporablja, ostaja institut nacionalnega prava.

Analiza sodne prakse Sodišča Evropske unije in Evropskega sodišča za človekove pravice kaže, da je Bruseljska uredba II bis zagotovila le minimalno varstvo otrokove pravice izraziti svoje mnenje. Obe sodišči pa se strinjata, da ta minimum ne pomeni kaj več od otrokove pravice, da izrazi svoje stališče na sodišču ali prek razgovora s pristojno osebo, praviloma prek razgovora s socialnim delavcem ali psihologom, ki ga za to nalogo določi sodišče. In čeprav Bruseljska uredba II bis poudarja otrokovo pravico izraziti stališče glede izida postopka, sodišče ni dolžno odločiti v skladu z otrokovim mnenjem. Tako na primer mnenje otroka v postopku glede otrokove ugrabitve v praksi le redko prevlada nad načelom Bruseljske uredbe, po katerem je treba otroka vrniti v državo, od koder je bil odpeljan. Čeprav se je Bruseljska uredba II bis trudila, da bi okrepila otrokov položaj v civilnih postopkih, ki ga zadevajo, uredba otroku dejansko ni zagotovila pravice izraziti svoje mnenje. To potrjuje tudi sodna praksa Sodišča Evropske unije, po kateri nemožnost otroka v postopku izraziti svoje mnenje pogosto sploh ne šteje za kršitev Bruseljske uredbe II bis; in zdi se, da tega ni spremenil niti pristop Evropske unije k Evropski konvenciji za človekove pravice. Evropska zakonodaja si mora zato v prihodnje prizadevati za krepitev otrokove pravice izraziti svoje mnenje in za to, da bo mnenje, ki ga je otrok izrazil, v postopku odločanja tudi upoštevano.

*Pregledni znanstveni članek*UDK: 341:347:342.7-053.2  
347(061.1EU)-053.2**ZOETEWIJ-TURHAN, Margarite Helena: Bruseljska uredba II bis: Otrokova pravica izraziti svoje mnenje v postopku s čezmejn timer elementom****Pravnik, Ljubljana 2015, let. 70 (132) št. 11-12**

Eden od ciljev Bruseljske uredbe II bis iz leta 2005 je zagotoviti, da bodo otroci lahko uresničili svoje pravice v postopkih s čezmejn timer elementom, ki jih zadevajo. Med otrokovimi pravicami v postopku je posebej pomembna pravica otroka, da izrazi svoje mnenje. Ta pravica ima tudi osrednjo vlogo v treh vrstah postopka, za katere se uporablja Bruseljska uredba II bis. Kljub temu sodne odločitve Sodišča Evropske unije, ki obravnavajo otrokovo pravico izraziti svoje mnenje, pričajo, da okoliščina, da otrok ni imel možnosti izraziti svoje mnenje v postopku, pogosto sploh ne šteje za kršitev Bruseljske uredbe II bis. Vse kaže, da tega ne bo spremenil niti pristop Evropske unije k Evropski konvenciji za človekove pravice.

*Review Article*UDC: 341:347:342.7-053.2  
347(061.1EU)-053.2**ZOETEWIJ-TURHAN, Margarite Helena: Brussels II bis: The Right of the Child to be Heard in International Proceedings****Pravnik, Ljubljana 2015, Vol. 70 (132), Nos. 11-12**

The 2005 Brussels II bis Regulation is aimed at making the child, caught in international proceedings, more visible and the bearer of more rights. The child's right to be heard should play an especially central role in three types of proceedings that fall within the scope of the Regulation. However, recent judgments of the European Court of Justice on the child's right to be heard give reason to believe that not hearing the child will not often be a reason to find that the Regulation has been breached. Even accession of the EU to the ECHR will not bring much change in this situation.