The Right of a Child to be Heard and Its Influence on Court Decisions in Family Law Matters

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1. INTRODUCTION

The right to be heard and to express one’s views are basic procedural rights of a child and are essential for effective participation in judicial proceedings, especially in the cases dealing with parental responsibility. There is a consensus among EU countries (supported by provisions of legal documents), that „children“ are human beings younger than 18 years unless, under the law applicable to the child, majority is attained earlier.¹

Several international documents have created legal grounds of participation rights of a child. However, as would be shown below, this international frame is only a base. The practical exercise of those rights is crucially influenced and limited by national legislation. This paper will compare different approaches adopted in four EU member states and will demonstrate significant distinctions that could produce discrimination between children in exercise of their right to be heard among EU member states.

The aim of this paper is to examine and analyze different attitudes towards exercise of the right to be heard. Based on this comparison, proposal of specific arrangements will be drafted to harmonize current fragmented praxis and to ensure the same standard of children´s rights and their exercise in the best interests of a child among all EU countries.

2. THE RIGHT OF A CHILD TO BE HEARD IN THE EU

In the territory of EU, the main legal sources of participation rights are international treaties and EU law, primarily:

1/ Convention on the Rights of the Child, United Nations, adopted and opened for signature, ratification and accession by General Assembly resolution No. 44/25 of November 20th 1989, entry into force September 2nd 1990 (hereinafter as „CRC“);


Charter of fundamental rights of the European Union, proclamation of The European Parliament, the Council and the Commission, dated December 7th 2000, (hereinafter as „EUC“);

3/ Council regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility,

¹ See Art. 1. CRC
repealing Regulation (EC) No 1347/2000, dated November 27th 2003 (hereinafter as „Regulation“).

ECECR is an international legal instrument specialized on participation rights of children. According to Art. 1 para 2 of ECECR, the main object of the convention is (in the best interests of children) to promote children’s rights, to grant them procedural rights and to facilitate the exercise of these rights by ensuring that children are (themselves or through other persons or bodies) informed and allowed to participate in proceedings affecting them before a judicial authority. Such proceedings are mainly family proceedings, in particular those involving the exercise of parental responsibilities such as residence and access to children. Therefore, a child has the right to express his/her views freely in all matters affecting him/her.

Although these documents recognize participation rights of the child, they also acknowledge the limitations arising from the child’s mental development connected to his/her age. Therefore, all rights mentioned above are not of absolute nature, but shall be exercised with regards to the degree of physical and mental maturity of the child and his ability to articulate his/her views.

Sine qua non for full exercise of the right to be heard is the necessity of providing a child with information concerning the proceedings (generally, legal situations). The extent and form of presentation of provided information depends on age and degree of mental development of a child. Similar provisions are in Art. 3 ECECR which leave the determination of criteria for assessing the degree of maturity of the child on each member state.

The actual form how to provide a child with information and represent his/her interest during the court proceedings is incorporated in Art. 10 of ECECR. A child shall be (unless this would be manifested contrary to the best interests of the child) provided all relevant information and explanations by a special representative appointed by a judicial authority. This representative shall also determine the views of a child and present these views to the

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2 Art. 12 CRC includes also administrative proceedings.
3 See Art. 1 para, 3 ECECR.
4 See also Art. 13 CRC and Art. 12 para. 1 and 2 CRC.
5 Ibid.
6 If the child is considered by internal law as having sufficient understanding, concerning the possible consequences of compliance with his or her views and the possible consequences of any action by the representative.
7 Art. 9 ECECR
judicial authority.\textsuperscript{8} Art. 12 para 2 CRC also stipulates that a child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Finally, the opinion of a child shall be taken into the consideration during the decision-making process.\textsuperscript{9} A judicial authority, before taking a decision, shall ensure that a child has received all relevant information, consult the child in person in appropriate cases itself or through other persons or bodies (in a manner appropriate to his/her understanding, unless this would be manifestly contrary to the best interests of the child), allow the child to express his/her views and give due weight to the views expressed by the child.\textsuperscript{10}

Regulation is considered as the main procedural source of EU law in the field of family law. However, the right of child to be heard is not specifically regulated; with the exception of Art. 19 of the Preamble to the Regulation, which states that the hearing of a child plays an important role in the application of the Regulation. Nevertheless, this instrument is not intended to modify national procedures applicable. On the other hand, if the child was not given an opportunity to be heard (unless a hearing was considered inappropriate having regard to his/her age or degree of maturity), it establishes grounds for possibility of refusing of recognition of the decision in other member states of EU.\textsuperscript{11}

Also, the EUC contains basic declaration of participation rights of a child in Art. 24, which is fully consistent with above mentioned principles. Children shall have the right to such protection and care which is necessary for their well-being. They shall be allowed to (may) express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.

3. THE RIGHT OF A CHILD TO BE HEARD IN SELECTED EU MEMBER STATES

Four EU member states were chosen as representatives of different approaches towards participation rights of a child. Each of those countries is bound by the same legal frame. However, the national legislation implementing the right to be heard have created significant

\textsuperscript{8} See Art. 10 ECECR.
\textsuperscript{9} See Art. 12 para. 1 CRC.
\textsuperscript{10} If the child is considered by internal law as having sufficient understanding Art. 6 ECECR.
\textsuperscript{11} E. g. Art. 23 Regulation.
differences in practical execution of those rights and gives basic for discrimination between children among EU.

3.1 The Czech Republic

In the Czech Republic, the CRC was signed in the name of the former Czech and Slovak Federative Republic (CSFR) on September 30th 1990. In succeeding the former Czech and Slovak Federative Republic, the Czech Republic became a State party to the Convention on February 22th 1993.\textsuperscript{12,13}

At a national level, the issue of a child’s right to be heard can be found in the following legal Acts: Act No. 89/2012 Coll. (Civil Code); Act No. 99/1963 Coll. (Civil Procedure Code); Act No. 292/2013 Coll. (Special Court Proceedings); Act No. 359/1999 Coll. (Social and Legal Protection of the Children).

The right of a child to be heard, as indicated in the international legal instruments mentioned in section 2 of the paper, was primarily implemented into the Section 867, para. 1,2 Civil Code,\textsuperscript{14} which regulates that during the court proceedings affecting a child’s interests, the child has a right to obtain all the relevant information, to consult and express his/her opinion and to be informed about consequences of presenting his/her view. However, the child’s right to be heard should not be interpreted as an absolute right, thus the court is not obliged to hold the hearing in all cases concerning interests of a child. Should the judge consider that a child’s hearing would not be in accordance with the child’s best interest, he might not allow the hearing to take place. Instead, the court shall inform and hear a person who is able to protect the interests of the child, given that this person is not in conflict with the interests of the child. The extent to which the child’s opinion is respected and the child is really heard in a court proceeding depends considerably on the circumstances of each case, child’s age and intellectual maturity, as well as on the judge’s assessment. In doubtful cases it is presumed that minors over the age of 12 have the capacity to understand situations and form their own opinions.\textsuperscript{15} The hearing of a child younger than twelve years must be carefully considered with regard to all circumstances of the case and the best interest of the child. In particular, the


\textsuperscript{13}According to Article 10 of the Constitution of the Czech Republic, all the promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than what a statute provides, the treaty shall apply

\textsuperscript{14}Act No. 89/2012 Coll.

\textsuperscript{15}Section 867, para. 2, Act No. 89/2012 Coll., Civil Code
judge must cautiously assess all the benefits of the child’s hearing in comparison to possible harm caused by inappropriate hearing. Moreover, the judge has to consider whether the child’s opinion is really his/her own opinion or whether the child follows the opinion of the parent with whom he/she lives.\textsuperscript{16}

Even if a child expresses his/her opinion, the court is not absolutely bound by it. The court takes into account the child's views with regard to the age and intellectual maturity of the child.\textsuperscript{17} The closer the child is to the age of majority, the more relevant his/her opinion is considered to be. When the judgment is not in harmony with the child’s opinion, the court must adequately justify its decision.

According to the Czech Constitutional Court, one of the reasons the right to be heard is so important is that it gives children the confidence that they are an important part of courts proceedings, instead of being only passive observers. The Czech Constitutional Court also ruled that in some cases even minors as young as 7-8 years old are capable to form and express their own opinions and make decisions.\textsuperscript{18}

As far as procedural aspect is concerned, the conventions and EU legislation do not provide instructions as how the court should obtain the child’s opinion. This issue is covered by individual national legislations. The Civil Procedure Code\textsuperscript{19} states in Section 100, para. 3 that in proceedings to which the participant is a child who is capable of forming his/her opinions, the court will proceed with the child’s hearing in order to determine the child’s opinion on the matter. In exceptional cases, the court may find the child’s opinion through his/her representative, through expert’s opinion or through authority of socio-legal protection of children. When expected that a presence of others could cause a child not to express his/her true opinion, the hearing may be done without the presence of others. The court takes into account the child's views with regard to the age and intellectual maturity of the child. According the Section 20, para. 4 Act on Special Court Proceedings,\textsuperscript{20} the child who participates in a proceeding and who is capable of forming his/her opinions should obtain from the court all the relevant information about the proceeding as well as information about


\textsuperscript{17} Section 100, paragraph 3, Act No. 99/1963 Coll., Civil Procedure Code

\textsuperscript{18} Czech Constitutional court’s decisions No. II. ÚS 1945/2008, II. ÚS 3765/2011.

\textsuperscript{19} Act No. 99/1963 Coll.

\textsuperscript{20} Act No. 292/2013 Coll.
the possible outcomes of court’s compliance with his/her opinion and possible consequences of court’s decision itself.

In the Czech Republic, a child is always a party to the proceeding concerning his/her interests. In majority of proceedings, the child is legally represented by his/her parents. If the parents or other person having parental responsibility cannot represent the child because of a conflict of interests, the judge will appoint a socio-legal agency (social worker) to represent the child.

At this point it is necessary to mention what is the actual procedure of a child’s hearing in the Czech Republic. If a judge, after considering all the circumstances of a case, comes to a conclusion that it is necessary to find a child’s opinion (regarding to his/her age and maturity) in order to make a ruling, the judge will set up a child’s hearing. In recent years, the courts have come to a set of several standards which they tend to follow in order to ensure a child friendly justice. These standards involve for example:

- The hearing of minors, especially if they are younger than 12 years old, should be held in a separate child friendly room without anyone whose presence could affect a child’s opinion or cause the child to be emotionally distressed. The child should be as comfortable as possible and should not be afraid to express his/her true opinion.\(^\text{21}\)

- The child's hearing should only be led by a person specially trained for these purposes. Such person should behave in a friendly, gentle, positive manner and should be familiar with the psychology of children. Such person must be aware of which questions are not allowed to be asked in a child’s hearing. In most cases, the hearing is led by a judge himself, provided that he/she has received a special training for such purposes. Alternatively, the judge has an option to appoint an external specialist, such as a legal expert or a social worker, to investigate the child’s opinion for him. However, if a hearing is not led by the judge himself, there is a risk that the judge will not evaluate the child’s opinion as correctly as if he had a chance to interact with the child personally.\(^\text{22}\)

- The child’s hearing must be preceded by providing the child with detailed information about the case itself and possible outcomes of the case.\(^\text{23}\) Parents are usually the first to receive information on proceedings and play a major role in providing it. They are

\(^{21}\) Czech Constitutional Court decision No. ÚS I. ÚS 2661/2010.

\(^{22}\) Czech Constitutional Court decision No. ÚS I. ÚS 2661/2010.

\(^{23}\) Section 20, paragraph 4, Act No. 292/2013 Coll., Special Court Proceedings
often expected to act as the primary informer, explaining the material matter to their children. However, most often the judge appoints a social worker to explain all the information to the child. Children should be informed about their rights, the stages of the proceedings, what to expect from the hearings and the availability of protective measures. Information should be tailored to children’s age, developmental phase, background and psychological condition.

Overall, the standards, legislation and practice of child’s right to be heard in the Czech Republic are developed and respected. Of course, there is still a room for possible improvement as proposed in the conclusion.

3.2 The Italian Republic

The Italian Government has ratified CRC on September 5th 1991 and it came into force on October 5th of the same year. Italy is also a member state of ECECR since 1996 and it came into force towards Italy on November 1st 2003. Regardless of its international obligations, Italy had shown little consideration towards children’s views in the judicial proceedings affecting them. Based on this attitude, Italy faced severe criticism from several European organizations based on failure to guarantee children’s right stipulated by above mentioned conventions. This situation was based on interpretation of the CRC, which stated that the Art. 12 needed punctual implementation into national legislation. This approach was changed after the Judgment of the Constitutional Court No. 1/2002, which pronounced that the content of article 12 CRC was declared as directly applicable and, as a consequence, no implementation was necessary. Despite of these judgments, judges are still very reluctant to hear the children during court proceedings.

The Constitutional Court also interpreted Art. 12 in such way, that it supplements (where appropriate) Art. 336 para 2 ICC, which created grounds for a child to become, in a technical

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sense, a “party” of the trial, implying the need for an adversarial proceeding against a child, after appointing a special curator if necessary.27

Italian procedural rules are quite incoherent in the field of participation rights of a child which results to some child-related proceedings where the child is not heard (national procedural rules do not contain such possibility) or the hearings not being held under same conditions. There are a few examples of this fragmentation: According to Art. 145 of Italian Civil Code (hereinafter as “ICC”), which applies to management of family life, the judge may suggest (upon a spouses’ request) an agreed solution to settle disputes concerning a couple’s relationship and thus the interests of the children. In such cases, only the views of adult members of the family would be heard and for this purpose children are being deemed as adults only when older than 1628 years of age. On the contrary, children over 14 should be heard by the judge in issues concerning parental authority (Art. 316 ICC). Act No. 54/2006 brought a piece of clarity to the issue of hearing of a child in separation and divorce proceedings. Based on this law, a judge shall obtain the opinion of a child older than 12 years old, or even younger child, if he/she is able to express his/her views.29 This vague possibility very often leads to not-hearing of younger children.30

Adoptions31 legislation as well provides several different rules: children over the age of 14 are required to give their consent by statute, while children over 12 years of age must be consulted (Art. 7, para 1, Act. No. 184/1983 Coll.). According to amendment provided by Act. No. 149/2001 Coll. even younger children with sufficient understanding should be heard. “Consultation” means lower form of court limitedness by a child’s view and the opinion would be freely assessed by the judge. Therefore, the adoption may be declared even against the child’s will. However, a child does not only hold the right to be heard, but must be also considered as a technical party to the proceeding, with the attribution (as a consequence) of the right to be protected by a lawyer.32 The procedural position of a child during these

27 Consideration, supra note 25, p. 35.
28 Children older than 16 have also special position during judicial recognition of biological parenthood – their consent is sought as well as their consent to the recognition (Art. 273 para 2 and 250 para 2 ICC).
29 BOSISIO, supra note 26, p. 149.
31 Applies also on other proceedings of limitation or cancellation of parental responsibility.
32 Consideration, supra note 25, p. 35.
proceedings is of “anomalous” party, because the child has not acquired the same legal position of an adult that is a party to a trial.\textsuperscript{33}

After ECECR entered into force for Italy, the Act 77/2003 implemented several provision of the convention to the national law, mainly the obligation to consider a child’s opinion for the purposes of deciding. Proceedings concerning children are held by specialized Juvenile Courts and senates composed of two professional judges and two honorary ones. \textsuperscript{34} In many courts, special hearing rooms have been created, with one-way mirrors for judges to witness the hearing of the children. \textsuperscript{35} A child shall be heard either directly by the judge or by an expert appointed by the judge.\textsuperscript{36}

In respect to Article 12 CRC, the Italian legal system is neither prepared nor adequate.\textsuperscript{37} The principle of participation acknowledges that children have views and perspectives to contribute to decision-making and that they are entitled to participate in all proceedings in which they are involved. However, the opinions of children are rarely taken seriously even when they are listened to. Unfortunately, the existing legislation does not explicitly give children the right to be heard when they are placed in an institute, sheltered community or foster care (in practice).\textsuperscript{38} Moreover, civil proceedings are not regulated by a coherent rules and different age limits governing the right to be heard apply in different contexts. Furthermore, in most cases, the law merely requires hearing of a child, whilst the outcome too often depends solely on the judge’s discretion. The child’s consent is only required in rare occasions.

3.3 The Republic of Austria

In Austria, the CRC was signed on January 26\textsuperscript{th} 1990 and entered into force on September 5\textsuperscript{th} 1992. The most important source of substantive law governing the child’s participation rights

\begin{itemize}
  \item \textsuperscript{33} Ibid, p. 36.
  \item \textsuperscript{34} A man and a woman, who are experts in human sciences (psychiatry, biology, pedagogy, anthropology). See BOSISIO, supra note 26, p. 149.
  \item \textsuperscript{37} \textit{Italy is not a country for children}. [online] cited April 4\textsuperscript{th} 2017. http://www.liberties.eu/en/news/italy-no-country-for-children
  \item \textsuperscript{38} SAVE THE CHILDREN. \textit{Ending educational and child poverty in Europe}. [online]. Cited April 4\textsuperscript{th} 2017. https://www.savethechildren.nl/sci-nl/media/Save-the-children/PDF/ending_educational_and_child_poverty_in_europe_02-12-2016.pdf.
\end{itemize}
is the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, hereinafter as “ABGB). The procedural provisions related to the child’s right to be heard are contained in the Non-Contentious Proceedings Act (Außerstreitgesetz, hereinafter as “AußStrG”). The 7th segment (§ 104 to 111a) of the AußStrG is dedicated to custody proceedings as well as to contact rights. This section also codifies the terms concerning the involvement of a child in a proceeding.

According to Section 105 para. 1 AußStrG a court is generally obliged to hear children in civil proceedings unless the child lacks the necessary capacity to understand the issue and to express his/her opinion, as in the case of a very small child. The Supreme Court ruled that the denial of the hearing of the 5-year-old child was appropriate because a serious statement was not to be expected in such case. The capacity of a child to understand the situation and to form his/her opinion must always be determined based on each individual case, e.g. through expert assessment. In doubtful cases, it is presumed that children over the age of 14 have the capacity to understand situations and form their own opinions.

The purpose of hearing a child is to improve the judge’s level of information and to extend his point of view. The hearing shall not only guarantee the child’s right to be heard but also to give the opportunity to include the child’s perspective, even if the child’s wish is not legally binding for the court’s decision. Furthermore, the purpose of the hearing is informing the minor about the actual stage of proceeding and evaluating its true unaffected wish. The wish must be taken into account depending on the age and the maturity of the child regarding his or her best interest. Primarily, the judgment should be in harmony with the child’s wish.

Generally, the child is heard directly by a judge (the advantage of this hearing mentioned above). However, minors under 10 years of age do not have to be heard exclusively by the judge. Austrian Family courts have a number of experts with whom they cooperate, so the child may also be heard by the youth welfare authority, by representatives of the juvenile court assistance office or by another appropriate means, such as legal experts, especially in cases when: the child has not yet reached the age of 10, the child’s development or health condition requires so, or when it is not expected that the child will otherwise express his/her...

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39 Außerstreitverfahren is a term which can hardly be translated into the English language. “Non-contentious proceedings act” could be an appropriate translation for this provision.
40 OGH (Supreme Court) 22. 4. 2013, 6 Ob 75/13t, EFSlg 140.589; iFamZ 2013/120 (Fucik).
41 Section 146c para.1 ABGB.
sincere and unaffected opinion.\textsuperscript{43} These experts are frequently asked to assist by the court in the hearing or they are asked to do their own hearings with children even older than 10 years. Whereas the hearing of a child younger than 14 years is another means of “evidence”, children older than 14 years of age are not only to be heard personally in visitation rights and custody cases. They also have proper rights as a party in these proceedings, so they may submit own applications, they are forwarded the applications and procedural documents of the other parties, they may offer evidence and they may file an appeal. Minors older than 14 years who intend to file an appeal to the Supreme Court are entitled to legal aid (lawyer) regardless of their financial situation.\textsuperscript{44}

According to Section 20 AußenStrG the minor can also be heard outside the oral proceeding if the child’s best interest requires that. Parties as well as their legal representatives may be excluded from attending the hearing if the child’s well-being would be endangered or their attendance would influence the outcome. If a personal hearing of a child (especially of a child older than 10 years) is denied by the court, the judge has to expose his or her reasons for doing so. If those reasons are not exposed or if the court of appeal believes the given reasons not to be substantial, it is seen as a procedural error, which can be contested. If the hearing of the child was denied without an appropriate reason the judgment has to be withdrawn.\textsuperscript{45}

Also, the hearing of a minor younger than 10 years old should be dealt with carefully. The hearing of a child is what makes the child become a subject of the proceedings instead of being a mere object to decision.

3.4 The United Kingdom

The United Kingdom of Great Britain and Northern Ireland is a party to CRC since 1990 and the ratification process was finished in 1991. The UK has not signed the ECECR and has specific position within EU law (similarly to Denmark). Therefore, in foreseen future no


\textsuperscript{44} Section 104 para. 3 AußenStrG.

changes in legislation are anticipated in connection with Brexit. Participation rights are enacted particularly in Children Act (1989) and in Family Proceedings Rules (1991). Outside the context of court proceedings the child has no right to be heard. During court proceedings concerning parental responsibility, pursuant to Sec. 1(3)(a) of the Children Act 1989, it is mandatory for the court to have regard to the ascertainable wishes and feelings of a child concerned (considered in the light of his age and understanding). A child’s opinion is most commonly provided through an expert report prepared by Children and Family Court Advisory and Support Service (hereinafter as “CAFCASS”) according to Sec. 7 of the Children Act 1989. The CAFCASS officer obtains a complex report containing interviews with parents and the child, and also “welfare report” on overall conditions of the child’s life, his family and other information necessary for the proceedings. In other words, the child’s opinion will be presented to the court through a third person, whose responsibility is to put forward a position that he or she believes to be in the best interest of the child. This position, of course, does not have to conform to the child’s opinion and might result in large degree of subjectivity. The Officer does not represent the child but merely reports on the circumstances. According to the Children Act 1989, the officer of CAFCASS has an obligation to explain the report to the child in a way that is appropriate to his/her age and degree of maturity.

With regards to Family Proceedings Act 1991, section 9.5., the court may appoint the Official Solicitor or some other proper person to act as a guardian ad litem of the child. Such guardian will act as an equal party to the proceedings. It should be noted that such situation is very rare and occurs only in exceptional cases. In 2005 – 2006 about 1 000 separate representations of children were appointed, but over 26 000 reports by CAFCASS were

46 According to the fact, that each geographical part of UK has it’s own legislation with specific differences, this paper will be focused solely on England.
48 www.cafcass.gov.
49 Or by a social worker on behalf of the local authority.
51 LOWE, supra note 47.
52 Court may appoint a guardian ad litem on it’s own motion, on the application of a party to the proceedings or proposed guardian ad litem.
54 BARONESS HALE, supra note 50, p. 120.
submitted. In other words, a child is not commonly a party to the proceedings and is not legally represented. He or she may initiate court proceedings only via third person or designated guardian. However, in any family proceedings where it appears to the court that the child should be separately represented, the child can be made a party to the proceedings. In such case the court will normally refer the matter to CAFCASS Legal.

In majority of cases, the court has the evidence of the child’s view only in the transformed way of CAFCASS welfare report and from his or her parents’ or other people’s accounts. Although a judge has an option of personal hearing of a child, this practice is quite rare and judges are discouraged from it. Even the case law (while affirming the judge’s discretion to meet the child) emphasized that it should be exercised with caution. The ruling court pointed out that, if a judge wants to see a child personally, it must be for a good reason in exceptional cases and it should not be a matter of routine.

Despite the fact that child abduction cases are a specific kind of family law proceedings, the following summary submitted to INCADAT database clearly represents the nature of the participation rights of a child during proceedings in England. Thirteen year old girl was heard during child abduction proceedings and the case was remitted to a different judge of the Family Division of the High Court for re-hearing by the Court of Appeal (Civil Division).

As mentioned before, there are three ways of providing a child an opportunity to be heard: report by a CAFCASS officer (or other professional), personal interview with the judge or a child being afforded full party status with legal representation. In most cases a child’s interview with a specialist CAFCASS officer will suffice. The Appellate Court made several points towards a personal meeting between a judge and a child: i) the judge’s role should be largely that of a passive recipient of information the child wishes to transmit. “ii) The purpose of the meeting is not to obtain evidence and the judge should not, therefore, probe or seek to

56 Re A (Contact: Separate Representation) [2001] 1 FLR 715.
57 LOWE, supra note 47.
59 It is based on the judge’s discretion. Case M (A minor) (Justice’s discretion), 1993, 2 FLR 706. (Booth J)
60 FERNANDO, supra note 58, p. 49.
62 www.incadat.com
test whatever it is that the child wishes to say. The meeting is primarily for the benefit of the child. The task of gathering evidence is for the specialist CAFCASS officers. iii) Where a meeting occurs prior to the judge deciding upon the central issues of the case, it should be for the dual purposes of allowing the judge to hear what the young person may wish to volunteer and for the young person to hear the judge explain the nature of the court process.”

The relevance of the child’s opinion to the court decision was described in Re P (minors) (wardship: care and control). “How far the wishes of children should be a determinative factor in their future placement must of course vary on the particular facts of each case. Those views must be considered and may, but not necessarily must, carry more weight as the children grow older.”

In several recent years, presented approach (opinion of a child primarily mediated through a third person, the role of a child during the proceedings is more of an passive object) is being eroded under movement of non-governmental organizations and also activities and guidelines prepared by governmental bodies, e.g. The Family Justice Council’s Voice of the Child Committee, Save the Children England, Children’s Rights Alliance for England. Recommendations prepared by these organizations highlight following points: 1/ the active role and involvement of a child during decision-making process, not only during court proceedings, but also in family life, 2/ right to be informed, get an understanding of a proceedings, opportunity to talk to the judge personally, if the child wishes to, 3/ obtaining a child’s opinion directly, reducing number of expert reports, 4/ effectiveness of family dispute solving process (mediations, interdisciplinary cooperation, swiftness of court proceedings).

4. COMPARISON

In previous parts, the particular legislation of four different countries was analyzed and we pointed out their specific approach to the participation rights of a child. Several important issues arose and would be further discussed.

The first problem occurs when assessing the intellectual maturity of a child. In all compared countries, the courts are generally obliged to hear children and the intellectual maturity is considered in each case individually by the judge. A different approach comes into view when determining the presumed age of intellectual maturity. In Austria, the limit is set to 14 years

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64 Ibid.
of age, whereas in the Czech Republic and Italy\textsuperscript{66} it is 12. However, in all these countries it is possible to hear younger children if the courts conclude that they have reached sufficient intellectual maturity. England has no specific age limit and the possibility of direct hearing of a child is solely on the judge’s discretion.

The judge must first deal with the question of whether to proceed to hear the child and should also carefully consider all the consequences when deciding not to do so (of not hearing the child). In Austria, the court has to thoroughly justify all the reasons for refusing to hear a child. If the reasons are not justified properly, it is a procedural error which may be contested and lead to the withdrawal of the decision. On the contrary, the Czech court is not obliged to justify not hearing a child and it is similar in the remaining states.\textsuperscript{67}

Another issue is determining who should perform the hearing of a child and in what form this should be done. In Austria, the hearing is generally performed by judges themselves with the exception of children under 10 years old when the judge is assisted by an expert. The presence of an expert is also required whenever there is a risk that without expert’s participation it would not be possible to get unaffected child’s opinion. In the Czech Republic and Italy, the hearing is also led by a judge, but the judge has the option to appoint an expert. In the Czech Republic, the hearing may also be performed by a social worker and this option is actually most common. In England, children are heard by CAFCASS (social services) who also hear the parents and prepare a welfare report. The hearing may be done in private by judge as well, but it is rather occasional. As regards the form of the hearing, the Austrian legislation enables, in case of possible threats to child’s development, that the hearing may be conducted outside the courtroom. In the Czech Republic, the unwritten rule is that younger (smaller) children are heard in private, children friendly room. Older children can be heard directly in the courtroom, without the presence of parents. In Italy, there are special interview rooms with one-way mirrors created for this purpose so the judge may observe questioning without actually being confronted with the child.

Another contentious issue is on the level of importance of the child’s opinion to a court decision or under what circumstances the court may decide contrary to the opinion of the child. There is no doubt that the final conclusion of the proceedings depends on the assessment of an independent court. However, the access to expressing a child’s opinion

\textsuperscript{66} in some matters, see above.

\textsuperscript{67} The situation of proposed hearing of a child by any party of the proceedings is not discussed in this paper.
should not result in a situation where the child's opinion is disregarded or replaced by indirect views of others. The right to be heard should not only represent the possibility of a child to express an opinion, but it should be interpreted more broadly so that the child’s rights are not being decided without his/her participation. In general, there is an equation - the older the child, the greater the relevance is given to his or her opinion. Courts in all countries are not generally bound by the wishes of a child, but they should always assess the child's best interest.

While hearing a child younger than 14 years is regarded rather as a means of evidence in Austria, from the age of 14 the child has proper rights to become a party to the proceedings. In the Czech Republic, the child is always a party. England takes a completely different approach; a child is not a party to the proceedings. In Italy, a child is a party to the proceedings but due to his/her incapacity to fully participate, his/her position is anomalous and is always represented by third independent person.

5. CONCLUSION AND PROPOSED SOLUTIONS

The issue of children's rights to be heard is both internationally and nationally associated with a number of interpretive and application problems. Granting the child a status of an active subject, who is not just a bearer of rights but who can actively exercise these rights, requires from the individual states to adjust their legal systems so that this concept would not remain merely theoretical, but the child is truly given an opportunity to actually realize his or her rights. This study aims not only to find similarities in legal regulations of the children’s right to be heard and their participation rights in the above mentioned states, but also to highlight the differences and their influence on judicial decisions. The basic thesis, which results from the sources of law at the international level, was that the child has a right to be heard in all proceedings that have an impact on his/her life. Such right includes the right to obtain all the relevant information about the proceedings in a way that is appropriate to the child’s age and degree of maturity as well as to be informed about the possible consequences of judicial decisions. Furthermore, the child has a right to express his/her opinion which should be properly considered by court.

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68 Exceptions are e. g. compulsory consent of a child of specific age (12/14/16) with his/her adoption.
69 With specific and rarely occurring exceptions.
Every fundamental right entails not only an entitlement for a subjective protection but also an obligation for other parties as well as a question of how the right is to be used, protected, asserted and defended from interference. EU countries have pledged to allow children to express their views freely in all concerning matters as well as to pay due attention to children’s opinion. However, these rights are always subject to the maturity of each child, not only physical but also psychological and moral, as well as the ability to articulate his/her view. The criteria for assessing the degree of a child's development with regard to its active participation in court proceedings has, however, been left to individual national laws. This has, as a result, created some differences between the EU countries’ approach to the children’s right to be heard. These application and interpretation differences, no matter how subtle they are, may eventually cause a major problem because they lead to situations where a similar case will be decided quite differently in different member states. Consequently, children in the EU may be, in certain circumstances, discriminated and may not always get the opportunity to fully exercise their rights.

Based on our research, it seems that a child is often still regarded more as an object for a decision than as a subject involved in a decision-making process. Firstly, to erase this obstacle, a child should be always the equal party to the proceedings. It is natural, that with regards to the age and maturity of a child, he/she would not be able to act him/herself, therefore the child should be always represented by neutral person, which might be e.g. social services or attorney.

The access to the realization of the principle of participation should be mainly individual, each case should be carefully evaluated. The basic starting point is that the right of a child to participate in proceedings must be considered as a right, not as an obligation. If a child expresses an initiative to express his/her opinion, the judge should not refuse to listen. Hearing of a child should be a rule. A judge shall always consider hearing of a child and put forward reasons why he refused to hear the child. Differences arising from a different age limit for hearing a child may be removed not only by the unification of the age limit in all EU countries, but especially by emphasizing individuality in assessing the intellectual maturity of the child, regardless of age. It is also absolutely essential, that the court properly justifies its decision, especially when denying the hearing of a child or making a decision contrary to the child’s opinion.
The hearing conducted directly by a judge has an advantage of the judge directly perceiving the wishes of the child, but on the other hand, courts are faced with a shortage of specially trained judges who would be competent to hear the child properly. The establishment of specialized and trained judges or interdisciplinary cooperative body (judge + psychologist team) for hearing children presents a great opportunity which would minimalize the risk of distortion of information due to incorrect mediation or reproduction.

Essential is as well the right to consultation, the right to adequate legal representation and the right to obtain information, which is a prerequisite for meaningful child participation in the proceedings. It is important that before a child is given the opportunity to comment on the present case, all the relevant information will have been revealed in a depth and form appropriate to his or her age and level of maturity and get an explanation of the consequences of expressing his or her opinion. A person, who provides the information and consultation to the child, should have sufficient qualifications in psychology or education and should be impartial, so that the danger of emotional or psychological harm is as low as possible.

Well informed children gain greater trust and confidence in themselves and the judicial system. They then feel more secure and talk more freely, which means their statements are more likely to be taken into account and their participation in proceedings may be more effective.

Our main goal was to propose solution which would fulfill the highest imperative of Art. 3 CRC, that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
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