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**Brussels II-A recast: the suppression of the *exequatur* and the
hearing of the child**

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I. Background

A. The Area of Freedom, Safety and Justice

The Amsterdam Treaty has established as a major goal for the European Union the creation of an area of freedom, safety and justice (Art. 67(1) TFUE), as a way to allow the free movement of people – a goal that was more recently reiterated in the Treaty of Lisbon. This has granted the EU legitimacy to expand and enter new domains, typically reserved for national legislation. Ever since, we have watched a considerable evolution of European law in the fields of private international law, international procedural law and international family law.

One of the means through which the area of freedom, safety and justice is achieved is judicial cooperation in civil matters. As a key element of cooperation, in 1999, the European Council of Tampere approved the principle of mutual recognition of judgments, based upon the principle of mutual trust. In the Presidency Conclusions, one can read that "Enhanced mutual recognition of judicial decisions and judgments and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights. The European Council therefore endorses the principle of mutual recognition which, in its view, should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union. The principle should apply both to judgments and to other decisions of judicial authorities."⁽¹⁾The path towards the abolishment of *exequatur* was set.

B. From Brussels II to Brussels II-A

With more people moving freely across Europe, families with spouses of different nationalities became a frequent reality. To ensure their rights, the suppression of physical borders was not enough. Delicate problems arise especially when the project of a common life comes to an end. With family law varying significantly from one Member State (hereafter MS) to the other, European law had to move progressively into what had traditionally been a national domain. With MS resisting the harmonization of laws in such sensitive matters, common rules for determining jurisdiction and of procedural nature had nonetheless to be adopted.

In this context, Brussels II was approved, entering into force in 2001. It was intended to regulate domains that were excluded from the Brussels Convention and Brussels I. It contained important provisions on both jurisdiction and recognition and execution of judgments in matters related to divorce and parental responsibilities, but its scope was limited in the latter². As early as

¹See, <https://publications.europa.eu/>(last date of access: 04-18-2019).

² It only applied to the common children of the couple, where the child was a habitual resident of a MS and the dispute arose in the context of proceedings of divorce, legal separation or marriage annulment. It left out children of unmarried couples, children of one of the spouses and children of couples who had sought divorce at a time not coinciding with the

2003 it was recasted, being repelled and replaced by its current version, Brussels II-A, which has been in force since 1 March 2005.

Brussels II-A is more extensive and bolder than its predecessor, its main achievement being perhaps the abolishment of *exequatur* for two sets of decisions regarding parental responsibilities: those concerning access rights (also contact orders) and those determining the return of the child, in cases of parental abduction. Concerning this latter, the Regulation created an interesting method, seeking to strengthen the return mechanism set forth in the 1980 Hague Convention making the return of the child more likely. It put in place what is known as the “overriding mechanism”, based on the primacy of a judgment deciding the return of the child, adopted in the MS of origin (the State of habitual residence), over a non-return order based on Art. 13 of the 1980 Hague Convention given by the court of the MS to which the child was illegally taken or where is being kept.

The abolishment of *exequatur* means that foreign judgments are essentially equivalent to domestic rulings, only a very limited number of exceptions to recognition and enforcement being possible. The absence of intermediate proceedings requires an advanced degree of integration and the trust that fundamental rights are equally observed throughout the European Union. It was a bold ambition, one that Brussels II was pioneer in accomplishing - even if, up until now, only partially. Shortly after this Regulation others followed⁽³⁾. As noted in the “explanatory memorandum” for the proposal of a recast of Brussels II-A, *exequatur* often represents a delay in proceedings, which varies according to the MS, but reaching up to several months (or more, in case an appeal is lodged), as well as it represents additional costs for the parties involved.

C. Safeguards: the public policy exception and the best interests of the child

The desired free circulation of judgments should not harm the protection of fundamental rights – a natural concern for the MS. As long as there are differences in the legislation of each country, additional guarantees will be understood as necessary.

In Brussels II-A, few reasons can be invoked against the recognition or enforcement of foreign decisions. One of such reasons is not new to international private law and consists of the exception of public policy (*ordre public*). This clause intends to assure that the core values of nations, such as the right to a fair trial or – arguably – the hearing of the child, are protected.

judgment on parental responsibility. This system created glaring inequality between children and within the families themselves, which was hardly acceptable, and the necessity to rethink it became one of the motives why this first version of the Regulation did not last long.

³ In field of civil law see Regulation (EC) no. 805/2004 of European Parliament and of the Council of 21 April 2004; Regulation (EC) no. 1896/2006 of the European Parliament and of the Council of 12 December 2006; Regulation (EC) no. 861/2007 of the European Parliament and of the Council of 11 July 2007. For the abolishment of *exequatur* in family law see Council Regulation (EC) no. 4/2009 of 18 December 2008.

In private international law, a difference is established between internal or domestic public policy and international public policy. The Regulation clearly states, in Art. 23, grounds of non-recognition for judgments relating to parental responsibility: “A judgment relating to parental responsibility shall not be recognized: (a) if such recognition is manifestly contrary to the public policy of the MS in which recognition is sought taking into account the best interests of the child”. MS thus have a saying but limited to decisions that are not only contrary to public policy but *manifestly* contrary. This clause is only to be used in exceptional cases. Though the Regulation refers to the public policy of the MS, the ECJ is the entity that ultimately sets its limits. We cannot stop but notice that, and more so after the introduction of the CFR, especially Art. 52(3)⁽⁴⁾. In the specific area of international family law, one cannot interpret the public policy exception disconnected from the best interests of the child, an idea that indeed permeates the Regulation and without which it cannot be successfully interpreted or applied.

II. The case-law of Brussels II-A

The intention behind the selection of this particular case law is to question the limits to the control of “foreign decisions” by the requested MS, under this Regulation. All of the following decisions were made in the context of child abduction, a sensitive topic by nature, and one where courts from different MS are especially called to cooperate with one another.

A. Raban - the best interests of the child (ECrthr app. no. 25437/08)

We find this decision relevant insofar as those who are expected to apply the Regulation need to be aware of the case law of the ECrtHR, as well as the case law of the ECJ. The former has a different scope, centered around the respect for human rights in light of the ECHR, but because of that often provides contributions that serve the interpreters of Brussels II-A.

In *Raban v. Romania*, the ECrtHR had the opportunity, in the context of a claim of an alleged violation of Art. 8 of the Convention, following a decision of non-return of a child who had been taken from Israel to Romania by her mother, to ascertain which interests are at stake in such cases, and very importantly, what should be considered as the child’s interest in particular. The Court identified three separate interests that must be balanced: the child’s, the parents’ and the interest of

⁴ As to the prediction that the ECHR, after the Opinion 2/13 one of the main motives to refuse the binding is risk of jeopardizing the mechanism of mutual recognition. For some authors this means that the ECJ “mutual recognition supersedes the protection of fundamental rights” (HAZELHORST, 2017,p.129). Since the case *Bosphorus* by the ECrtHR, the guaranties of human rights was reinforced by binding force of the CFR. Art. 52 (3) of the Charter aligns the protection of fundamental rights of the European law system held the ECHR and it indirectly supports the application of the presumption of equivalent protection (RAVASI, 2017 p. 102).

public order. Always acknowledging and underlining that the interest of the child, if dissident, must be prevalent.

Even though one cannot say what is best for every child given that families and circumstances differ, it is usually in the child's best interest to maintain ties with his or her family, as well as to be guaranteed a safe environment that allows him or her to develop free of constraints. This affirmation allows the Court to state that the child's return under the 1980 Hague Convention cannot operate automatically, as it seems to follow from the rules of the Hague Convention and even more so of Brussels II. On the contrary, the courts must understand which solution is adequate to the case *in concreto*. In order to do so, fair opportunity to explain and argue in favour of their position must be given to all parties concerned, as well as a careful examination of the family situation and other relevant factors must be conducted⁽⁵⁾.

B. Rinau (ECJ, C-195/08 PPU)

In *Rinau*, the court of the MS where the child was being illegally retained by her mother, Lithuania, handed an initial judgment in which it failed to recognize that the father had the right to take his daughter back to Germany, where they used to live, according to the Hague Convention. The decision was not transmitted through the appropriate channels (via the Central Authorities), nonetheless, the German court was made aware of it by the applicant himself. Later, the Lithuanian courts decided to overturn the decision and ordered the return of the child. Meanwhile, the German court certified a decision where the father is said to have custody of the child and that, accordingly, she must return to Germany. Confronted by the mother with a request not to recognize this latter judgment, the Lithuanian court stalled the proceedings. It then asked the ECJ if the German court could have made a subsequent decision on the return of the child even though the Lithuanian court had also decided in favor of the return of the child, and whether it was possible to put in crisis the recognition of such a decision, as the mother intended.

The Regulation made the return of children to their country of origin a priority, creating a mechanism that goes further than the Hague Convention, by giving more power to the court of the MS of origin. Once a non-return decision is taken by a court of the MS where the child was illegally retained, the court of the MS of origin can override it by pronouncing a decision of return. The latter prevails. For the MS of origin to make such a decision it only needs to be aware that a non-return decision has been made in the other state – this decision does not need to be final, and it is not relevant that that jurisdiction itself later changed the ruling. The German court thus acted in compliance with the Regulation and the Hague Convention. No opposition to recognition is

⁵ http://www.europarl.europa.eu/summits/tam_en.htm

allowed, for decisions on the return of children are not dependent on an *exequatur*. Only if the court of the MS of origin itself provided a decision incompatible with its former one, would the court in the MS to where the child was taken have grounds, under Art. 47(2), second paragraph, to refuse recognition.

C. Povse – change of circumstances (ECJ, C-211/10 PPU and ECrtHR app. n.º 3890/11)

In this case, a point was made by the ECJ in the sense that the enforcement of decisions may not even be denied when new circumstances arise. If the new circumstances are such that the interest of the child supports a different decision, the new facts can only be presented to the competent court in the MS of origin. Interestingly, the mother, who lost custody subsequent to an Art. 11(8) decision that ordered the return of her daughter to the father, in Italy, sued Austria in the ECrtHR for complying with the Regulation and therefore dismissing her claim. In this context, the Court had to recognize Austria had no margin to act differently when confronted with the overriding decision of the court of the MS of origin⁽⁶⁾.

D. Zarraga and the hearing of the child (ECJ C-491/10 PPU)

The Zarraga case reaffirms what has been said in Povse, and goes even further. In this case, the ECJ not only confirms that the court of the MS to which the child was illegally taken or is being retained cannot deny recognition and enforcement to the decision of the court of the MS of origin – provided it has been certified – rather it goes as far as to say that even if the court where enforcement is sought is aware that the very requirements the requesting court should have followed to certify the judgment were not observed in the first place, it cannot refuse recognition.

In the Zarraga case, it was argued that the decision had been taken in violation of a fundamental right, one that the Regulation also protects explicitly – the hearing of the child. Yet the ECJ was adamant in saying that there can be no control of the circumstances in which a certificate is issued by another court. That is the case even when the information on that certificate is deemed incorrect, and may jeopardize a fundamental right. The control must be made before the certificate is issued, by the first court.

In Zarraga, the mother and the child were not heard. Interestingly, at the time of the ECJ's decision, the text of Brussels II-A seemed to better support the opposite understanding, given that the absence of an opportunity for the child to be heard was an explicit ground for the refusal of recognition – which is no longer the case in the proposal for a regulation recast. Of course, one of the arguments that can be made in defense of this ruling is that opportunity was given for the

⁶ For a similar reasoning, see ECrtHR *Šneerson and Kampanella v. Italy*, of 12 of July 2011.

mother and child to be heard. But was it? The mother expressed her concern in going back to Spain and asked for videoconference to be used, which was denied, but could have solved the problem in a satisfactory manner. We believe that such technology is not being used sufficiently in European courts, partially because there is some distrust on the part of judges. Even though immediation is better assured when the judge and the parties are in the same room, technology should be used when one of the parties is abroad and cannot reasonably be expected to appear in court (see proposed recital 24). The alternative, that a child who might want to speak, ends up not doing so, is far worse. In any case, the violation of a fundamental right should constitute an exception to the immediate recognition and enforcement of any decision. But with the proposal for a recast of Brussels II-A, the Court is not expected to change its case law. On the contrary, the opportunity for the child to give his opinion was struck out of the list of reasons that can be invoked to refuse recognition (current Art. 23, Art. 40 of the proposal). The right of the child to express his or her opinion is now an autonomous principle (Art. 20) reinforcing the idea that it is for the court of the MS of origin to control its observance and, on the other hand, salutarily, making the hearing of the child an important moment of any procedure under Brussels II-A, and not only those concerning the return of children to their country of origin.

III. Why the need for a reform?

Art. 65 of the Brussels II-A envisions that, at the latest, in January 1st, 2012 and, thereafter, every five years, the Commission will present the European Parliament, the Council and the EESC, after gathering information from MS, a report on the implementation of Brussels II-A and amendment's proposals. It was published by April 2014⁽⁷⁾ and identified some problems that need tackling, either on matters of jurisdiction, recognition and enforceability, cooperation between Central Authorities and cross-border parental child abduction.

Pertaining to parental responsibility it was found to carry on some misunderstandings relating to Art. 12's consensual prorogation of jurisdiction and Art. 15's transfer of jurisdiction⁸. On matters of recognition and enforceability, the observance of *exequatur* for judgements beyond certified returns and access rights enhances the procedure's complexity, length and cost and enables antinomic rulings. Apropos of recognition, it pinpoints the leading disagreements between MS as the use of the "public policy" clause; the understanding of the child's opportunity to be heard and the comprehension of enforcement. Anent cooperation between Central Authorities, difficulties

⁷ COM (2014) 225 final: available at <https://eur-lex.europa.eu/> (last date of access: 04-18-2019).

⁸ It notes that the ECJ has given response to some questions, such as the impossibility to use provisional measures by the State where a child was abducted when a prior provisional measure was already in force (in *Detiček*, C-403/09 and *Purrucker*, C-296/10), the inapplicability of the *lis pendens* rule whenever provisional measures are taken. The absence of rules on residual jurisdiction, on *forum necessitatis* and on the demur jurisdiction in favor of a third state court are seen as problematic.

bear on the collection and exchange of information on the child’s situation. Lastly, with regard to cross-border parental abduction the greatest predicament is the discrepancy amidst MS on the meaning of complying with procedural safeguards in order to issue a certification, primarily on the hearing of the child.

IV. The proposal

A. The main modifications

After issuing Report COM (2014) 225, the Commission assigned an external consultation to gather data related to Brussels II-A⁽⁹⁾ which confirmed its broad conclusions. Subsequently it gave rise to the Commission’s proposal to recast Brussels II-A⁽¹⁰⁾, latterly amended by the European Parliament⁽¹¹⁾ and that is yet to be adopted.

The recast proposal bypasses the matrimonial issues and focuses on parental responsibilities singling out six primary weaknesses: child return procedure; placement of children in another MS; the *exequatur* procedure; the hearing of the child; enforcement of decisions and cooperation between Central Authorities. We will chiefly consider the subject of the hearing of the child, linked to enforcement of decisions and *exequatur*’s abolition.

Apart from terminological adjustments⁽¹²⁾, the recast proposal enshrines a definition of child — as any person below eighteen years of age — as in Art. 2 of the 1996 Hague Convention. An important change concerns the reversal of the *perpetuatio fori* principle — which establishes jurisdiction based on the child’s habitual residence when court was first seized (current Art. 8) — in all matters except access rights (proposed Art. 7 and 8), since, whenever a child is lawfully relocated, jurisdiction will be assigned to a court within the new habitual residence country, unless otherwise is agreed upon. Based on proposed recital 15, this applies even to pending proceedings if parties don’t agree otherwise. With regard to the hearing of the child, the proposal envisions a new Art. 20, with the epigraph “right of the child to express his or her views”, which summons, in articulation with national procedural rules, Art. 24(1) of the CFR, Art. 12 of UNCRC and the Council of Europe Recommendation CM/Rec(2012)2 to impose on MS’s authorities the duty to, when dealing with matters of parental responsibility, ensuring that a child capable of forming his or her views on the matter is given a genuine and effective opportunity to express him or herself amid

⁹ Study on the assessment of Regulation (EC) No. 2201/2003 and the policy options for its amendment, final report, available at: <https://publications.europa.eu/> (last date of access: 04-18-2019).

¹⁰ COM(2016) 411 final at <https://eur-lex.europa.eu/> (last date of access: 04-18-2019).

¹¹ http://www.europarl.europa.eu/doceo/document/A-8-2017-0388_EN.pdf (last date of access: 04-18-2019).

¹² In order to encompass different administrative authorities who hold jurisdiction in some MS, the term “court” was replaced by authority, harmoniously with current and proposed Art. 2(2). The same line of thought led to shifting from “judgement” to “decision”.

proceedings. Also, with respect to return proceedings, the hearing of the child when applying Art. 12 and 13 of the 1980 Hague Convention, which was previously in Art. 11(2), is now enshrined autonomously in proposed Art. 24 with a direct cross-reference to the new Art. 20 — giving it a different angle, instead of being merely a duty for the MS, it is presented as a child’s right.

Studies that preceded the Commission’s proposal shed light onto the scarcity of child’s hearings, especially when dealing with return proceedings of Art. 11, and have concluded that children are heard just in *circa* 20% of the time, and although their age and lack of maturity are the only reasons enshrined in Art. 11(2) those were not the motives identified by the interviewed judges, who conveyed issues like national procedural rules; the existence of a minimum age for exercising the right to be heard; shortage of technical and human resources, etc⁽¹³⁾.

Art. 20 brings the novelty of being an article of general usance, since until now the right of the child to be heard was only unambiguously mentioned with regard to return proceedings (Art. 11(2) and 42(2a)); as a reason for non-recognition of judgements (Art. 23(b)) and as a requirement for issuing a certificate regarding access rights (Art. 41(2c)).

The hearing of the child can, according to the new Art. 20, be intermediated either by a judge or by a specially trained expert and must take place in an adequate manner and setting, in an unconstrained environment, suitable language and with the child’s best interest at heart. There should be no parties present (*e.g.*, parents) nor legal representatives, although a recording will be made available to all. Competent authorities must, if the child is heard, give his or her testimony due weight, considering his or her age and maturity and, in either case, document the variables that contributed to that decision. It was the Commission’s intention to commit authorities with two different decisions: firstly, to gauge if the child has enough age or maturity to form a personal view, and secondly to assess how to weight the testimony given by a child — which could warrant two different justifications by the competent judge, although Art. 20 just foresees the former⁽¹⁴⁾.

Brussels II-A gave stage to the first abolition of *exequatur* in EU law, although limited, in what concerns to parental responsibilities, to access rights and child’s return, which was followed by several other Regulations, such as Regulation (EC) no. 4/2009 and Brussels I-A.

The Commission’s proposal intends to expand the abolition to all decisions on parental responsibilities, stating in Art. 30(1) that “A decision on matters of parental responsibility in respect of a child given in a MS which is enforceable in that MS shall be enforceable in the other MS without any declaration of enforceability being required”. Present-day Art. 28(1), in contrast, clearly requires an application for enforcement by the interested party and, subsequently, a declaration of enforceability by the

¹³ BEAUMONT/WALKER/HOLLIDAY, 2016.

¹⁴ *Idem*.

required MS's court, professing that "A judgment on the exercise of parental responsibility in respect of a child given in a MS which is enforceable in that MS and has been served shall be enforced in another MS when, on the application of any interested party, it has been declared enforceable there".

Under the contemplated solution enforceability depends merely on: (i) Concurrent enforceability on the state of origin (emphasis on pending appeal's effects, since a staying appeal won't give ground to enforceability)⁽¹⁵⁾ (new Art. 28(1)); (ii) Submission of the necessary documents, *i.e.*, a copy of the decision capable of granting authenticity and the certificate contemplated in Art. 53 (new Art. 34); (iii) No ground for opposition of enforcement being called upon (Art.s 38 and 40 of the Commission's regulation project).

The blueprint envisages various grounds for opposing enforcement, likewise Regulation Brussel I⁽¹⁶⁾. First, Art. 40(1) refers to Art. 38's grounds for non-recognition: (i) Opposition, considering the best interest of the child, to the public policy of the MS in which recognition is sought (Art. 38(1a)); (ii) Decision given in default of appearance if the person in default wasn't given a proper chance of defense and has not unequivocally accepted the decision (Art. 38(1b)); (iii) By claims that a decision on parental responsibility was reached without a proper opportunity to be heard being given to the holder of such responsibility (Art. 38(1c)); (iv) Irreconcilability with a later decision on parental responsibility by the requested MS (Art. 38(1d)); (v) Irreconcilability with a later decision on parental responsibility by another MS or in the non-MS of habitual residence that is befitting for recognition in the requested MS (Art. 38(1e)).

To those, Art. 40 adds that after a decision is given, circumstances can conspicuously change making its enforcement contrary to the public policy of the MS of enforcement by reason of: (i) The child with sufficient age and maturity objecting the decision's enforcement and therefore making it incompatible with his or her's best interest; (ii) The change being so palpable that enforcement would be patently contrary to the child's best interest. Different rules still apply to access rights and return decisions, since Art. 40(1)'s second part exempts them from the grounds of non-recognition of Art.s 38(1) sections a; b; and c. It is important to note that the only relevant changes in circumstances are those who could not have been considered by the state of origin's court, *i.e.*, the ones that followed the decision⁽¹⁷⁾.

A significant contrast with the Regulation in force is that the proposal doesn't have a norm like current Art. 23(b), which allows for the non-recognition, and, *ex vi* Art. 31(2), refusal of

¹⁵ Proposed Art. 36(1) envisions the possibility for the requested court to stay enforcement proceedings if enforceability is suspended on the State of origin. Each MS can have different rules, making either stay or continuation of proceedings the norm — *e.g.*, in Germany and in Austria all decisions concerning children will only be enforceable when they become unappealable. See, HONORATI, 2017.

¹⁶ That was a path argued by many authors, *e.g.*, KRUGER/SAMYN, 2016, p. 160.

¹⁷ As it was stated in *Deiček* (C-403/09), para. 47.

enforceability, on the grounds of, beyond cases of urgency, a decision being issued without the child having an opportunity to be heard and that constituting a violation of basic procedural principles of the MS where enforcement is being sought. The same is enshrined with relation to access rights and return of the child, since, respectively, Art.s 41(2c) and 42(2a) make the hearing of the child, when appropriate according to age and maturity, a condition for the issuance of a certificate by the State of origin, which in turn is a condition for its enforceability without the *exequatur* procedure.

The problem with clauses like current Art.s 23(b), 41(2c) and 42(2a) is that they heavily rely on national procedural laws and domestic understanding of the hearing of the child — as it is best exemplified by *Zarraga (vide supra)*.

The new Art. 20, contrary to Art. 23(b), doesn't merely reference national procedural rules, but conversely grasps the hearing of the child by linking it to Art. 24(1) of the CFR, Art. 12 of UNCRC and the Council of Europe Recommendation CM/Rec(2012)2, therefore summoning an understanding beyond national borders, promoting a possibly more uniform and non-national meaning⁽¹⁸⁾. Nevertheless, recital 23 of the proposal, likewise current recital 19, states that Brussels II-A doesn't offer or intends to change national procedural rules concerning the hearing of the child.

There are some legitimate worries that an absence of coordination or minimum procedural standards could lead to an artificial compliance with Art. 20, *i.e.*, a strictly formal acquiescence with the child's right to be heard. According to proposed Art. 53(2), all authorities that issue decisions on matters of parental responsibility must send forth a certificate using Annex II, *ex officio* if at the time it is already presented as a cross-border situation and whenever requested by interested parties, if it becomes cross-border afterwards. Howbeit, *ex vi* Art. 53(4a), a certificate can only be produced not only if all parties have had an opportunity to be heard, but also if such opportunity was given to the child and it can be labelled as a genuine chance, as stated by Art. 53(5) which refers to Art. 20. If the State of origin understands that the child had a genuine opportunity to be heard and issues a certificate, because the *exequatur* procedure was abolished, there is no mechanism to refuse enforcement on the requested State outside the ones in Art. 38 and 40, but that doesn't solve the preexisting problem that conditioned mutual trust between MS: the differing rules and practices *vis-à-vis* the hearing of the child⁽¹⁹⁾, since Art. 23(b) was invoked *circa* 69% of the time so as to refuse enforcement⁽²⁰⁾.

¹⁸ As suggested, *e.g.*, by UBERTAZZI, 2017, p. 589 and KRUGER/SAMYN, 2016, p. 157.

¹⁹ SCOTT, 2015, p. 31.

²⁰ VAZQUEZ, 2017, p. 776.

In order to solve that difficulty, the Commission, in its report⁽²¹⁾, suggested introducing common minimum procedural standards⁽²²⁾, although that was not embraced in the final proposal. Some authors still see an indirect possibility to refuse enforcement by reason of the child not being heard, or for being heard in an inadequate way, in the public policy clause laid out in Art. 38(1a) since it is linked to the child's best interest⁽²³⁾. Nevertheless, the commandant principle is mutual trust and, as it was established in *P v. Q* (C-455/15 PPU), every refusal based on the contrariety to public policy must be interpreted in a restrictive manner⁽²⁴⁾. Adding to that, the legislator explicitly repelled a norm likewise Art. 23(b) and clustered all the safeguards in the issuance and withdrawal of the certificate by the State of origin, evidencing its opposition to that kind of inspection by the enforcement country.

V. Art. 20 as a common minimum standard procedural rule

Even though Art. 20 in respect to the hearing of the child has a procedural nature, it is crucial to the construction of a due process. This article opens the door to the control of the decision alongside with Art. 47 CFR and Art. 6 of the European Convention. Art. 12 of the UNCRC is the fundamental charter on children's rights and sets minimum standards on the consideration of their opinions and views. Also, it embodies the right to be informed, including the possible consequences of compliance with those views, in line with ECEC (Art. 3). Art. 24 of the CFR goes along the same direction⁽²⁵⁾.

The problem in the absence of unified or harmonized procedural rules is how to ensure in a non-discriminatory fashion the right of a child to be heard. The articulation between the reference to "appropriate information" and "age-maturity" of the child is vague and undetermined. The recognition of competence of the MS due to the principle of procedural autonomy compromises the effectiveness of the right of the child. Until now, only Art. 11(2) Brussels II-A specified an obligation of the hearing as a prerequisite to apply Art.s 12 and 13 of the 1980 Hague Convention. Nevertheless, it does not confer an absolute right to be heard. Firstly, the legal standard on age and maturity depends on each MS, and secondly, it implies a burden of justification for not hearing the child. We can say that there is a presumption that the child will be heard unless it appears inappropriate, taken in consideration his or hers maturity and capacity and willingness to give an opinion.

²¹ COM (2014) 225, pp.11 and 14.

²² Also, PINEAU, 2017, p. 152.

²³ E.g., SELLENS, 2017, p. 807.

²⁴ DOMÍNGUEZ, 2017, p. 637.

²⁵ See KOHLER/PINTENS, 2013, p. 1502 and MANSEL/THORN/WAGNER 2015, p. 9.

The general scope granted by the grounds of non-recognition (Art. 23(b)) as well as for the certificate of Art. 41(2) and 42(2) incorporates a fundamental rights system. But, with the exception of Art. 11(2), those provisions are neutral in the sense that they control *ex post* the right of the child.

The reformulation of this system embodied in Art. 20 should confer an autonomous status to the hearing of the child as a true guarantee necessary to ensure the due process inherent to fundamental rights. But this new provision should be entangled with Art. 12 of UNCRC, linked to Art.s 6 and 8 of the ECHR and the above mentioned Art. 3 of the ECECR and Art. 24 of the CFR.

The proposed Art. 20 differentiates the "whether" and the "how" of the hearing. In the first paragraph the focus is on the capacity to form a will and its manifestation. The second paragraph concerns the substance of the expressed opinion of the child. This distinction also takes place in the form-based certificate (see Annex II and Annex III draft). In fact, at least in the present context, the emphasis should be on the *obligation* of the authorities to hear the child. Although this corresponds to a subjective right, according to the meaning and purpose of the regulation, the perspective of the obligatory addressee seems more significant, since this is the only way to ensure the effectiveness of such right⁽²⁶⁾.

When talking about the abolition of the declaration of enforceability, we must address the problem that it represents. The effects of a decision shouldn't be object of restrictions *per se* in terms of its recognition and enforcement, but the common values where the European Union lays down impose the positive obligation of safeguarding the best interest of the child, and for that not every decision is guaranteed to be enforced, especially when changes in the situation of the child may have occurred.

This volatile effect, typical of the protection of children, ensures that every decision, foreign or national, should be able to be scrutinized, even though not generally and *a priori* subject to formal recognition and enforcement. The expression of RAAPE *leap into the dark*⁽²⁷⁾ when it comes to application of foreign law, has even a deeper meaning when it is referred to the effects of a foreign decision. Especially because of the concrete impact that a decision represents for the parties involved, particularly for the child.

This problem becomes more relevant when the mechanism of mutual recognition, as a way to further the internal market, tends to conflict with the guarantees of the rights of a concrete child. The introduction of common minimum procedural standards, in particular regarding the hearing of the child, are the paramount prerequisite for enhancing mutual trust, a condition necessary for the

²⁶ WELLER, 2017. p. 227

²⁷ RAAPE, 1977.p. 199.

abolition of the *exequatur*. In this respect, *mutual trust* must be present or at least taken into consideration when the effects of a decision will need enforcement in another MS.

The proposal of Brussels II-A recast and its Art. 20 keeps the autonomy of the MS in what regards how and when the child should be heard, stating that, when heard, the opinion of the child should be effectively taken into consideration. The new recital states “this Regulation is not intended to set out whether the child should be heard by the judge in person or by a specially trained expert reporting to the court afterwards, or whether the child should be heard in the courtroom or in another place or through other means. In addition, while remaining a right of the child, hearing the child cannot constitute an absolute obligation, but must be assessed taking into account the best interests of the child, for example, in cases involving agreements between the parties.”⁽²⁸⁾ .

Apparently nothing changes. The autonomy of Art. 20 determines a due process obligation for the States that implies an *a posteriori* control in terms of opposing the enforcement of the decision by invoking a public policy clause (the proposed Art. 38(2)), but indirectly it has a *prima facie* effect in rendering mandatory the hearing of the child.

The natural capacity is the key concept that will determine the necessity of the hearing. This will have as a consequence the need to ensure the effectiveness of the right of the child independently, as a prognosis judgement of the enforceability of the decision in other MS. The coordination of systems as proposed by PAOLO PICONE ⁽²⁹⁾ will have a prevalent meaning when the stakes are the effectiveness of a decision needed to be enforced in another MS. This will impose the court to take into consideration the law or laws of other MS in respect to the hearing of the child (with the limits set by recital 23 and the *supra* case-law of ECJ), done mainly in cooperation between States through Art. 34 of 1996 Hague Convention.

The broad meaning of the general clause of Art. 38(2) imposes that the MS deciding on the issue of parental responsibilities has a special obligation to take into consideration the rights of the child as a fundamental effect of its decision. If it is certain that under Art. 267 TFEU, it is to the ECJ to give the ultimate interpretation of European law and provide national courts with precise guidelines for applying it, it should scrupulously respect the "dividing line" between its jurisdiction and the national court's, in order not to undermine the foundations of this instrument of cooperation. This applies vertically in terms of the interplay between primacy and national procedural autonomy, but when it comes to horizontal cooperation with national courts the *effect utile* must be determined in respect with the common core of fundamental rights that binds the European Union and all MS.

²⁸ Proposal for Brussels II-A *recast* - General approach. ST 15401 2018 INI.

²⁹ PICONE, 1986, p. 264 ss.

As KOHLER and PITENS stated in respect to the *Povse* case, the fundamental rights of a child are ensured if there is access to the court of the State of origin in case of change in circumstances, because it is this court that has the obligation of protecting those rights, not only by Art.s 6 and 8 ECHR⁽³⁰⁾, but also through the application of European law in terms of State responsibilities, mainly Art. 24 of the CFR and Art. 3 of the UNCRC. This concern is avowed in the special procedure of suspension of enforcement proceedings and refusal of enforcement (Subsection 2, Art.s 47k ff.). Leaving Art. 47k(4) the safety net of an individual decision to protect a child in a specific case.

The automatic enforceability of the decision — accompanied by the documents indicated in the proposed Art. 33 — puts the burden on the defendant who wants to challenge its effects (Art. 30). Until the proposal of reform, the declaration of enforceability was unnecessary only for the cases of return of a child and rights of access (Art.s 41 and 42 Brussels II-A). With the new version, enforceability is guaranteed, only changing the impulse to oppose such effect and the limitation of grounds to successfully obtain the refusal of reinforcement and consequent recognition (Art.s 47e and 47f).

A. *Ordre public* – Public policy

Human and child rights are consecrated in numerous instruments, even as supranational principles and freedoms sanctioned in European Union law, which cannot be forgotten, given that, in any case, we find undeniable constricting forces of private-international regimes of domestic origin. For that matter, international — *maxime*, the evolving legal cooperation between the United Nations, the International Commission on Civil Status and the Council of Europe — and European instruments — we think in particular in the extent to which human rights protection was also brought to the centre of the legal order of the European Union — ensure the protection of human rights and establish the principles and legal criteria for the conformation of family relationships, ending up by harbouring a set of regulatory requirements that will be mandatory and will meet an inevitable regulatory function in the field of “spatially heterogeneous” private relations.

Indeed, although, in general terms, they do not formulate true conflict rules, what is certain is that they will often provide evaluative requirements that serve as authentic “minimum *standards* of protection” (RAMOS⁽³¹⁾), which may justify the abandonment of the strict *mise en oeuvre* of conflicting solutions and even, at least according to some doctrine, will constitute the emerging horizon of a truly international or transnational public order. This means that the traditional mechanism of public policy, its simple function of national instrument for the eviction of the

³⁰ KOHLER/PINTENS, 2013, p. 1502.

³¹ RAMOS, 2008.

foreign law and decision, is becoming an instrument for the guardianship of supra-national values and understood as a positive legal measure.

In addition, also in relation to EU law, it is feasible to develop a parallel reasoning, especially since it is also possible to refer — similarly to what happens in the case of the instruments relating to human and child rights — to the existence of an European public order or, at any rate, recognizing that the principles and freedoms sanctioned by EU law may immediately set up an autonomous limit to the application of the law deemed competent by the specific rule of conflict of laws and jurisdictions. In addition, there are numerous situations, *a propos* of the various institutes and criteria of private international law, where the functioning of State source solutions on the coordination of legal system, can be deemed incompatible with EU law. The existence of an European *ordre public*, as a result of the development of common standards, will still need the national States for its enforcement, particularly in the context of enforcement procedures, in order to ensure the rights of the defendants as well as in the procedures for recognition and enforcement⁽³²⁾.

The notion of public policy becomes *materialized* by the best interests of the child and works as the chief criterion for the application of the instruments related to transnational situations akin to the legal status of children. The words of LAGARDE in respect to the 1996 Hague Convention — *the best interests of the child, which principle moreover should inspire the application of all the Articles of the Convention* – should also be extended to the Brussels II-A. The best interest has a modelling effect that shapes the public policy clause function and becomes a clause that allows for the incorporation of multilevel regulation from various sources of law. The CRC establishes the basic values and rules that bind the MS directly and through regional cooperation and integration. Children's rights are therefore the paramount criteria in interpreting and applying the law.

Methodologically, the courts are primarily guided by established basic values, like the well being of the child, taking into consideration his or hers opinion. Secondly, in accordance with Art. 24(2) of the CFR, the courts are subject to a *prima facie* scrutiny of decision's effects according to the child's rights. Thirdly, the ECJ expressly emphasized the interdependence between the interpretation of EU secondary law and the Art. 3 of the CRC. The interplay between international, European and national law outlines the framework of what is included into the concept of the best interests of the child, leaving little room for local moral values. Especially when it comes to the recognition of decisions in what should be an area of freedom, security and justice.

³² LOPES, 2018; ORÓ MARTÍNEZ, 2009, p. 221; BASEDOW, 2005, p. 65.

Art. 23 states the core principle of recognition relating to children. The traditional public policy is intertwined with the protection of human rights of the children. This doesn't mean that it is possible to raise obstacles to recognition solely for the noncompliance of rules on jurisdiction. Remedies should be ensured directly by the jurisdiction of the MS of origin and not by indirect control of a decision by another court. The intervention of these courts, when necessary, must be regarded as an "exceptional remedy"⁽³³⁾. Because of this, Art. 23(b) and (d) (b) Brussels II-A stipulates that if the child was not given the opportunity to be heard in violation of fundamental principles of procedure of the requested State (except in a case of urgency); the recognition is manifestly contrary to public policy of the requested State, taking into account his best interests.

The reform underway, even though it changes the formulation of said article, maintains the same grounds for refusal of recognition and consequent non-enforceability. As stated above, the formulation of situations where the hearing is not mandatory (urgency situations or decisions related to patrimonial acts) should have a clear effect directed to the MS of origin, in what regards the terms and requisites to hear a child and to scrutinize how the opinion of the child was taken into consideration when adjudicating.

A. Harmonization of procedural rules

According to the well established case law of the ECJ: "in the absence of Community rules in the field, it is for the domestic legal system of each MS to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)"⁽³⁴⁾.

The procedural autonomy is a result of the need of national authorities to enforce European law and the diversity of legal systems as well as administrative justice systems. "As such, there is what is referred to as the principle of national procedural autonomy, whereby in the absence of Union rules on the subject, the MS have in principle autonomy to organize their respective judicial framework and procedures, with the result that the European Union essentially 'piggybacks' on what is provided for in the national legal systems."⁽³⁵⁾. This autonomy interplays the principle of primacy stated in the case *Costa-Enel* and has been discussed in the

³³ "Although there is an overlap between public policy and breach of a fundamental principle under Art. 23 (b), public policy, being an "exceptional remedy", requires "something more"" (Paul Torremans (2017) p. 1129). The public policy of the MS where recognition is sought cannot be raised as an obstacle to the recognition or enforcement of a judgment given in another MS solely on the ground that the MS of origin failed to comply with the rules on jurisdiction contained in Brussels II-A.

³⁴ See Joined Cases C-222/05 to C-225/05 *van der Weerd et al.*, para 28.

³⁵ LENAERTS et. al, 2014, p. 107.

literature for decades, starting with the case of *Simmenthal*. The main problem lies down to the *effect utile* that the primacy of European law relies. Art. 4(3) TEU places national courts and tribunals under a duty to ensure the “full effectiveness of Union law”. Recognition is an enabling instrument of the internal market and an assurance of European freedoms (*indirect communitarization*) therefore being extended to areas that are not directly integrated in the principle of conferral of powers.

In our case, it is important to dwell on the limits of procedural autonomy.

We should take as an example the experience of criminal cooperation of enhanced mutual trust and cooperation towards the suppression of the *exequatur*⁽³⁶⁾. An *ex ante* intervention between the authorities and the harmonization of procedural laws becomes the path to incorporate the trust needed to ensure the freedom of the decision’s circulation.

Harmonization of procedural and substantive standards becomes necessary as a mean in order to protect the fundamental rights of the child. One of the key ideas is to ensure a non-arbitrary decision or that the rights are not unjustifiably curtailed. For that, it is essential for the court with jurisdiction to take into consideration where the effects of enforceability are intended. A ubiquitous decision should be the premise for determining at least an equivalent protection of the child, and if needed, to consider the rules in respect to hearing of the MS of enforcement. The interplay between procedural and substantive rules are intertwined to the point where the decision must take in consideration its radial or outspread effects.

This allows to circumvent the omission of an uniform set of procedural rules and allows, by means of coordinating procedural and substantive rules, the harmonisation of systems within the European Union.

The question that arises is the need for a common ground of protection of the child’s best interests that shouldn’t be limited by a minimal common denominator, but requires an imperative standard applied beyond what is established by national law. The possibility of reverse effects (cases where internal situations are subject to less guarantees than international situations) should determine the evolution of national law towards a high standard of effectiveness of the rights of the child and not the other way around. Only then, can we talk of instruments that give full faith and credit to a decision that will have impact in another MS.

In any case, the party concerned can still avail itself of this public policy clause, by creating an occasion for this condition to be examined by lodging an appeal against the *exequatur*. This, however, should work as an *ultima ratio* taking into account the need for mutual trust between

³⁶ REQUEJO ISIDRO, 2017, p. 116.

authorities and the principle of equal treatment between the national and the foreign law and respective decisions. Certain that the derogatory effect of the special public policy clause of Art. 40 provides the instruments necessary for an actual and effective response by MS Authorities to ensure a decision that promotes the best interest of the child.

VI. Results

After this analysis our contribution can be summarized in the following conclusions:

1. Enshrining the child's right to be heard in an autonomous norm, as the proposed Art. 20, provides an *a priori* control in the State of origin, instead of being solely a ground to refuse enforcement.
2. Even if it maintains a procedural nature, it is at the core of the right to due process and, by granting it a *status* of European Union Law, it becomes clear that the mere surmise of equivalence is not enough, and it permeates what can be described as an European public order.
3. Albeit Art. 20, *prima facie*, does not collide with the procedural autonomy of MS, we find that it imposes on them an enhanced burden of justification in every decision not to hear the child.
4. The court must, therefore, summon not only the procedural rules of the State of origin, but also take into consideration the ones of the countries in which the decision at hand can be enforced.
5. This is meant not as a path to downgrading this fundamental right of children but, on the contrary, to potentially lead to a spillover effect and a boost its strength by creating a net of enhanced safeguard.

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