The Project is co-funded by the Action Grants to support transnational projects to promote judicial cooperation in civil and criminal matters JUST/JCOO/AG/2018 of the European Union under Grant agreement No 831608.

National Report

PORTUGAL

Children's right to information in civil proceedings in Italy

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1. The children's right to information as an essential component of the right to be heard and to participate

The Portuguese legal order recognises the right of every child with a capacity for discernment to express his or her views freely on matters affecting him or her, following his or her age or maturity, as also to participate in those same decisions where those views are to be taken into account, as well as the right to be heard in proceedings affecting him or her.

Following the UNCRC, the right to be heard and participate stands one of its four pillars, together with the right to life, non-discrimination and the right to the full development of one's personality. Considering the child as an autonomous person with full rights, without giving him or her the possibility of participating and being heard in matters concerning him or her, implies that adults know how to internalise this new conception of the child as a person and to give concrete expression to the child's best interest and respect to his or her fundamental rights.

The right to be heard and to participate expressed in art. 12 UNCRC, which binds Portugal, ensures the child's right to be part in decisions affecting him or her by freely expressing their decision and being heard and taken into account. Under this provision, whenever a decision that affects a child is taken, his or her opinions, wishes and feelings must be ascertained, regardless of age, gender, religion,

social status or situation. It is a general principle applied to all children, (including children with disabilities), and in the implementation of all the rights enshrined in the convention.

This right of the child to be heard and to participate implies a dialoguing relationship between the child and the adult, listening to the child and considering the child's opinion before making a decision that affects him or her. The hearing and participation of the child in a procedure concerning her or him must be carried out in a manner "in which a child or children are heard and participate, must be transparent and informative, voluntary, respectful, relevant, child-friendly, inclusive, supported by training, safe and sensitive to risk and accountable" ([1]).

In the interpretation of domestic rules, it is also necessary to consider arts. 3 and 6 ECER, according to which:

«(a) A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, and receive all relevant information; be consulted and express his or her views; be informed of the possible consequences of compliance with these views and the possible consequences of any decision. The judicial authority should hear the child personally if necessary in private, directly or through other persons, in a manner appropriate to the child's judgment, allowing the child to express his or her views and taking into account the views expressed by the child; and be informed of the possible consequences of acting by his or her views and of the possible consequences of any decision.

(b) In proceedings affecting a child, the judicial authority, before taking a decision, shall: consider whether it has sufficient information at its disposal in order to decide the best interests of the child and, where necessary, it shall obtain further information, in particular from the holders of parental responsibilities; in a case where the child is considered by internal law as having sufficient understanding: ensure that the child has received all relevant information; consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child; allow the child to express his or her views; give due weight to the views expressed by the child».

Another special consideration is also given to the Council of Europe Parliamentary Assembly Recommendation 1864 (2009) on Promoting children's participation in decisions affecting them. This recommendation establishes that, in participation, adults should not only be listeners but also consider

[1] Committee on the Rights of the Child, General Comment No. 12, The child's right to be heard, CRC/C/GC/12, Geneva, 1 July 2009.

and follow the views expressed by children, Member States should provide training on children's rights in decision-making processes, in particular for judges, prosecutors, lawyers, educators and medical staff, as well as for the development of all professionals working with children who can consult children of different age groups.

The Council of Europe calls on all decision-makers to consider seriously the opinions, wishes and feelings of children, including very young children. The influence wielded by the child over the decision-making process will depend on his or her age and maturity. Participation should always be relevant and voluntary and be facilitated. Adults have a duty not to expose children to risks or overburden them with responsibilities that they cannot take on. Children have unique knowledge about their own lives, needs and concerns. Their participation should be a major factor in any decisions directly affecting them. Therefore, children must be listened to and allowed to participate in decisions in all fields, especially in family life, health care, adoption issues and procedures, education, community life, access to justice, and the administration of justice. Additional efforts are needed to ensure that children can express their opinions freely during judicial and administrative proceedings in a climate of respect, trust and mutual understanding. When promoting meaningful participation by children, special attention should be paid to avoid putting them at risk in any way, and to avoid harming, pressurising, coercing or manipulating them; children should have access to child-friendly information, appropriate to their age and their situation.

Also, the Council of Europe's Committee of Ministers Recommendation CM/Rec (2012) recommended the necessity to ensure that every child can exercise his or her right to be heard, to be taken seriously and to participate in decision-making on all matters affecting him or her, taking into account his or her age and degree of maturity.

The Guidelines of the Council of Europe's Committee of Ministries on Adapted Justice for Children are also important in implementing this right. The Council of Europe emphasises the information adaptation to the child's needs proportionate to his or her level of understanding, the consideration of his or her views and opinions, and his or her right (positive and negative) to be heard and obtain the necessary information. The information should be transmitted in an understandable language, by qualified professionals, in an environment and conditions appropriate to his or her age, maturity, level of understanding or any difficulties of communication he or she may have.

Also giving effect to the obligations of States emerging from art. 11 UNCRC, art. 13 (2) HCCH 1980 Child Abduction Convention provides that the judicial authority may give reasons for refusing to

return a child where it finds that the child objects to his or her return and has reached an age and degree of maturity which take into account his or her views on the matter.

Within the European Union, the provides that children must express their views freely and that their views shall be taken into consideration in matters that concern them by their age and maturity (art. 24(1) CFR).

As an essential instrument of European integration, the hearing and participation of the child in legal proceedings involving him or her, by his or her age and maturity, is also particularly relevant as an essential condition for the enforceability of decisions relating to the rights of the child to be reunited with his or her parents or relating to the unlawful removal or retention of children (art. 23, 24(1)), 23(b), 41(3)(c), 42(2)(a) Brussels IIa concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility).

To promote children's rights in order to break the vicious circle of inequality as a factor promoting respect for human dignity, the Recommendation 2013/112/EU urges the Member States to enable and encourage the participation of children in decisions which concern them and which establish the right of the child to be heard in all judicial proceedings in which they are involved, promoting child-sensitive justice.

The right to express one's views freely and have one's views taken into account is a fundamental human right of children recognised in art. 24(1) CFR and has general applicability and does not only relate to court proceedings. ECER enshrines children's procedural rights concerning proceedings concerning family matters, including the right to express their views freely and to be informed, choose a representative, and be assisted by a person they trust. The ECHR does not expressly recognise this right, and the ECtHR has understood that art. 8 ECHR, which refers to the protection of private and family life, does not require national courts to hear children in all cases, making this right dependent on the circumstances of the case, its age and maturity.

The child's right to be heard is an autonomous right that is valid per se and instrumental in the child's best interests. It manifests itself in a triple dimension: (i) the right to speak and to express one's will, (ii) the right to participate actively in processes concerning the child and to have this opinion taken into account, and (iii) recognition of the child as a subject of rights. The child's hearing is a process of dialogue, in which the child expresses or does not express what he or she wants as his or her right (it is not an obligation in which he or she is called to testify and to detail what one of the parents' demands). There is an obligation to ensure that all conditions are in place for his or her opinion to be truly expressed freely and unreservedly, especially by ensuring that the person who will listen to the

child recognises the true value to his or her voice, avoiding any constraints on the exercise of this right.

The child's right «to express his or her views freely» underlines the child's faculty to express his or her views without any kind of manipulation or undue influence or pressure and can choose whether or not to exercise his or her right to be heard. By requiring that due weight be given to the child's views by age and maturity, art. 12 UNCRC makes it clear that age cannot determine the interpretation of his or her views. Therefore, the weight to be given to the child's opinion must be assessed on a case-by-case basis. Concerning the second paragraph of art. 12, the Committee on the Rights of the Child clarifies that this right applies to all relevant legal proceedings affecting the child.

2. The evolution of the right to be heard in the Portuguese legal system: legislative provisions

Art. 1878 (2) CC recognises the child's right of participation in family affairs and the recognition of the growing autonomy in the organisation of his or her own life:

«1. It is the parents' responsibility, in their children's interests, to watch over their safety and health, provide for their children, direct their education, represent them, even if they are born, and administer their property.

2. Children ought to abide by their parents; however, according to their children's maturity, these should consider their opinion in important family matters and recognise their autonomy in the organisation of their own lives».

With the Law 61/2008, art. 1901(2) (3) CC (Parental responsibilities in the constancy of marriage) states the principle that rules the exercise of the parental responsibilities (including in cases of divorce, *de facto* separation, care provided by a third person, cohabitation or civil partnership):

«2 - The parents exercise the parental responsibilities by common agreement and, if this is lacking in matters of particular importance, either of them can lodge an action before the court, which will try to conciliate.

3 - If the conciliation referred to in the preceding paragraph is not possible, the court shall hear the child before the ruling, except when circumstances advise against it».

Number 3 of the provisions provides the principle of the required prior hearing of children, adhering to a democratic and participatory conception of parental responsibilities and the child's status as a subject of rights, endowed with a natural capacity to express his or her affections and feelings. It abolished the age limit of 14 years following art. 12 UNCRC. The paramount criteria is the children's

de facto capacity to express their opinion on matters concerning them and the right to be heard in all proceedings judicial and administrative procedures that respect them. The legal change was within Commission on European Family Law's Principles of European family law regarding parental responsibilities, namely principle 3:37:

«(1) Subject to Principle 3:6, the competent authority should hear the child in all proceedings concerning parental responsibilities, but if it decides not to hear the child, it should give specific reasons.

(2) The child's hearing should take place either directly before the competent authority or indirectly before a person or body appointed by the competent authority.

(3) The child should be heard in a manner appropriate to his or her age and maturity».

Before this new version, the former (from the Law-Decree 496/77, 25-11) stated: «Parents exercise parental responsibility by common agreement and, if this is lacking in matters of particular significance, either parent can lodge a case before the court, which will try to conciliate; if this is not possible, the court will hear the child who is fourteen years of age before deciding, unless circumstances require it to be discouraged».

This sets the rule that whenever a decision that affects a child is taken, his or her opinions, wishes and feelings have to be duly taken into account, having due regard to his or her age and degree of maturity. Age and maturity must be considered together, and these two factors do not solely concern the child's intellectual capacity. How children express their feelings, the development of their personality, their evolving capacities and their ability to confront various emotions and possibilities are just as important.

Even before the law of 2008, the LPCJP, in his art. 4(j) enshrines the principle of compulsory hearing of children, without any reference to age limits (Mandatory hearing and participation - the child and young person, separately or in the company of their parents or a person of their choice, as well as the parents, the guardian or the legal representative, have the right to be heard and to participate in the acts and definition of the measure of promoting rights and protection;).

There are several provisions to ensure the child's participation in decision-making processes on his or her life project in the Portuguese legal system. art. 1981(1)(a) CC requires the child's consent over the age of 12 to establish an adoptive parentage bond. The civil code also provides that, before a guardian is appointed, the child over the age of 14 must be heard, art. 1931(2) CC. On the other hand, the child over the age of 16, when submitted to a guardian, has direct legitimacy to convene the Family Council, under art. 1957 (1) CC. Under the LPCJP, the child's opposition over the age of 12

makes it no longer legitimate for the intervention of the entities with competence in matters of children and young people (art. 7 LPCJP) and the protection commissions (art. 8 LPCJP), per art. 10(1) LPCJP, giving rise to judicial intervention, by art. 11(c) LPCJP. Regarding children under 12 years of age, who can understand the meaning of the intervention, even if the opposition does not directly refer the case back to court, it is taken into account as relevant under art. 10(2) LPCJP.

In addition to the relevance of the child's will in legitimising the intervention of non-judicial authorities, the right is guaranteed in the course of the proceedings to children over 12 years of age, or younger where their ability to understand the meaning of the intervention so advises, to be heard by the protection commission or the Judge on the situations which gave rise to the intervention and on the application, review or termination of promotion and protection measures (art. 84(1) LPCJP). The child also has a say in determining and implementing the measure by requiring his or her consent to implement the promotion and protection agreement (art. 98(3) LPCJP).

The child or young person's hearing and participation in the intervention of promotion and protection of rights as provided for in art. 4, paragraph j) and 84, LPCJP. These rules establish that the children and young people are heard by the protection commission or Judge on the situations that gave rise to the intervention and regarding the application, review or termination of promotion and protection measures, under the terms provided for in art. 4 and 5 RGPTC.

In the context of the judicial procedure for adoption, the adopting party must be heard by the Judge, in the presence of the public prosecutor, following and in compliance with the rules laid down for the hearing of children in civil proceedings, which hearing must be conducted separately and in such a way as to safeguard identity (art. 3 and 54(1)(c) and (2) RJPA).

In the context of LTE, the hearing of the child is always carried out by the judicial authority (judge or public prosecutor) who may designate a social service assistant or another expert specially qualified to accompany the child in a proceeding and, if necessary, provide him/her with the necessary psychological support by a specialised technician, as well as determine that the hearing does not take place in court or that it takes place without the use of professional clothing (art. 47 and 96 LTE).

A child who is the victim of a crime has the right to be heard in the proceedings, taking into account his or her age and maturity and, where there is a conflict of interest between him or her and the holders of parental responsibilities, he or she has the right to be appointed a representative (art. 7 (6) and 22 VS). Reflecting a clear concern for systematic harmonisation and realisation of the child's rights to participate and be heard, art. 4 and 5 RGPTC.

In 2015 the OTM was revoked, and the new RGPTC regime approved, giving rise to the procedural realisation of the child's rights to be heard and to participate in proceedings. RGPTC establishes, in the first place, as one of the guiding principles of civil protection intervention, the hearing and participation of the child when he or she can understand the matters under discussion, according to his or her age and maturity, preferably with the support of technical advice to the court, with the possibility of accompanying the adult of his or her choice and, secondly, by putting in place various implementing rules concerning the hearing of the child, in the dual aspect of his or her hearing or taking statements as evidence. This legal provision establishes a set of rules concerning the child's hearing and participation, which apply not only to civil proceedings but also to promotion and protection proceedings and clear consequences for the hearing of children in criminal proceedings. It can be said that it enshrines the general principle ensuring the right to be heard of the children.

Art. 5 (child's hearing) RGPTC establishes that:

«1 - The child has the right to be heard, his or her opinion being taken into account by the judicial authorities when determining his or her best interests.

2 - For the purposes of the previous paragraph, the Judge shall promote the child's hearing, which may occur in a judicial procedure specially scheduled for that purpose.

3 - The child's hearing is preceded by providing clear information on the meaning and scope of the hearing.

4 - The hearing of the child respects his or her particular circumstances, ensuring, in any case, the existence of appropriate conditions for this purpose:

a) The child is not subjected to an intimidating, hostile or inappropriate space or environment concerning his age, maturity and personal characteristics;

(b) the participation of properly qualified judiciary actors.

5 - To comply with the previous paragraph, preference is given to not wearing professional garments when hearing the child.

6 - Whenever the child's interest justifies it, the court, on request or ex officio, may hear the child, at any stage of the proceedings, so that his or her statement may be considered as evidence in subsequent procedural acts, including the trial.

7 - The taking of statements obeys the following rules:

a) The taking of statements is carried out in an informal and reserved environment, in order to guarantee, in particular, the spontaneity and sincerity of the responses, and the

child must be assisted in the course of the procedural act by a specially qualified technician, previously appointed for this purpose;

b) The enquiry shall be made by the Judge; the Public Prosecutor and the lawyers may ask additional questions;

c) The child's statements shall be recorded by audio or audiovisual recording, and other suitable technical means may be used only to ensure their full reproduction when those means are not available, and preference shall in any case be given to audiovisual recording whenever the nature of the matter to be decided, or the interest of the child so requires;

(d) when in criminal proceedings the child has made statement for future use, these may be considered as evidence in civil proceedings;

e) When in civil proceedings the child has made a statement before a judge or public prosecutor, with due regard for the principle of adversarial proceedings, it may be considered as evidence in civil proceedings;

f) The taking of a statement per the preceding paragraphs shall be without prejudice to the giving of evidence at a trial, whenever this should be possible and should not jeopardise the child's physical and mental health and full development;

(g) in any case not contrary to this provision, the civil procedural arrangements for advance evidence shall apply mutatis mutandis».

Thus, the environment or space in which the child is heard should not be intimidating, hostile or inappropriate to the child's age, maturity and personal characteristics, and statements should be made in an informal and reserved environment (art. 5(4)(a) and (7)(a) RGPTC).

The number of persons involved must be minimal and adequately trained, and the assistance and follow-up of the child must be guaranteed by a specially qualified technician or by a person of his or her confidence (art. 5(4)(b) and (7)(a) RGPTC).

The statements made must be recorded by audio or audiovisual recording, preference being given to audiovisual recording where the nature of the matter to be decided or the interest of the child so requires (art. 5(7)(c) RGPTC).

The Judge shall make the examination, and the Public Prosecutor and lawyers may ask additional questions (art. 5(7)(b) RGPTC).

Despite all this, the child's hearing is an extraordinarily intense moment for the child and demanding the judiciary actors. They need special training and expertise to carry out the hearing, but also the difficulties of understanding the non-verbal behaviour or a reasonable knowledge of the various

variables that may be present at the hearing (the environment, the conduct of the interview, the level of development of the child and, finally, those relating to the adults who are carrying).

These are the rights of participation of children, which go beyond the view of children as objects of parental authority and enshrine the concept of the child as a subject of law. The child's opinion is not binding, and it consists of one element, among others, to be considered in the decision. If the court deviates from the child's opinion, an increased duty to give reasons for the court decision should be required. As a principle, the child's will and opinion o must be respected, if there is not a valid motive discourages him, from the point of view of the safekeeping of their best interests.

The child is heard preferably with the expert assistance and the comfort of an adult of his or her choice is guaranteed, except if the Judge discards such possibility given reasons for the refusal (art.42 (1), e) RGPTC). The hearing is a child's right but not an obligation. The child is free to refuse to express his or her opinion and remain silent. The Judge can decide that the child should not be heard when " serious reasons discourage him/her" (art. 1901 (2) (3) CC or if the defence of his/her best interest discourages him/her (art. 35 (2) (3) RGPTC) and may use expert assistance to assess the child's capacity to understand (art. 42 (2) RGPTC). Specially trained expert reporting to the court afterwards, or whether the child should be heard in the courtroom or another place or through other means. Besides, while remaining a child's right, hearing the child cannot constitute an absolute obligation but must be assessed pending the child's best interests, such as cases involving agreements between the parties.

This means, in summary, that the hearing is discouraged if the child is not mature or incapable of expressing himself if there are conflicts of loyalty, feelings of guilt or other psychological damage resulting from the child's involvement in the parents' conflict, as well as the danger of being coerced by the parents or a third person. The law presumes the child's natural capacity to be heard. The burden of proof of the incapacity or the prejudicial nature of the hearing rests with the person who invokes it, the parents or the Public Prosecutor, and the Judge must investigate the degree of maturity of the child and the psychological damage that may result from the hearing. A reasoned judicial decision must be taken to refuse to hear the child. Art. 35 (2) (3) RGPTC adopted the principle of the hearing of the child, in the Conference on the process of regulating parental responsibilities, following art. 4 (1), e) and 52 RGPTC. This principle extends to any proceeding relating to non-compliance agreement or decision on parental responsibility, or even if the decision is void and without effect. Art. 5 RGPTC establishes rules to be observed by the courts in hearing the child.

3. Relevant case law

3.1. Relevance of the hearing and sanction for not hearing

3.1.1. Supremo Tribunal de Justiça (14-12-2016)[2]

I - A child's hearing cannot be regarded merely as a means of proof, but as a child's right to have his or her point of view considered in the decision's process affecting him or her.

II - The exercise of the right to be heard, as a privileged means of pursuing the child's best interests, is naturally dependent on the child's maturity.

III - The current Portuguese law, following the various international instruments, has changed the way of determining the compulsory nature of such a hearing, having started to foresee (...) that the child should be heard when he or she has "the capacity to understand the matters under discussion, taking into account his or her age and maturity."

IV - The consideration of the child's maturity is the critical parameter in the decision to hear her, and the justification for not hearing is only dismissed when it is clear that his or her low age does not allow or advise him or her to be heard.

V - Not hearing the child affects the final decisions' validity as it corresponds to a general principle of substantive nature, and it is not suitable to consider as the nullity of proceedings.

3.1.2. Relação do Porto (23-01-2020)[3]

Usually, because of the possibility, it gives to understand each child's opinion better, their hearing makes a very relevant contribution to each concrete case when it does not contain in itself the path for the choice of the proportional and adjusted protection measure.

3.1.3. Relação do Porto (04-11-2019)[4]

I - In law, the child is now entitled to a broad and extensive opportunity to be heard in legal proceedings concerning him or her.

[2] ECLI:PT:STJ:2016:268.12.0TBMGL.C1.S1.F4, available jurisprudencia.csm.org.pt/.
[3] Processo n.º 822/17.3T8ETR.P1, available www.dgsi.pt.
[4] Processo n.º 1474/17.6T8PRD.P1, available www.dgsi.pt.

II - The child's right to be heard appears as an exercise of his or her expression's right, but it also acts as a prerequisite for an effective right of active participation by the child in proceedings concerning him or her within the framework of a judicial culture that affirms the child as a subject of rights.

III- In the context of a promotion and protection process, there must always be an order, duly substantiated, reflecting whether or not the child needs to be heard.

IV- Failure to make such an order affects the validity of the procedure's final decision because it corresponds to a general principle of substantive relevance and is not appropriate to apply the procedural nullity regime to it.

3.1.4. Relação de Guimarães (10-07-2019)[5]

Thus, the child under 12 years is not mandatory heard. Contrary to what happens with a child over 12 years of age - art. 35 (3) RGPTC. Only if he or she cannot understand the matters under discussion, and this capacity will be evaluated on a case-by-case basis by the Judge who, for this purpose, may resort to the support of the expert assistance. However, in casu, the Judge, until the parents' request, decided to hear the child and the expert assistance to the court is not compulsory. The law only speaks of this being so "preferably" (al. c), of art. 4), the way and how the hearing is carried out is regulated by the said art. 5. Therefore, no nullity occurs, since the expert assistance to the court was not necessary, and the court could always hear the child without it. However, even if the alleged nullity were to occur, it would always be remedied, since it was not even, as we have seen, timely accused.

3.1.5. Relação do Porto (30-04-2019)[6]

I - The child's right to be heard is an expression of the child's right to freedom of speech and the expression of his or her will, but it also acts as a prerequisite for the child's effective right to participate actively in proceedings concerning him or her within a judicial culture that affirms the child as a subject of rights.

II - In a procedure for regulating parental responsibilities or altering such responsibilities, there must always be an order reflecting the need or not for the child to be heard, duly reasoned per his or her age and maturity.

[5] ECLI:PT:TRG:2019:1982.15.3T8VRL.A.G1.A6, available jurisprudencia.csm.org.pt/.

[6] Processo n.º 371/12.6TBAMT-F.P1, available www.dgsi.pt.

III - The absence of such an order affects the validity of the decision issued without the child's right to be heard, as it is an infringement of a general principle of substantive relevance and it is not appropriate to apply the system of procedural nullity to the child.

IV - Not hearing the child without justification, thus constitutes a procedural fault and a clear violation of substantive law rules, and the court must not confine itself to seeing this omission in a strictly procedural perspective. However, it must instead repeat the failure to hear the child as an undeniable violation of that general principle of substantive relevance, and therefore procedural, affecting the validity of the judgment thus delivered.

3.1.6. Relação de Guimarães (20-11-2014)[7]

I. The principle of hearing a child laid down in domestic and international law to which the Portuguese State is bound is based on considering that the child must be heard in decisions concerning him, out of respect for his personality.

II. This principle extends to the incident of failure to comply with parental responsibilities, in which the violation of rights of contact is involved.

III. The prior hearing of a child, taking account of his or her age and degree of maturity, is mandatory (see Article 4(i) LPPCJP ex vi Article 147-A OTM), so that failure to hold such a hearing renders the decision invalid.

3.1.7. Relação de Évora (13-01-2005) [8]

I - "When regulating the parental authority, the child's opinion must be heard and consider in his or her best interests assessment, with a view to his or her integral development, that is to say, his or her physical, intellectual and moral development".

II - The will of the child, who is of age and of sufficient discernment to be able to decide what he wants in his life, namely when it comes to which of his parents he wants to live with, must be respected, if there is no valid reason, from the point of view of safeguarding his best interests, to disregard him.

[7] ECLI:PT:TRG:2014:43.13.4TMBRG.G1.93, available jurisprudencia.csm.org.pt/.
[8] ECLI:PT:TRE:2005:1635.04.2.2D, available jurisprudencia.csm.org.pt/.

3.1.8. Relação de Guimarães (20-03-2018)[9]

In cases of regulating parental responsibilities, the child's benefit is that the judgment is to be given; in the child's future, the judgment will be reflected. The child is at the centre of the procedure leading up to the final decision. The child's opinion must be accepted in the adjudication, provided it is not subject to external distortion or reveals a lack of adequate discernment of risks, that is to say, after having been duly assessed in the context in which it was taken and in the light of his or her best interests.

3.1.9. Relação de Coimbra (08-05-2019)[10]

I- The primary legal purpose behind regulating the exercise of parental responsibilities is the child's best interests.

II- Since this is a generic concept, the child's best interests must be ascertained in a case by case, while always keeping in mind the idea of the child's right to his or her healthy and normal development on the physical, intellectual, moral, spiritual and social levels, in conditions of freedom and dignity. That is, as far as possible, everything should be done in such a way as to contribute to the child's integral development in harmonious and happy terms.

III- The right of the child to be heard and to express his or her opinion in proceedings concerning and affecting him or her, taking into account his or her age and capacity for understanding/discernment of the matters under discussion, has been enshrined precisely to achieve this best interest of the child.

IV- This does not mean that the decision to be taken should require the child to fully respect this opinion, but at least, it should be taken into account when weighing the interests at stake and always with the child's best interests mind.

V- Failure to hear a child in a case which directly concerns him or her, because it is aimed at taking a measure which may affect him or her in the future, cannot be regarded merely as a means of proof, but rather as the violation of a child's right, and as such may lead to the nullity of the decision which is to be given.

VI- The child's future residence after the parents' separation takes on particular importance in regulating the exercise of parental responsibilities, since it may conflict with his or her development as referred to in II.

[9] ECLI:PT:TRG:2018:1910.16.9T8BRG.A.G1.C7, available jurisprudencia.csm.org.pt/.
[10] ECLI:PT:TRC:2019:148.19.8T8CNT.A.C1.54, available jurisprudencia.csm.org.pt/.

VII- The decision taken (albeit provisionally) by the court is not valid insofar as the child (at an age when he or she is at least sufficiently mature to understand the scope of such a measure of guardianship) was not heard by the court, and the court does not present the grounds for that decision.

3.1.10. Relação de Lisboa (27-02-2013) [11]

I-The prior hearing of a child for applying a precautionary measure is the principle, as laid down in Articles 77 to 110 of the LTE since the ex novo application of a precautionary measure (educational measures) is considered.

II- However, in the event of an ex officio review of the precautionary measure (educational measures) concerning the child, it is at the Judge's discretion to hear the child, the prosecutor and the authority responsible for enforcing the measure. For hearing them "where necessary", which is understandable as in this case, it is simply a question of verifying the (in) subsistence of the conditions on which the measure already enforced is based.

III-The non-exercise of such a faculty (of hearing) need not be either reasoned or expressly mentioned.

3.2. Purpose of the hearing: evidence-opinion and wishes

3.2.1. Tribunal da Relação de Coimbra (20-10-2020)[12]

The hearing of the child to freely express his or her opinion provided in art. 5 (1) (2) RGPTC is not to be confused with his or her hearing to take statements for evidence purposes, this involving questioning by the Judge, with additional questions by the Public Prosecutor and Lawyers, subject to the rules set out in art. 5 (6) (7) RGPTC.

It is in the child's best interest to keep in contact with both parents – when they demonstrate their ability to ensure the child's psycho-affective development – to ensure the child's well-being and integral development (art. 1906 (7) CC).

Like other aspects of regulation, the contact's regime should be adjusted if circumstances require.

[11] ECLI:PT:TRL:2013:219.09.9T2AMD.B.L1.3.68, available jurisprudencia.csm.org.pt/.

[12] Processo n.º 4661/16.0T8VIS-R.C1, available www.dgsi.pt.

3.2.2. Tribunal da Relação de Lisboa (10-11-2019)[13]

I- The hearing of the child, provided for in arts. 4 (1) © and 5 RGPTC may serve two distinct aims, with different regimes: for the child to express his or her views regarding the family conflict and the measures to be adopted to overcome it (nos. 1 and 2); and as a means of evidence (nos. 6 and 7).

II- The child's hearing, art. 5 (1) (2) RGPTC, is mandatory as a rule, while the modality referred in paragraphs 6 and 7 is merely optional.

III- The child has the right to request that his or her hearing is not attended by his or her parents and their attorneys and opt for its confidentiality as an exercise of the right.

IV- When the child exercises both the faculties provided for in III, the child's answers cannot be used as evidence.

V. If the child requests that his or her parents and their attorneys not attend the hearing but accepts the revealing the content of his or her statements, it may be used as evidence, provided that the Court grant the parents' right Audi alteram partem.

VI- The expression "if his opinion is taken into consideration" in art. 5(1) RGPTC must be interpreted as requiring the Judge to weigh the child's views and arguments, without the Judge being bound to decide following the child's opinion.

VII- In a procedure to regulate the exercise of parental responsibility or its modification, in which the residence is discussed of two girls currently aged 14 and 17 respectively, the court must determine the alternate residence, even if they oppose it if it is convinced that this is the regime which serves their best interests.

3.2.3. Relação de Lisboa (06-06-2019)[14]

I. The hearing of the child to give his or her opinion (art. 5 (1) (2) is not to be confused with the hearing for taking statements for evidential purposes (art. 5, (6) (7)).

II. The hearing of the child to freely express his/her opinion (art. 5(1)) is not subject to the rules set out in art. 5(6) (7) RGPTC, namely, to an interrogation – by the Judge, with additional questions by the Public Prosecutor and lawyers – recorded through audio or visual recording.

[13] Processo n.º 3162/17.4T8CSC.L1-7, available www.dgsi.pt.

[14] ECLI:PT:TRL:2019:3573.14.7T8FNC.C.L1.6.1A, available jurisprudencia.csm.org.pt/.

3.2.4. Relação de Lisboa (01-07-2017)[15]

When the child's statement is recorded, the lawyers were allowed to formulate the additional questions they deemed appropriate, which they did not, after hearing the recordings, in a continuous act.

This absence of physical presence is not necessary, and very likely intimidating, since lawyers from such antagonised parents have so far failed to collaborate towards this other guiding principle of civil tutelage processes, namely that of Consensualisation (family conflicts are preferably settled by consensus, with recourse to specialised technical hearings and/or mediation, art. 4(1)(b) RGPTC.)

Suppose the child has made a statement before a judge or public prosecutor, in compliance with the adversarial procedure principle. In that case, that statement may be considered as evidence in civil proceedings' - it follows that when in civil proceedings the child makes a statement without compliance with the principle of the adversarial procedure - which, it is reiterated if it is not considered to be the case - the sole consequence will be that those statements cannot be considered as evidence in the proceedings. In any case, the principle of the hearing of the child, translated into the realisation of the right to speech and the expression of the child's will; the right to active participation in the proceedings concerning the child and to have this opinion taken into account; in a culture of the child as a subject of rights.

3.3. Child's capacity and assessment

3.3.1. Relação do Porto (08-10-2020)[16]

A 6 and a half-year-old child should be heard in the choice of schools between a public and a private one (for attendance at the 1st cycle) when it is indicated that he or she has already attended the kindergarten of one of them for about two years.

At this age, the child, despite having difficulties in making decisions, and still being influenced by his parents, already develops an ethical sense, can distinguish between good and wrong, not only in cases involving him but also in other situations.

3.3.2. Relação de Guimarães (10-07-2019)[17]

The hearing of a child, even if under the age of 12, "unaccompanied by an expert assistance", is not a procedural nullity, since the expert assistance to the court, although preferential, is not required (al. c), of art. 4, art. 5 and no. 3, of art. 35, all of the RGPTC).

[15] Processo 653/14.2TBPTM-J.L1, available www.dgsi.pt.
[16] Processo n.º 12970/19.0T8PRT-C.P1, available www.dgsi.pt.
[17] ECLI:PT:TRG:2019:1982.15.3T8VRL.A.G1.A6, available jurisprudencia.csm.org.pt/.

Art. 35(3), RGPTC states that "A child over the age of 12 years or younger who is capable of understanding the subject-matter under discussion, taking into account his or her age and maturity, shall be heard by the court following the terms prescribed in art. 4(c) and art. 5 unless the defence of his or her superior interest advises against it".

The art. 5 RGPTC enshrines the "guiding principles" governing tutelage proceedings. Paragraph c) establishes the principle: "Hearing and participation of the child - the child, capable of understanding the matters under discussion, having regard to his or her age and maturity, is always heard on the decisions which concern him or her, preferably with expert assistance to the Court, being assured, unless the judge refuses to give grounds, the accompanying adult of his or her choice whenever he or she shows an interest".

The second paragraph of the art. 5 states that the Judge assesses the child's ability to understand the matters under discussion on a case-by-case basis, who may, for this purpose, resort to the expert assistance.

3.3.3. Relação de Guimarães (07-02-2019)[18]

The court aims to achieve the best possible solution given the case's concrete circumstances; it is to find the solution that will generate the least destabilisation and discontinuity in the child's life, already shaken by the separation of the parents. In this way, the attribution of the child's residence to the primary figure of reference, if any, constitutes the solution most in keeping with the child's interests, since it makes it possible to promote the continuity of the child's primary affective relationship, corresponding, therefore, to the child's real and effective preference, provided that it gives evidence of allowing the child's contacts with the other parent.

It makes the status quo the prior hearing of the child in any legal proceedings concerning him. For this reason, the courts should hear the child, taking into account his age and degree of maturity and capacity of discernment. The child's opinion must be weighted according to the maturity it shows.

The child's alleged preference (at the age of 8) to stay in Portugal does not seem to be motivated nor does it reveal itself to be conscious, since there are no valid and attentive grounds for such a preference. Instead, it reveals immaturity, proper to his age, and will be influenced.

Furthermore, the suggested preference cannot be the decisive criterion for establishing the child's future residence, since he is an under eight-year-old and the people around him (father/grandparents) are likely to change his willingness to speak freely and to say what he virtually feels. Moreover, the

[18] Processo n.º 784/18.0T8FAF-B. G1, available www.dgsi.pt.

concrete child, eight years old, is not mature enough to know what is best for him: if he lives in Portugal or Switzerland, or lives with his Father or his Mother since he was eight years old at the time he was heard, and went to live in Switzerland when he was only four, By associating Portugal with holiday periods (say with parents) and Switzerland with classes, school responsibilities and routines (also with both parents), you do not have the insight and real perception and terms of comparison to enable you to decide. The child's opinion should not be taken into account, as the preference to stay in Portugal is motivated by the paternal grandparents (who miss them) and play (football field), the opinion of an eight-year-old child, without real maturity that is sufficient to express a consistent, consistent and enlightened opinion.

Thus, the child's opinion is not mature (cf. art. 4 and 5), it is impaired in its ability to understand the issues under discussion and, potentially, has been driven by the parent with whom he lives since the beginning of the holidays on 22/7/2018.

The child's school education started, by a decision of both parents, in Switzerland in 2013. Since the language and teaching methods are different from those adopted in Portugal, once started the school in Switzerland, it is in the child's best interest to keep attending the swiss schools, despite his preferences to stay in Portugal. It is in Switzerland that the child has his centre of life organised, should not be considered.

As the appellant says, in Portugal, the child has the paternal family, which he misses (naturally), and in Switzerland, he has the maternal family, with which he has lived for the last five years, of the then eight of his life, which he will miss (naturally).

The child, eight years old, has not shown himself to be mature and capable of understanding the reason for his hearing, nor has he shown credible, well-founded and freely achieved reasons of preference. He did not show the discernment to understand the problem on which the court has focused (on the question of why he likes being in Portugal more, he says "(...) because he is with his paternal grandparents, whom he missed, and who likes to play football, on a field he has next to home..."). The Judge cannot base his decision on a vague and unfounded reference of a child of 8 years of age, without the necessary maturity to take a position - cf.

As the appellant and the Public Prosecutor rightly point out, the Judge did not take into account essential facts which indicated that the best interest of the child, from the very beginning the centre of Manuel's life in the last five years was in Switzerland, with his parents, relatives living there, friends he made and the school connection to Swiss education - 2 years of pre-school and two years of the first cycle. More than half of Manuel's life was spent in Switzerland, where he went with about

three years, depriving with his paternal grandparents during the Christmas and summer school holidays.

The parent's conduct of unilaterally withholding his child in Portugal, hindering his studies in Switzerland and making it difficult for the child to live together with his mother, suggests, from the outset, that the parent does not prioritise the emotional and psychological well-being of the child and that he puts his interests first and foremost at the expense of the child's well-being.

The documents show that, with some certainty, the child returning with his mother to Switzerland will find the housing, economic, educational and family conditions that he had.

Although the court may hear the child, it had to frame, interpret, value and critically analyse what he or she transmitted.

Therefore, for the reasons explained by the appellant and the Public Prosecutor, who presented himself well to defend the child's interests, and for the reasons just mentioned, we believe that the decision handed down should be changed.

3.3.4. Supremo Tribunal de Justiça (18-10-2018)[19]

Art. 4 RGPTC prescribes that "a child with the capacity to understand the matters under discussion, taking into account his age and maturity, is always heard on the decisions that concern him, preferably with the assistance of an expert appointed by the court, being assured the support of an adult of his choice whenever he shows interest in this unless the judge justifies his dismissal".

For its part, art. 35, no. 3, specifies this requirement, prescribing that "a child over 12 years of age or younger, capable of understanding the matters under discussion, taking into account his or her age and maturity, shall be heard by the court, following art. 4 © and art. 5, unless the protection of his or her best interests would advise against it". The hearing which should be carried out with the diligence described in art. 5.

No absolute rule emerges when we are in a child under 12 years of age. His or her hearing should be assessed on a case-by-case basis in light of the elements relating to their age and maturity, with consideration of the child's best interests.

The parents who are now appellants have practically confined themselves to invoking, in a general manner and, as has been said, only in this appeal court, the need for such an expeditious hearing of minors, without giving any ponderous reasons that specifically demanded or advised it. The case also

[19] ECLI:PT:STJ:2018:533.14.1TBPFR.P2.S1.DB, available jurisprudencia.csm.org.pt/.

does not reflect (as they would no longer do at the time of the first judgment of the appeal) any doubt about the legitimacy and adjustment of its adoption.

The applicability of the prior hearing to the two youngest minors is notoriously ruled out, and the relationship with their parents is very tenuous since they only know the institution where they were taken in and which has been watching over their development. Nevertheless, even for the two older children, considering both their age and maturity and the framework in which the decision of the bodies of trust developed with a view to their future adoption, this hearing is neither compulsory nor necessary, nor even convenient.

On the side of the children, specifically of the two older sisters, there is no evidence of a particular maturity which would allow them to freely express their thoughts and opinions within immediately feasible alternatives: continuation of the measure of foster care or the possibility of adoption.

3.3.5. Relação de Lisboa (04-10-2018) [20]

Where the reassessment of a foster care measure is concerned, the parental responsibility's holders, as well as young people over 12 years of age and children capable of comprehending the issues under discussion, must be heard before the decision is taken, either on the facts or on the measure applied and the need to extend it or not (art. 4 (j), 58(1)(d) and (h), 84 and 85 of the LPCJP).

3.3.6. Relação de Lisboa (20-09-2018)[21]

In cases where there is a need to regulate and, or, to modify the exercise of parental responsibilities, there should be a prior hearing of the child is now established in law and doctrine, and the courts should hear the child, taking into account his age and degree of maturity and capacity of discernment. However, the Judge does not need to the hear the child under the age of seven if he or she was heard months before the final decision by expert assistance, in whose report the child was heard and where he or she said what relationship he or she keeps with both parents.

This dismissal shelters the child from further non-mandatory diligence, all the more so as it was not a question of an immediate redefinition of the child's current residence, but only of the need to provide for the extension of the regime of contact with the parent with whom the child does not habitually reside, made more difficult by the other parent.

[20] ECLI:PT:TRL:2018:14091.09.5T2SNT.L1.2.55, available jurisprudencia.csm.org.pt/.
[21] ECLI:PT:TRL:2018:10264.16.2T8LRS.B.L1.8.D0, available jurisprudencia.csm.org.pt/.

It results from the provisions of art. 1906 (7) CC that the greater closeness to both parents is in the child's best interests so that the court must make decisions that provide more significant opportunities for contact with both parents and for sharing responsibilities.

The child's best interest establishes and not that of the parents. Therefore, even if the parent's relation is litigious, the court should foster a regime that enhances the child's relationship with both parents. The issue is parenthood and not of unsuccessful marriage or any relationship between the child's parents.

The greater the conflict, the more necessary court's intervention is to establish, even if only provisionally, the terms of the regime for the child's contact with the parent with whom he or she does not live, thus guaranteeing the interest of the child to the contact with both parents.

3.3.7. Relação de Lisboa (12-07-2018)[22]

I. The principle of the child's hearing, as laid down in national and international law to which the Portuguese State is bound, is based on the consideration that the child must be heard in decisions concerning him, on the grounds of regard for his identity.

II. This principle extends to the incident of the parental responsibility regime modification.

III. The prior hearing of a minor, taking account of his age and degree of maturity, is compulsory, so that failure to hold such a hearing renders the decision invalid.

3.3.8. Supremo Tribunal de Justiça (05-04-2018)[23]

As a long time has passed since the beginning of the intervention, and as the child is already 11 years old it becomes necessary to assess and know the child's wishes as to the life-plan which would imply an adoption, as well as the consequences of total separation from his biological family. His opinion is necessary to assess what will be its best interest. Especially being the child eleven years old, the age at which it is natural to possess a considerable degree of discernment and a will of one's own.

The child's hearing should be in-person and conducted by the court with the assistance of psychologic or other experts.

[22] ECLI:PT:TRL:2018:390.08.7TMFUN.F.L1.1.CC, available jurisprudencia.csm.org.pt/.

[23] ECLI:PT:STJ:2018:17.14.8T8FAR.E1.S2.62, available jurisprudencia.csm.org.pt/.

3.3.9. Relação de Lisboa (25-01-2018)[24]

A lawyer's appointment to a child is not required if the child's interest does not conflict with the parents' interests but rather is identical to the parents' position in conflict with the other.

The child's hearing cannot be dismissed because the parents or an attorney not representing the child stated what the child's opinion was.

3.3.10. Relação de Lisboa (13-07-2017)[25]

1- The appointment of a child lawyer is required when his or her interests and those of his or her parents, legal representative or de facto guardian, are conflicting, and when the child with adequate maturity requests it from the court.

2- The law states a child over the age of 12 years is presumed to understand the matters under discussion. Considering his or her age and maturity, in principle, the Judge should not refuse him or her a request for a lawyer's appointment on the assumption that the justification put forward – by the child – for such a request does not prove to be sufficiently relevant.

3- Furthermore, the lawyer must act in such a way as to defend the legitimate interests of the represented party, without prejudice to compliance with the legal and deontological norms, it is certain that always maintaining his independence in the exercise of his profession and any circumstances, and only be required to use all the technical knowledge, knowledge and procedures which the legis artis consigns and which are supposed to be in his possession, it is in the last instance the appointed lawyer who shall be responsible for assessing the appropriate means to better defend – in the proceedings – the legitimate interests of the child.

3.3.11. Relação de Porto (06-10-2017) [26]

And so we understand the presence, during the child's hearing, of the " expert" referred to in art. 5o no. 7 al. a) RGPTC may be dispensed with by the Judge, to the extent that the child's statements reveal maturity, i.e. a genuine feeling of self-interest, in an enlightened relationship with all others, namely close relatives (this situation usually occurs already in adolescents aged 13, as is the case here, when the moment of puberty, leads to a gradual detachment from the parents, or the image of the parents).

[24] ECLI:PT:TRL:2018:17627.17.4T8LSB.L1.6.21, available jurisprudencia.csm.org.pt/.
[25] ECLI:PT:TRL:2017:1201.14.0T8VFX.L1.6.93, available jurisprudencia.csm.org.pt/.
[26] Processo 572/16.8T8ETR-E.P1, available www.dgsi.pt.

However, the same cannot be said of recording the declarations, which contributes to the parents' total clarification, namely concerning the child's freedom to express his or her opinion. Once the child has been informed that his or her statements will be recorded to clarify the parents, the lack of correspondence between the time of the statements and the time of the parents' hearing – and their foreseeable immediate reaction, even if not verbally expressed – is sufficient to guarantee the free expression of the child's opinion. In this way, we do not see a real reason for not having recorded the child's statements – and despite the child's (scrupulous) sensitivity in confronting his or her parents, expressly referring to his or her annoyance at the fact that the mother may "be sad" at the child's will. In that way a nullity was committed, in the sense that 'the irregularity committed could influence the examination or decision of the case', the statements made having influenced, as they did, the conviction formed by the court, by the provisions of art. 195(1) CPC, as a subsidiary right – art. 33(1) RGPTC'.

3.3.12. Relação de Coimbra (14-01-2016)[27]

In a proceeding about the right of a granddaughter's contact (art. 1887-A of the CC), the direct hearing of a child under the age of 5 is not mandatory, due to a lack of discernment adequate to express one's opinion of refusal to contact the grandparents is due to loyalty to the mother. After the death of the child's father, she does not promote and even refuses to contact the grandparents.

3.3.13. Relação de Porto (08-10-2020) [28]

A 6 and a half-year-old child should be heard in the process of choosing a public or private school, principally when he or she has already attended kindergarten in one of them for about two years.

3.3.14. Relação de Lisboa (14-07-2020)[29]

Art. 1887-A of the Civil Code, added by Law 84/95 of 31 August 1995, enshrined the child's right to contact his grandparents and recognised their right to contact his grandchild, which could be called "contact rights".

Art. 28 RGPTC does not provide for any legal derogation, in the context of provisional and precautionary decisions, from the general principles of hearing the child and the adversarial procedure.

[27] ECLI:PT:TRC:2014:194.11.0T6AVR.C1.06, available jurisprudencia.csm.org.pt/.
[28] Processo 12970/19.0T8PRT-C.P1, available www.dgsi.pt.
[29] Processo 24889/19.0T8LSB/A.L1/6 , available www.dgsi.pt.

Not hearing the child, in the context of the determination of a provisional system of contact between grandchildren and grandparents, results in the annulment of the contested decision and determines that the proceedings be dropped in order to either hear the children if their ability to understand so determines or be justified in not hearing them.

In this matter (contact with his or hers grandparents), the law itself establishes a presumption that the relationship of the child with the grandparents is beneficial to the child, and the parents, if they wish successfully to oppose the refusal of such a relationship, will have to invoke and demonstrate concrete reasons for the prohibition, which presupposes prior adversarial proceedings.

3.4. Binding nature of the opinion

3.4.1. Relação de Lisboa (23-05-2019) [30]

I – The court is not bound by the child's opinion and will, since the child's best interests often conflict with his or her own extravagant will and wishes.

II- The Judge must not be a mere receptacle of that will, desire or opinion, merely gathering it, observing it and abiding by it uncritically. Instead, he must decisively bring it together, submitting it to the judgment of the child's real, concrete and casuistic interest, for only in this way will he succeed in performing his duties.

3.5. When is the child heard

3.5.1. Relação do Porto (24-10-2019)[31]

I – If the child has already been heard on the regulation of the exercise of parental responsibilities, he or she does not have to be heard again before the modification of the preliminary regulation of that exercise if the aspect addressed by this decision is not new or original concerning those raised at that hearing.

II – The modification of the provisional arrangements may be decided by the court even if none of the parties has requested it, but the parties' hearing must precede the decision.

III – The modification of the current provisional regime, established by the parties' agreement and homologated by the court, should only be ruled if there is a non-compliance with that regime or if there are supervening circumstances that require the modification to safeguard the best interests of the child.

[30] ECLI:PT:TRL:2019:2403.15.7T8SXL.A.L1.2.2D, available jurisprudencia.csm.org.pt/.

[31] Processo n.º 21097/17.9T8PRT-E.P1, available www.dgsi.pt.

3.6. Appointment of a curator or lawyer

3.6.1. Relação de Lisboa (25-01-2018)[32]

A lawyer's appointment to a child is not required if the child's interest does not conflict with the parents' interests but rather is identical to the parents' position in conflict with the other.

4. The effectivity of the hearing as dependent on the right to receive adequate information: gaps and deficiency in the Portuguese legal system

One of the problems that can be pointed out to the Portuguese legal system's entropies or inadequacies is the lack of standardised and technically validated procedures. Making this right to be heard and participating, in reality, depends more on the practice of the different judicial actors than the legislation.

Standardisation, proper training, necessary critical sense about the way our children are heard are more needed. There is still a need for proper training in child-friendly and understandable language to inform them.

Despite the difficulties, there are considerable achievements. The improvement of physical spaces for the child's hearing, more training offer, access and availability of expert assistance, and the development and dissemination of good practice manuals. Some of these improvements have resulted from the joint effort between specialists and judicial operators (bar association and magistrates) ([33]), or even from work the experts that assist the courts (social security) ([34]). Also noteworthy is the courts' growing specialisation, circumscribing cases involving children in specialised courts (family and minors). Nevertheless, there is a lack of collective awareness of the importance of the child's information and participation. The exercise of the right tends to be exhausted at the concrete moment of the hearing (there is an idea of subsequent unaccountability as to the type of information to be provided about the process itself), as well as by the lack of awareness of the actors themselves (in particular the parents) who are the figures close to the children. There is an absence of a culture of children's rights, resulting in some cases in an idea of fulfilling a formality, without the child being included in decision-making processes.

[32] ECLI:PT:TRL:2018:17627.17.4T8LSB.L1.6.21, available jurisprudencia.csm.org.pt/.
[33] https://crlisboa.org/2017/imagens/Audicao-Crianca-Guia-Boas-Praticas.pdf
[34] http://www.seg-social.pt/

5. Analysis of the current practices in Portugal

5.1. Common considerations

Since 2015, as stated above, there are special rules that determine how and where the child's hearing should be (art 5 RGPTC). The information provided to the child is made at the time of the hearing and is normally provided by the Judge. Sometimes, experts (social security assistants, psychologists) provide a context for the proceedings. Once the hearing has taken place, there is no continuity of information or the proceedings' outcome. The mediation of information is not guaranteed, beyond the proceeding moment in which it takes place. It is up to the parents (or those who care for the child) to inform (when they do so) what happens after the hearing and the outcome. There are no guarantees in keeping the child as the interlocutor in the process. The rule is that the child is only heard in the light of new facts or circumstances,

This means that the information is conveyed in a process-oriented, and usually, it has no follow up. As a rule, the court's assistance experts only take steps to obtain information for the case. The approach is different depending on the formation and time the child is heard. There is no protocol or standard rules on how to be heard, although there has been an effort to train judges and raise awareness of the hearing's relevance.

It has been understood that from the moment children enter primary school (at the age of 6 or 7), this is the framework that allows them to consider that they are minimally endowed with sufficient capacity of understanding and discernment to understand their rights. Depending on each age group, it is necessary to explain the collection of rights in clear and accessible language for the child/young person. The age group defines the child/young person's right to understand the rights of the child/young person.

The experts that assist are appointed by the court, being independent for either party. Even though it is established by law, the courts' faculty to resort to experts assistance does not always happen. Only in certain cases a psychologist or other health professional may be appointed in cases of more serious unprotection, when the child presents symptoms of emotional disorder, or when the parental or family conflict is more intense.

The child, who is capable of understanding the matters under discussion, taking into account his or her age and maturity, is always heard on decisions concerning him or her, preferably with the support of an expert to the court, and is guaranteed, unless the judge gives grounds to refuse the hearing. The child can be heard with the presence of an adult of his or her choice whenever he or she shows an

interest (art. 4(c) of the RGPTC). As a rule, children (here meaning those under 18 years of age) should be heard in judicial and administrative proceedings concerning them. There is no special moment to the child be heard, but normally it happens at the begging of the proceedings according to art. 35 (2) (3) (RGPTC):

«2 – The Judge may also determine that the grandparents or other relatives and persons of special affective reference for the child are present.

3 – A child over 12 years of age or younger, capable of understanding the matters under discussion, taking into account his or her age and maturity, shall be heard by the court, under the terms of article 4© and article 5, unless the best interests of the child are advised against it».

The child's hearing to give his or her opinion (hearing of children capable of understanding the matters in question and provided for in art. 5(1) (2) RGPTC) must not be confused with the 'hearing' to take statements for evidence (which may be determined by the court, of its motion or on the application, where the child's interest so justifies, provided for in art. 5(6) (7 RGPTC)).

It should also be noted that art. 4(2) RGPTC provides for the Judge's obligation to assess, on a case-by-case basis, the child's ability to understand and discern the matters under discussion, and to this end, he may avail himself of the support of technical advice. Therefore, it will be necessary to begin by assessing the child's capacity for discernment, which will involve, from the outset, the creation of an environment that fosters a willingness and comfort for the child, allowing a dialoguing relationship to be established between the child and the Judge.

In turn, in art. 5 the legislator stipulates child's right to be heard, his or her views being taken into account by the judicial authorities when determining his or her best interests. Before being heard, the child must be informed about the scope and significance of his or her hearing (no. 1, 2 and 3). This is essential for the proper implementation and enforcement of this right, thus ensuring, on the one hand, that the child is expressed freely and in an informed manner and, on the other hand, that the expectations the child may have regarding the weight of his or her intervention are not frustrated. Art. 5(4) RGPTC, lists the procedure to be taken in this endeavour, including the holding of this hearing in a child-friendly, non-intimidatory space appropriate to the child concerned and the need for the intervention of judicial and other appropriately trained personnel. Despite all this care, it is important to always keep in mind that the child's hearing concerning him or her is an extraordinarily intense moment for the child and a very demanding one for the professionals who carry it out.

In turn, in order for "the child's testimony to be considered as evidence", the "statements" referred to in paragraph 7 of the art as mentioned earlier. Art. 5 RGPTC should be taken, following the rules set forth therein, which, as far as it is concerned, provides that the taking of statements "shall be carried out in an informal and reserved environment, to ensure, namely, the spontaneity and sincerity of the answers. The child must be assisted in the course of the procedural act by a specially qualified technician, previously appointed for the purpose", that "the Judge enquires. The Public Prosecution Service and the Lawyers may ask additional questions", that "the child's statements are recorded by audio or audiovisual recording. Other suitable technical means may only be used to ensure their full reproduction when those means are not available. Preference is given to audiovisual recording where the nature of the matter to be decided, or the interest of the child so requires", as well as "wherein civil proceedings the child has made a statement before a judge or public prosecutor, in compliance with the principle of adversarial proceedings, these may be considered as evidence in civil proceedings".

Finally, it should only be mentioned that the hearing and participation of the child or young person in the scope of the promotion and protection of rights intervention is provided for in art. 4, paragraph j) and 84, LPCJP, by establishing that children and young people are heard by the protection commission or the Judge on the situations that gave rise to the intervention and regarding the application, revision or termination of promotion and protection measures, under the terms provided for in art. 4 and 5 RGPTC.

In turn, also in the context of the adoption process, the adopting party must be heard by the Judge, with the presence of the Public Prosecutor, under the terms and in compliance with the rules provided for the hearing of children in civil protection cases, which hearing must be done separately and in order to safeguard identity secrecy (art. 3 and 54 (1) © (2) RJPA).

The information provided depends on the person holding the proceedings. The child is always informed of the duties performed by the person present, the confidentiality of the declaration made, the procedure and its possible outcome. Besides, information on the object of the proceedings is provided. There are cases where the information provided extends to procedural guarantees and the rights of the child.

5.2. Parental responsibility proceedings

There is a common interpretation of the child's rights to participate and be heard. This duty is incumbent upon those who preside over the diligence (normally, the judge), and the corresponding right is incumbent upon those who are mature, and no specific age is fixed.

It has been understood that from the moment children enter primary school (at the age of 6 or 7), this is the framework that allows them to consider that they are minimally endowed with sufficient capacity of understanding and discernment to understand their rights. Depending on each age group, it is necessary to explain the collection of rights in clear and accessible language for the child/young person. The age group defines the child's right to understand his or her rights.

5.3. Child abduction

The principles and rules set out in the RGPTC apply to all proceedings aimed at defining the child's situation. There are no special rules of international abduction procedures than those prescribed in the 1980 Hague Convention and Brussels IIa Regulation.

As in all other cases, the child is heard at the first instance, at a proper and autonomous procedural stage, following the rules laid down in the RGPTC. This means, taking into consideration the age and the *de facto* capacity, as laid down in art. 5 and 32 (2) RGPTC (*see above*).

5.4. Maintenance

Although there is a general rule when it is exclusively a matter of defining the amount of maintenance, it has been understood that the child should not be heard. The reason given is the patrimonial nature of the matter going beyond his or her understanding, and the fact that the hearing does not contribute to the final decision.

The pecuniary nature of the object of the maintenance obligation leads to an interpretation that there is no right of the child to be heard in this kind of procedures. Therefore, the general practice is to disregard the child's hearing. If any information is to be provided, it shall be given by the judge or by the court clerks at the beginning of the proceedings; if it is at an earlier time, it shall be given by the lawyer of one of the parties proceedings.

In situations where they are heard, only basic information on the proceedings' subject matter and the proceedings' purpose is given. Information is not always given on the importance of their opinion and the outcome of the proceedings.

The outcome of the process is never formally or officially informed. If feedback is available, it is usually provided by the caregivers, usually the parents.

5.5. Appointment of a special representative for the child

Art. 18(1) (2) of the RGPTC states that the proceedings «must be followed by a lawyer at the appeal stage» and also that «the child must be given a lawyer when his or her interests and those of his or her parents, legal representative or de facto guardian, conflict, and also when the child, with adequate maturity, asks the court to do so».

For its part, the preceding art. 17, under the heading of «procedural initiative», states that «Unless expressly provided otherwise and without prejudice to the provisions of art. 52 and 58, the procedural initiative shall be the responsibility of the Public Prosecutor, the child over the age of 12, the relatives in the ascending line, the siblings and the child's legal representative».

However, since the legislator has enshrined in the RGPTC the possibility for the child aged over 12 years to take the procedural initiative for the establishment of a civil guardianship measure (art. 17 RGPTC), this is tantamount to saying that, implicitly, the legislator considers that a child aged over 12 years is already a child with adequate maturity.

Consequently, under art. 18(2) RGPTC, the court is required to consider the request of the child by appointing him a lawyer, and the court cannot condition the granting of the appointment in question on the "relevance" of the ratio invoked - by the child.

Furthermore, it is the lawyer's responsibility to act in such a way as to defend the legitimate interests of the child, in compliance with the legal and deontological rules (art. 97, of the EOA). He shall always maintain his independence and shall act free from any pressure (cf. art. 89, of the EOA), or of external influences abstaining from neglecting professional deontology in order to please his client, before having to use all the technical knowledge, knowledge and procedures which the legis artis consigns and which are supposed to be in his possession. It is ultimately up to the appointed lawyer to determine the appropriate means to better defend the child's legitimate interests.

Then, by Part I of art. 18(2) of the RGPTC, the appointment of a lawyer to the child, is necessary when his interests and parents, legal representative or de facto guardian, are conflicting. It is clear from the child's application that the request for the appointment of a lawyer presupposes precisely the existence of conflicting interests between the child and his parents. It was also sufficient for his request to be granted, with the appointed lawyer being responsible for assessing and choosing the

appropriate means of overcoming the conflict, and for this to be guided solely by the fundamental and decisive criterion of the defence of the child's best interests.

Moreover, the possibility of appointing a lawyer to a child is in art. 103(2) (3) LPCJP, which states that «The appointment of a child or young person as a legal guardian is compulsory where his or her interests and those of his or her parents are concerned». The appointment of a lawyer is made «per the law on legal aid» and specially stated in art. 10 (2) LAC.

Precisely in the context of regulating parental responsibilities (art. 35 (3) and art. 5 (1) RGPTC), the law establishes that «a child over the age of 12 years or younger, capable of understanding the matters under discussion, taking into account his or her age and maturity, shall be heard by the court, following the terms of art. 4 (c) and art. 5, unless the defence of his or her best interests advises against it».

If the child wants to appeal against the judicial decision that homologates the parental responsibilities agreement, the court must appoint a lawyer in cases where it is no longer possible. The fact that the child has been appointed a lawyer does not justify the non-appointment of a lawyer, even though it is not possible to do so on the date of an ordinary appeal or complaint, when, because the child has conflicting interests with those of his parents, the legal assistance provided by the appointed lawyer must be strictly construed for the entire proceedings, which are not directed solely towards the practice of a single and isolated procedural act.

Because guardianship proceedings have the nature of voluntary jurisdiction (art. 12 RGPTC), the respective resolutions (handed down according to criteria of convenience or opportunity) prima facie do not "become res judicata", since they may always be altered, without prejudice to the effects already produced, based on supervening circumstances that justify their alteration (art. 988 CPC).

6. Conclusions

The child's effective right to be heard embodies the conditions for his or her emancipation as a holder of rights and self-determination as an element that enhances his or her dignity and promotes his or her development. It is therefore vital that the child be allowed to exercise his or her rights to freedom of speech and participation in all areas of life; rights which the family, the various institutions and the individual must foster and respect, also creating the best conditions, recommended by culture, science, technique and experience.

Despite the path taken by the Portuguese system, it is still imperative to change mentalities and procedures in order to ensure a continuum of information that enables the child to participate

effectively in the processes that concern him/her. It requires the adoption of validated procedures and training that require concerted action and not left to *ad hoc* or voluntary approaches. This does not need to be adopted in legislative terms (taking into account the content of the law in force, especially, the art. 5 RGPTC), but as a result of the implementation of common rules commissioned by the judicial authorities (magistrates, academics, experts, lawyers, professionals' bars, institutions, etc.). Improvements to the system include an awareness of children's rights, which requires an opening up of the judicial system to a multidisciplinary approach and cooperation between the different actors.

Abbreviations

Brussels II-A — Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

CC — Civil Code

CPC — Civil Procedure Code

CFR — Charter of Fundamental Rights of the European Union

ECER — European Convention on the Exercise of Children's Rights

ECHR — European Convention on Human Rights

ECtHR — European Court of Human Rights

EOA — Statute of the Bar Association

HCCH 1980 Child Abduction Convention — Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

LAC — civil custody (fostering) of children (*apadrinhamento civil*, Law 103/2009, 11-09, last modification by the Law 141/2015, 08-09).

LPCJP — Law for Protecting Children and Young People at Risk (Law 147/99, 01-09, last modification by Law 26/2018, 05-07)

LTE — Educational Guardianship Law (Law 166/99, 14-09, las modification by Law 4/2015, 15-01)

OTM — Jurisdictional organisation of children (Law Decree 314/78, 27-10 (last modification by Law 31/2003, 22-08), revoked by Law 141/2015, 08-09)

RJPA — (Law 143/2015, 08-09)

RGPTC — General Regime of Tutelage Procedure (Law 141/2015, 08-09 last modification by Law 24/2017, 24-05)

UNCRC — United Nations Convention on the Rights of the Child

VS — Victim's Statute (Law 130/2015, 04-09).