



Paper

The *protection of unaccompanied foreign minors and the guardianship system*

International, regional and national legal framework

1. International legal framework (United Nations, European Union, Council of Europe)

The rights of the children have been recognised in a number of international and regional agreements signed by the Member States of international and regional organizations. Most of these agreements are legally binding and for this reason have been implemented at national level. Through these legal instruments, the protection of the rights of the unaccompanied foreign minors (UAMs) can be achieved more effectively.

A generally recognized modern approach addresses **children as autonomous rights-holders**. This autonomy has to be guaranteed through the protection and promotion of the *best interests of the minor* principle¹.

The *best interests of the child* principle

The *best interests of a minor* is a fundamental principle in the protection of the rights of all children. It becomes essential in case of the UAMs to find short and long-term solutions taking into account their particularly vulnerable situation².

There is a direct relationship between the protection and promotion of the *best interests of child* principle and the appointment of a guardian or a representative. In the case of UAMs,

*the appointment of a competent guardian as expeditiously as possible serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child and, therefore, such a child should only be referred to asylum or other procedures after the appointment of a guardian*³.

¹ See, CoE Parliamentary Assembly, *The inclusion of children's rights in national constitutions as an essential component of effective national child policies*, Res. 2056(2015), par. 5.2. Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21783&lang=en>

² UNHCR *Guidelines on Determining the Best Interests of the Child*, Geneva, 2008. See, <http://www.unhcr.org/4566b16b2.pdf> ; for further information, see Kalverboer M., Beltman D., Van Os C., Zijlstra E., *The Best Interests of the Child in Cases of Migration Assessing and Determining the Best Interests of the Child in Migration Procedures*, international journal of children's rights, 25 (2017) pp. 114-139.

³ See, CRC Committee, *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin* - CRC/GC/2005/6, 1 September 2005 (par. 21), available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2005%2f6&Lang=en



Listed below are the most relevant legal instruments adopted at international and regional level that refer to the principle. These can be applied either directly or indirectly in domestic legislations⁴.

UNITED NATIONS

The ***Geneva Declaration of the Rights of the Child*** adopted by the League of Nations in 1924, has recognised for the first time the existence of rights specific to children and the responsibility of adults to assure them: *by the present declaration of the rights of the child, men and women of all nations, recognizing that mankind owe to the child the best that it has to give, declare and accept as their duty (...)*⁵.

The ***UN Declaration of the Rights of the Child*** adopted by the General Assembly in 1959 expressly referred to the principle: *the child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration* (principle 2)⁶.

The ***United Nations Convention on the Rights of the Child (CRC)*** is a multilateral treaty ratified by 196 States members of the United Nations in 1989⁷. The CRC is the first core and legally binding convention to incorporate the full range of human rights of children. The State Parties are obliged to implement the content of the CRC provisions in domestic law (*the implementation of CRC obligations and principles in the context of migration is supported by an underlying principle: that the standards set out by the CRC should have primacy over any other aspect or policy involved*⁸). The obligation derives from the ratification of the convention.

Art. 3 - Best Interests

- 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.**
- 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.**
- 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.**

⁴ A declaration doesn't create a legally binding obligation on the countries which have signed it. However, in case of human rights protection, a declaration can have political and moral importance.

⁵ See, <http://www.un-documents.net/gdrc1924.htm>

⁶ General Assembly, resolution 1386 (XIV), A/RES/14/1386, 20 November 1959. See, <https://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf>

⁷ See, https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en

⁸ See Kalverboer M., Beltman D., Van Os C., Zijlstra E., *The Best Interests of the Child in Cases of Migration*, 2017 (p. 117). For more information about the incorporation of the CRC into the domestic legal order, see European Commission for Democracy through Law (VENICE COMMISSION, CoE), REPORT *on the protection of children's rights: international standards and domestic constitutions*, CDL-AD(2014)005 (2014), available at : [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2014\)005-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2014)005-e)



The three general principles based on the *best interests* principle are: *non-discrimination*, *right to life and to development*, *right to be heard*⁹. In the case of protection of UAMs, particular attention is given to the principle of non-discrimination in association with the right to express his or her views freely.

Art. 2 - Non-discrimination

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction *without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*

Art. 6 - Right to life, to development

- 1. States Parties recognize that *every child has the inherent right to life.***
- 2. States Parties shall ensure to the maximum extent possible the *survival and development of the child.***

Art. 12 Right to be heard

- 1. States Parties shall assure to the child who is capable of forming his or her own views *the right to express those views freely* in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.**
- 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.**

The *UN Committee on the Rights of the Child* is a body of 18 independent experts. It is a treaty-based mechanism and its mandate is to monitor the implementation of the CRC in the national legislation. The CRC Committee publishes *general comments*, a useful interpretation of the CRC provisions to address the actions of States¹⁰.

The *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1) states that principle as a *rule of procedure* (CRC/C/GC/14, 29 May 2013, Introduction)¹¹.

According to the opinion of the CRC Committee, the elements to be taken in account assessing the *best interests of child* are:

- 1) The child's views** (art. 12);
- 2) The child's identity** (art. 8) *Although children and young peoples share basic universal needs, the expression of those needs depends on a wider range of personal, physical, social and cultural aspects, including their evolving capacities ;*
- 3) Preservation of the family environment and maintaining relations** (art. 9, preventing family separation) ;

⁹ Reference, UN Doc A/RES/44/25 (20 November 1989), <http://www.un.org/documents/ga/res/44/a44r025.htm>

¹⁰ The CRC Committee has numerous other tasks in addition to the elaboration of general comments. For further information, see <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>

¹¹ Reference, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f14&Lang=en



- 4) **Care, protection and safety of the child** (art. 3.2). *Children's well-being, in a broad sense, includes their basic material, physical, educational and emotional needs, as well as needs for affection and safety.*
- 5) **Situation of vulnerability** (such as to be a refugee, an asylum seeker or victim of abuse) ;
- 6) **The child's right to health** (art. 24) ;
- 7) **The child's right to education** (art. 28). *To enhance children's responsibilities to overcome the limitations of their vulnerability of any kind, will be best interests of children.*

(V. Implementation: assessing and determining the child's best interests A. Best interests assessment and determination, parr. 48-79).

In 2005 the CRC Committee released the *General Comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin*¹².

Four risks faced of by UAMs are identified: *sexual exploitation and abuse, military recruitment, child labour (including for their foster families) and detention.*

Some forms of discrimination can make it difficult their integration (denied access to food, shelter, housing, health services and education). *In some situations the children have no access to appropriate identification, registration, documentation, guardianship system or legal advice. The aim of the general comment is to provide clear guidance to states on the obligations deriving from the Convention with regard to this vulnerable group of children (Objectives of GC).*

EUROPEAN UNION

There are groups of children and adolescents who have special needs and who are particularly at risk: children belonging to ethnic or other minorities, child migrants, displaced children or refugees, children affected by armed conflicts, child soldiers, orphans and children without parental care, children affected by HIV/AIDS, and children with disabilities, all warrant special attention. Girls are particularly vulnerable and face additional risks.

A Special Place for Children in EU External Action (Communication, COM(2008) 55 final, p. 3)

In 2017 the EU Fundamental Rights Agency (FRA), published a handbook on *European law relating to the rights of the child* providing an outline of the fundamental rights of children in the EU and in the Council of Europe (CoE) Member States. The handbook focuses specifically on the rights of migrant children, in different range of migration situations, reporting cases of alleged or proven violations of rights which go against the principle of non discrimination (to read in conjunction with other rights like child's best interests, life family, respect for private and family life)¹³.

¹² General Comment No. 6 (2005), *Treatment of Unaccompanied and Separated Children*- CRC/GC/2005/6 (2005). Reference, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2005%2f6&Lang=en

¹³ See, FRA, *Handbook on European law relating to the rights of the child*, Luxembourg, June 2015 (published in 2017), Chapter 9. *Migration and Asylum* (pp. 161-180, in particular pp. 161-162), available at : <http://fra.europa.eu/en/publication/2015/handbook-european-law-child-rights>



Some references to the protection of the child are included in the **Lisbon Treaty** (2007, came into force in 2009), paid attention to the promotion of social justice¹⁴.

Treaty on the European Union (TEU)

art. 3.3 (*The Union shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child*) ;

art. 3.5 (*The Union shall contribute to (...) eradication of poverty and the protection of human rights, in particular the rights of the child*) ;

art. 79.2 lett d and **art. 83.1** (*The Union shall adopt measures to combat trafficking in persons, in particular women and children*).

The **Charter of Fundamental Rights of the European Union** (2000), a EU legally binding instrument on human rights which came into force in 2009, contains some provisions *addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law* (art. 51, application of the Charter)¹⁵.

Some of these directly and indirectly concern to the right of the child and the *best interests* principle and are based on the right to equality and non-discrimination.

Art. 21, Non-discrimination

- 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.**
- 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.**

Art. 24, The rights of the child

- 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.**
- 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.**
- 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.**

This provision is directly linked to the art. 3 of the UN CRC.

Art. 18, Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of

¹⁴ For further information about the Lisbon Treaty, see http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuid=FTU_1.1.5.html

¹⁵ Reference, 2007/C 303/01. The text of the Charter and more information are available, https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights_en



refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as ‘the Treaties’).

Art. 19, Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

The 2017 European Commission Communication - *The Protection of children in migration* – refers to the vulnerability of migrant children and to the priority in protection.

The migrant children are in state of particular vulnerability because of their age, their distance from home, and often their separation from parents or carers. They require specific and appropriate protection (...) Protecting children is first and foremost about upholding European values of respect for human rights, dignity and solidarity. It is also about enforcing European Union law and respecting the Charter of Fundamental Rights of the European Union and international human rights law on the rights of the child. This is why protecting all children in migration, regardless of status and at all stages of migration, is a priority¹⁶.

The *best interests of the child principle* is contained in other binding instruments adopted at EU level and part of the general “*Common European Asylum System*”.

The Dublin Regulation (Dublin III, EU No. 604/2013), art. 6 on the *guarantees for minors* and with a specific reference to the role of the *representative* that have to ensure the best interests of the minor (about the role of the *representative*, see below)¹⁷.

This Regulation contains stronger guarantees for UAMs comparing it to the previous Dublin Regulation (2003).

Standards for the Reception Directive (2013/33/EU), art. 23 on the primacy of the *best interests* of the child in the implementation of the provisions of the Directive at national level taking in account: *family reunification possibilities, minor’s well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity* (art. 23.2)¹⁸

Family Reunification Directive (2003/86/EC), art. 5 on the submission and examination of the application. *When examining an application, the Member States shall have due regard to the best interests of minor children* (art. 5.5)¹⁹.

¹⁶ European Commission, Communication, *The protection of children in migration*, COM(2017)211 final, Brussels, April 2017 (p. 2), <http://ec.europa.eu/transparency/regdoc/?fuseaction=list&cotelId=1&year=2017&number=211&version=ALL&language=it>

¹⁷ The Dublin Regulation (2013) *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person* (recast), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013R0604&from=EN>

¹⁸ See, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN>

¹⁹ See, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0086&from=IT>



Qualification Directive (2011/95/EU), art. 20 on the general rules. *The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors (Chapter VIII, «Content Of International Protection»)*²⁰.

Procedures Directive (2013/32/EU), art. 25 on *guarantees for unaccompanied minors. The best interests of the child shall be a primary consideration for Member States when implementing this Directive (art. 25.6)*²¹.

Return Directive (2008/115/EC), art. 5 on *on-refoulement, best interests of the child, family life and state of health, rights to take due account by the Member States in implementing the Directive*²².

COUNCIL OF EUROPE

The **Council of Europe (CoE)** published on May 2017 an *Action Plan on Protecting Refugee and Migrant Children in Europe* with a focus on UAMs. The aim of the Triennial Action Plan is to assist the Member States of the Organization in:

- 1. ensuring access to rights and child-friendly procedures**
- 2. providing effective protection**
- 3. enhancing the integration of children who would remain in Europe**

The *best interests of the child* plays a central role in the achievement of all these aims.

In 1996 the CoE adopted the *European Convention on the Exercise of Children's Rights*²³, an important legal instrument to use as reference. According to the art. 1.2,

*the object of the Convention is, in the best interests of children, to promote their rights, to grant them procedural rights and to facilitate the exercise of these rights by ensuring that children are, themselves or through other persons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority*²⁴.

The Convention establishes the right of minors to participate actively to any proceedings, to be informed and to express own opinion (Chapter II) having the right to apply for the appointment of a special representative (art. 4).

²⁰ See, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0095&from=IT>

²¹ See, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=it>

²² See, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0115&from=it>

²³ CoE, European Treaty Series - ETS No.160, Strasbourg, 25/01/1996, <https://rm.coe.int/168007cdaf>

²⁴ Italy ratified the Convention. Adoption of Law No. 77, 20 March 2003, entered into force on 1 November 2003.



2. The guardianship provisions and the unaccompanied foreign minors in the European Union Directives

Who is an *unaccompanied minor*²⁵?

According to the art. 2.L of EU Directive 2011/95/EU, *on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection*,

An '**unaccompanied minor**' means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States²⁶.

The art. 2.F of Directive 2001/55/EC, *on minimum standards for giving temporary protection in the event of a mass influx*, specifying the age range, defines "unaccompanied minor" as a third-country nationals or stateless persons below the age of eighteen²⁷.

The EU Member States provide to protect the unaccompanied foreign minors deprived of parental care through the adoption of a guardianship system regulated by law. The three main objectives of the protection that they share are:

- 1) to safeguard the best interests of the child
- 2) to provide a legal representation
- 3) to promote the well-being of children

In EU Member States the definition of unaccompanied minors can differ. Some countries such as Germany, Austria and Portugal use the term « *unaccompanied asylum-seeking (or refugee) minors* » ; In Italy the most frequently used term is « *foreign unaccompanied minors* »²⁸.

²⁵ The Separated Children in Europe Programme (SCEP) uses the term *separated child* to equally identify the unaccompanied minor "because it more accurately defines the essential problem that such children face, namely that they lack the care and protection of their parents or primary caregiver and, as a consequence, suffer socially and psychologically from this separation". See, FRA Handbook, *Guardianship systems for children deprived of parental care*, 2014 (p. 12), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/guardianship_for_children/guardianship_for_children_deprived_of_parental_care_en.pdf and the SCEP website <http://www.separated-children-europe-programme.org/>

²⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0095&from=IT> . The same definition is included in the art. 2.E of the EU Directive 2013/33/EU, *laying down standards for the reception of applicants for international protection*, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0033&from=EN>

²⁷ The complete definition is "unaccompanied minors means third-country nationals or stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person, or minors who are left unaccompanied after they have entered the territory of the Member States" (art. 2.F, EU Directive 2001/55), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0055&from=IT>

²⁸ See, Accorinti M., *Unaccompanied foreign minors in Italy: A political and social analysis*, Social Science Learning Educational Journal, September 2016 (pp. 27-41, in particular p. 29).



Nevertheless, taking in account the different definitions, the unaccompanied minors are all children who are lacking parents.

What are the challenges the children face in migration?

• **Inadequate reception** – Some reception facilities where children first find shelter are inadequate and unsafe for minors. Staff may not be qualified or trained and reception conditions may not be monitored. • **Access to basic services** – Children in migration often have inadequate access to health and psychosocial care, legal assistance and education. • **Family separation** – Children may be separated from their families, for example when travelling in large groups of people, if borders are closed or due to deliberate actions by smugglers. • **Protracted family reunion and transfer procedures** – There are often long delays or no access to family reunion or transfer procedures. • **Support for victims of abuse** – Many children have arrived in Europe with obvious signs of injury, trauma or physical, sexual and psychological abuse incurred on their way, sometimes including on EU territory. • **Guardianship systems** – EU law already provides for the appointment as soon as possible of guardians for unaccompanied children, but children may have to wait a long time before being allocated one. Also, guardians may have far too many children to take care of or may not be adequately trained.

What needs to be done? Child protection and child safeguarding measures

• **Encourage** the establishment of integrated national child protection systems in the EU Member States and beyond;
• **Improve** cross-border cooperation between authorities in charge of protecting children;
• **Implement** child protection and child safeguarding measures at the hotspots and in all reception facilities;
• **Extend** the use of family-based or foster care;
• **Improve** access to education and adequate healthcare, including psychosocial care;
• **Protect** children against the risk of sexual violence, sexual exploitation and trafficking in reception and detention centres, as well as along the route;
• **Invest** in alternatives to detention, such as community-based foster care.

Protecting children in migration, European Commission Factsheet - November 2016

The guardianship system

Several international and regional instruments on the rights of children refer to the general guardianship system and highlight the central role of the guardian or representative to ensure the full enjoyment of the fundamental human rights by UAMs.

The appointment of a competent guardian as expeditiously as possible serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child and, therefore, such a child should only be referred to asylum or other procedures after the appointment of a guardian.

States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority (...).

CRC GC No. 6 (2005), *Treatment of Unaccompanied and Separated Children* (parr. 21 and 33)



An efficient national guardianship system must to be ready to receive minors in migration.

*Following their arrival in the European Union, **children in migration should always be identified and registered as children**, using a uniform data set across the European Union (for example, to indicate whether a child is unaccompanied, separated or travelling with family, nationality/statelessness, age, sex, etc.). **Children should be prioritised in all border-related procedures and receive adequate support from specialised staff in the process of identification and registration.** They should notably apply child-friendly and gender-sensitive approaches when collecting fingerprints and biometric data. **Vulnerabilities and special protection needs, including healthcare needs, should be better systematically and individually assessed (...).***

In case of children who are unaccompanied: a person responsible for child protection should therefore be present at an early stage of the identification and registration phase (...).

*(...) **There is an urgent need to integrate child protection at the hotspots by appointing in each hotspot a child protection officer** – namely, a person responsible for child protection acting as a focal point for all issues relating to children, **irrespective of whether children are applicants for international protection or not.***

The protection of children in migration, COM(2017)211 final (p. 6)

Usually the guardianship is regulated by civil law (specifically family law). As for responsibilities of implementation of the guardianship system, in some Member States these are shared between regional and local level²⁹.

What is a guardian?

The European Union Fundamental Rights Agency states that « *there is no commonly agreed definition of a guardian. While EU law recognises the importance of guardianship and legal representation to safeguard the child's best interests and well-being, **it does not define the notion of guardian, nor does it define his or her functions.** In addition to the term 'guardian', EU law uses the terms 'legal or other representative' and 'special representative' to describe the person appointed to assist and support unaccompanied children or children whose parents are precluded from exercising parental rights* » (FRA, 2014)³⁰.

The United Nations, the European Union and the Council of Europe documents and legal instruments mostly refer to *legal guardian* and *legal representative* (focusing on the function):

²⁹ For details see, FRA Report, *Guardianship systems for children deprived of parental care in the European Union. With a particular focus on their role in responding to child trafficking*, 2015 (p. 27), available at:

<http://fra.europa.eu/en/publication/2015/guardianship-children-deprived-parental-care>

³⁰ See, FRA, *Guardianship for children deprived of parental care: A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, Luxembourg, Publications Office, June 2014 (published in 2015), p. 13, <http://fra.europa.eu/en/publication/2014/guardianship-children-deprived-parental-care-handbook-reinforce-guardianship>



Terminology
UNITED NATIONS: UN Committee on the Rights of the Child, General Comment No. 6 CRC/GC/2005/6 <i>Guardian and Legal representative</i> (par. 33) UN Alternative care guidelines A/HRC/11/L.13 <i>Legal guardian Recognized responsible adult</i> (par. 100)
COUNCIL OF EUROPE: Convention on Action against Trafficking in Human Beings (2005) <i>Legal guardian</i> (art. 10.4(a))
EUROPEAN UNION: Anti-Trafficking Directive (2011/36/EU) <i>Guardian</i> (art. 14.2) <i>Representative</i> (art. 16.3) Reception Conditions Directive (2013/33/EU) <i>Representative</i> (art. 2.j) Asylum Procedures Directive (2013/32/EU) <i>Representative</i> (art. 2.n) Qualification Directive (2011/95/EU) <i>Legal guardian</i> (art. 31.1) <i>Representative</i> (art. 31.2) Victims' Directive (2012/29/EU) <i>Guardian</i> (art. 24.b) <i>Special/legal representative</i> Preamble (principle 60) Sexual exploitation of children Directive (2011/93/EU) <i>Special/legal representative</i> (art. 20) Dublin Regulation (604/2013/EU) <i>Representative</i> (art. 2.k)

FRA, *Guardianship for children deprived of parental care. A handbook to reinforce guardianship systems, 2014* (p. 14)

Across EU Member States, the term 'guardian' is used to describe a variety of persons with different mandates and functions. Other terms are also used to describe the persons exercising guardianship duties.

Some examples:

Denmark: *guardian* (responsible for child's finances); *custody holder* (responsible of the child's well-being and best interests of the child);

Czech Republic: *guardian* (represents the child in certain proceedings); *custodian* (responsible of the child's well-being and best interests of the child);

Portugal: *guardian* (represents the child in different legal proceedings); *tutor* (exercises other parental rights and duties of child care).

FRA Report, *Guardianship systems for children deprived of parental care in the European Union, 2015* (pp. 22-23)



Despite the differences and the lack of formal definition, nevertheless it is generally accepted that the *guardian* is an independent person who:

- 1) *safeguards the best interests of the child* (protecting the rights to non-discrimination, the right to life, survival and development and the right to be heard)³¹,
- 2) *supports and guarantees* the well-being of the child *and*
- 3) *complements* the limited legal capacity of the child (in the same way that a parent represents his or her child).

Referring to the FRA report, the guardians are *one of the most important features of a protection system for children who are deprived of their family environment and cannot have their interests represented by their parents*³².

Two EU Directives state a general common definition of *representative*.

What is a *representative*?

According to art. 2.j of the Reception Conditions Directive (2013/33/UE) and to art. 2.n of the Asylum Procedures Directive (2013/32/UE), a *representative* is

a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Directive with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary (...).

What is a *legal assistant* or a *counselor*?

The appointment of representatives *aims solely to ensure representation of a child in particular proceedings, so it cannot be seen as equivalent to the appointment of guardian. The legal representative's mandate does not cover all aspects of a child's life and development.* The representative or the guardian are different tasks as compared to the legal assistant or counselor (qualified lawyers or legal professionals): the latter *provide legal assistance, speaks on behalf of the child and legally represents him or her in written statements and in person before administrative and judicial authorities in criminal, asylum or other legal proceedings as provided in national law*³³.

What is a *Guardianship Authority* ?

*National law should designate an independent authority responsible for guardianship. Such an authority should be an integral part of the national child protection system (...). The mandate and functions of the guardianship authority should be clearly defined in domestic legislation*³⁴.

³¹ See, UN CRC Committee, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) - CRC/C/GC/14, 29 May 2013 (pp. 5-6), available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f14&Lang=en

³² FRA, Summary - Guardianship systems for children deprived of parental care in the European Union, 2018, (p. 1), available at : <http://fra.europa.eu/en/publication/2018/guardianship-systems-children-deprived-parental-care-european-union-summary>

³³ See, FRA, *Guardianship for children deprived of parental care* (2014), p. 13 and p. 37.

³⁴ *Ibid.* p. 40. Reference to *Guidelines for the Alternative Care of Children*, UN Doc. A/HRC/11/L.13 (2009), par. 117: *The competent authority or agency should devise a system, and should train concerned staff accordingly, to assess and match the needs of the child with the abilities and resources of potential foster carers and to prepare all concerned for the placement (...)*



The *guardian*, link between different actors, works together with the *representative* and the *legal assistant* to guarantee the protection of the best interests of the child in case of the measures taken in favour to the UAMs³⁵.

What does the guarantee of *guardianship* mean?

The European Commission Action Plan on *Unaccompanied Minors* (2010-2014), published in 2010, highlights the importance of the strengthening of a guardianship system at European and national level established on an effective protection of the unaccompanied foreign minors and an appropriate framework that takes in account the new challenges, especially with the increase in the last decade of the numbers of the migrant people in Europe³⁶.

Who does as *guardian* act?

When appointment of relatives is not possible guardianship is either assigned to an institution or entity designated by law or to a private person unrelated to the child who has undergone a vetting procedure (...) The employees of the guardianship institution or entity designated by law or natural persons, following their appointment by a court or other competent authority, perform the guardianship duties (...) If natural persons not representing an institution are appointed, these persons need to give their consent before they are assigned guardianship of an individual child³⁷.

The tasks of the guardian

The concrete tasks and duties of guardians in the EU Member States vary and depend to a certain extent on the legal basis of their appointment. (It is noted that) in the majority of Member States (the guardian's tasks are not precisely defined by law³⁸.

The EU Qualification Directive (2011/95/EU) contains a specific provision relating to the adoption by the EU member States of the necessary measures to ensure representation of unaccompanied minors “**by a legal guardian or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or court order**” (art. 31.1); at the same time the Member State shall ensure that unaccompanied minors are placed either: (a) *with adult relatives*; or (b) *with a foster family*; or (c) *in centres specialised in accommodation for minors*; or (d) *in other accommodation suitable for minors* (art. 31.3).

The art. 16 of the Directive on Temporary Protection (2001/55/EC) establishes that

1. The Member States shall as soon as possible take measures to ensure the necessary representation of unaccompanied minors enjoying temporary protection by legal guardianship, or, where necessary, representation

³⁵ See, FRA, *Guardianship for children deprived of parental care* (2014), Figure 12: *The guardian acting as a link between various actors*, p. 91.

³⁶ European Commission, *Action Plan on Unaccompanied Minors* (2010 – 2014), COM(2010)213 final, Brussels, 6.5.2010 (available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0213:FIN:en:PDF>). See also the European Commission, *European Agenda on Migration*, COM(2015) 240 final, Brussels, 13.5.2015 in particular pp. 17-18 (available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015DC0240&from=IT>); European Commission, on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, COM(2016) 85 final

³⁷ *Ibid.* pp. 23-24; Table data comparison. The EU-28 and the national institutions to which guardianship is assigned by law, p. 25. , Brussels, 10.2.2016, available at : <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-85-EN-F1-1.PDF>

³⁸ See FRA Report, *Guardianship systems for children deprived of parental care in the European Union*, 2015 (p. 53).



by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation.

2. During the period of temporary protection Member States shall provide for unaccompanied minors to be placed:

(a) with adult relatives;

(b) with a foster-family;

(c) in reception centres with special provisions for minors, or in other accommodation suitable for minors;

(d) with the person who looked after the child when fleeing.

The Member States shall take the necessary steps to enable the placement. Agreement by the adult person or persons concerned shall be established by the Member States. The views of the child shall be taken into account in accordance with the age and maturity of the child³⁹.

Taking in account the definition included in some national legislation, the tasks of the guardian are:

• ensure the child's physical and mental safety; • take care of the child's health and schooling; educate the child; • decide upon issues related to the child's interests in cooperation with interested central and local government institutions; • not create obstacles to the child being in contact with his or her biological parents provided this is not detrimental to the child's interests; • maintain contact with the child's parents; inform the child's parents and close relatives, if they so request, about the child's development, health, studies and other important issues; • organise the child's leisure activities, taking into account the child's age, development level and inclinations; • prepare the child for independent life and work in the family, society and the state.

(Lithuanian Civil Code, 2000, art. 3.271)⁴⁰

³⁹ Relating to the guarantees for unaccompanied minors with respect to the legal procedures for granting and withdrawing the international protection and the election of a representative who represents and assists him/her, the EU instrument of reference is the Asylum Procedures Directive (2013/32/EU), art. 25, at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013L0032&from=it>

⁴⁰ See, Civil Code of Lithuania, http://www.wipo.int/wipolex/en/text.jsp?file_id=202088. More details available reading FRA Report, *Guardianship systems for children deprived of parental care in the European Union* (2015), p. 54.



3. Guardianship in Italy

*To have a guardian as reference is really different
from living in a reception centre because (...)
you can have a support and you are not alone...
(Mohamed, Egypt).*

Relevant legislation

- **Italian Constitution** (*Costituzione*), artt. 2, 3, 10, 30, 31;
- **Civil Code** (*Codice Civile*), artt. 330, 333 (Title IX), art. 343 et seq. (Title X, artt. 343-399), in particular artt. 348 and 371, artt. 402, 403 (Title XI);
- **Presidential Decree No. 616/1977**, *Transfer of functions from the State to the Regions* - Art. 25 (1) (Trasferimento delle funzioni amministrative alle Regioni)
- **Law No. 184/1983** modified by Law No. 149/2001, *Right of a Minor to Family* (Diritto del minore ad una famiglia) – in particular artt. 2, 3, 4, 5, 9;
- **Law No. 176/1991**, *Ratification and execution of the UN Convention on the Rights of the Child*;
- **Law No. 77/2003**, *Ratification and execution of the European Convention on the Exercise of Children's Rights* (Convenzione del Consiglio d'Europa sull'esercizio dei diritti dei fanciulli, fatta a Strasburgo il 25 gennaio 1996);
- **Legislative Decree No. 286/1998**, *Consolidated Act of Provisions concerning immigration and the condition of third country nationals* (Testo Unico Immigrazione) – in particular artt. 18, 28, 29, 31 32, 33; and Presidential Decree No. 394/1999, Execution of the Law No. 286/1998;
- **Law No. 269/1998**, *Provisions against trafficking in human beings dealt with the sexual exploitation of children* (Norme contro lo sfruttamento della prostituzione, della pornografia, del turismo sessuale in danno dei minori);
- **Decree of the President of the Council of Ministers No. 535/1999**, *Regulation on the tasks of the Committee for Foreign Minors* (Comitato per i Minori Stranieri);
- **Law No. 228/2003**, *Measures against human trafficking* (Misure contro la tratta di persone);
- **Ministry of Interior Decree of 27 April 2015**, *Modalities for requests for services from local entities for the reception in SPRAR of foreign unaccompanied minors* (Modalità di presentazione delle domande di contributo, da parte degli enti locali, per i servizi finalizzati all'accoglienza nella rete SPRAR di MSNA), in particular art. 3;
- **Legislative Decree no. 142 of 18 August 2015**, *Implementation of Directive 2013/33/EU on standards for the reception of asylum applicants and the Directive 2013/32/EU on common procedures for the recognition and revocation of the status of international protection* (procedure e norme per richieste di asilo), artt. 18, 19, 21 (art. 19 emended by Legislative Decree no. 220 of 22 December 2017);
- **Ministry of Interior Decree of 1 September 2016**, *Establishment of first reception centers dedicated to unaccompanied minors* (Istituzione di centri governativi di prima accoglienza per MSNA), in particular art. 4;
- **Law No. 47/2017**, *Provisions concerning protection measures for unaccompanied foreign minors* (Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati).



Law No. 47/2017

On 7th of April 2017 Italy adopted a new legislation for the protection of unaccompanied minors. The Law No. 47/2017, *provisions on protective measures for unaccompanied foreign minors*, entered into force on 6th of May 2017 (GU Serie Generale n.93 del 21 aprile 2017)⁴¹ and represents the first example of an innovative and comprehensive legal instrument adopted by an EU-member State and relating to the rights of the unaccompanied foreign minors coming from non EU-member States (without Italian or other EU member States citizenship).

Law No. 47 recognizes inherent rights for the unaccompanied foreign minors and introduces into Italian legislation both some elements of change in the general legal framework and numerous amendments to Legislative Decrees No. 286 of 1998 and No. 142 of 2015.

The *best interests of the child* represents the foundation of the Law in question. The art. 3 affirms the principle of *non-refoulement* ensuring that the unaccompanied foreign minor is not sent back for any reason (emended artt. 19, 31 and 33 of the Legislative Decree No. 286/1998). The art. 4 refers to the establishment of initial reception centres devoted exclusively to minors (emended art. 19.1 of the Legislative Decree No. 286/1998) by the Protection System for Refugees and Asylum Seekers.

According to the art. 2, an **unaccompanied minor** is:

a minor arrived for any reason on the territory of the Italian State without Italian or EU member State citizenship and unaccompanied by an adult responsible for them on the base of the Italian legislation.

One of the most important result is the adoption of a legal instrument concerning the rights of **all** unaccompanied foreign minors without any distinction based on the legal status and the reason why they came to Italy (asylum seeker, economic migrant, victim of trafficking or other reasons).

They are entitled to the protection in the same manner as minors having Italian or EU member States citizenship (art. 1). For this reason, the legal guardianship of the unaccompanied foreign minor is regulated by the same provision direct to protect the rights of minor with Italian citizenship (art. 343 of the Italian Civil Code).

The main provisions of the Law no. 47/2017 relating to the **guardianship guarantee** are:

- **Art. 7, Foster care:** to promote the foster care family instead of the accommodation in specialised and devoted reception centres. The local authorities promote in the people the awareness of the foster parents to facilitate the foster care.
- **Art. 11, List of volunteer guardians:** at all the Italian youth courts are affixed lists of the volunteer guardians available to assume the guardianship of an unaccompanied minor. This provision represents one of the most innovative measures established by the Law. Together with the legal guardian (already provided for by the Italian Civil Code) it is envisaged the activity of individual volunteer guardian (private citizens) with an active involvement of the civil society⁴².

The purpose of this provision is to go beyond the low level of guarantees deriving from the higher number of minors to protect.

⁴¹ See, <http://www.gazzettaufficiale.it/eli/id/2017/04/21/17G00062/sg>

⁴² In Italy, for example, AccoglieRete Association is already active since several years (2013) in providing support to the unaccompanied minors and training volunteer guardians.



The National and Regional Authorities for Children and Adolescents (*Autorità Garante nazionale e garanti regionali per l'Infanzia e l'Adolescenza*) are the independent entities of reference in selection and training of the volunteer guardians promoting an uniform approach. The Authorities are supported by associations with experience in children migration, local institutions, professional orders and universities. After the training course, having all the necessary requirements (minimum conditions), the name of the volunteer guardians can be added to the list⁴³;

- **Art. 13**, *Measures accompanying the minor towards the age of majority – Long term integration measure*: according to the art. 13.2, reaching the age of eighteen, the minor has the possibility to continue, not later than age of twenty-one, the integration process with the permission from juvenile courts and the request to and support of the Social Services (“*Servizi Sociali*”);
- **Art. 15**, *Right to be heard and to participate through the legal representation in judicial hearing that involve directly the minor*, a right extremely important in the achievement of the *best interests of child* principle;
- **Art. 16** *Right to the legal guardianship*: in legal proceedings the minor has the right to designate a trusted lawyer; the designation can be done also through the appointed guardian or the person who exercises the parental responsibility (in accordance with the art. 3.1, Law No. 184/1983, *The Right of the Minor to a Family*).

Furthermore, the Law recognizes the right of the minor to *cultural mediator* (artt. 5 and 15).

The Law No. 47/2017 therefore aims at:

- 1) **Protecting** unaccompanied minors through an organized management of the reception system with rules that are clear and equally applicable throughout Italy;
- 2) **Reducing** the stay of minors in initial reception centres (from 60 to 30 days);
- 3) **Enabling** the effective integration of minors with a long-term perspective;
- 4) **Introducing** in the reception system the figure of the *volunteer guardian* (different from the foster care) who helps to allow a concrete legal and social integration of the minor;
- 5) **Supporting** municipalities that join the SPRAR system in the implementation of projects for unaccompanied minors, with the provision of funds specifically dedicated to these;
- 6) **Strengthening** cooperation between the different actors involved to ensure the effective implementation of the Law.

⁴³ On April 2018, six month after the adoption of the Law, more than 3000 people had already ran for becoming volunteer guardians (Save the Children, *Guida per i tutori volontari dei minori stranieri non accompagnati*, April 2018, p. 5; available at: <https://www.savethechildren.it/cosa-facciamo/pubblicazioni/guida-i-tutori-volontari-di-minori-stranieri-non-accompagnati>). The unaccompanied minors, after the identification, are under the care of the responsible of the initial reception centre (or the municipalities) until the appointment of a guardian.