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Effective guardianship for unaccompanied and separated migrant children

Report¹

Committee on Migration, Refugees and Displaced Persons

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Summary:

Migrant children are more in danger than other children to become victims of human trafficking or criminal networks which have immediate as well as long-term prejudicial consequences. By offering them the protection of a guardian, there is much more chance that their rights will be safeguarded, and solutions found for their future. Guardianship is also key in helping with the transition to adulthood and integration in a new country.

This report provides an analysis of the legal basis for guardianship in European countries, as well as different practices of guardianship in the member States of the Council of Europe.

It highlights the need for the elaboration of a holistic and effective guardianship system in Europe, and includes recommendations on how to ensure the necessary protection for unaccompanied and separated migrant children, principles upon which such protection should be based and best practices which should be followed.

Finally, the report welcomes the adoption by the Committee of Ministers of the Council of Europe of Recommendation CM/Rec(2019)11 on effective guardianship for unaccompanied and separated children in the context of migration and in line with this text calls the member States to step up their action and assess their legislation, policies and practices and where appropriate, take measures and allocate resources to ensure the necessary reforms to implement it.

¹ Reference to committee: Doc. 14637, Reference 4410 of 23 November 2018.

A. Draft resolution²

1. Unaccompanied and separated migrant children are among the most vulnerable individuals and as such require additional protection when they arrive in Europe, often after traumatic experiences in their countries of origin or during their migration.
2. Referring to its Resolutions 2136 (2016) on Harmonising the protection of unaccompanied minors in Europe, 2195 (2017) on child-friendly age assessment for unaccompanied migrant children and 2243 (2018) on family reunification of refugees and migrants in the Council of Europe member States, the Parliamentary Assembly reiterates its position that guardians play an essential role in ensuring protection and respect of the fundamental rights of unaccompanied and separated migrant children.
3. The Assembly is concerned that despite ratification by all Council of Europe states of the UN Convention on the Rights of the Child, which obliges them to protect the best interests of all children on their territory, the same states do not ensure effective guardianship systems to help ensure children's best interests are adequately safeguarded and duly considered in all processes and decisions concerning them.
4. Guardianship systems are not harmonized across Europe and differ from country to country. There is a serious lack of qualified professionals who can exercise the functions of guardians and there are considerable delays in their appointment, in particular in the countries which face large influxes of migrants. In some countries one guardian is responsible for more than 20 children and there is no regular monitoring of guardians' performance.
5. The Assembly stresses the key role local and regional authorities play in providing access to child-friendly services, including guardianship, to unaccompanied and separated migrant children, and invites governments to make sure that migrant and refugee children are integrated into national child protection systems and the existing procedures facilitate the work of child-care services at the local and regional level enabling their timely and effective assistance.
6. It is convinced that in order to ensure effective guardianship systems for unaccompanied and separated migrant children, children's opinions should be taken into account, and special attention paid to their individual situations, their age, maturity, language and culture.
7. The Assembly welcomes the adoption by the Committee of Ministers of the Council of Europe of Recommendation CM/Rec (2019)11 on effective guardianship for unaccompanied and separated children in the context of migration, and calls on member States to ensure the successful implementation of this recommendation by:
 - 7.1. reviewing their legislation, with a view to putting in place more effective guardianship systems;
 - 7.2. creating a Europe-wide unified database of unaccompanied and separated migrant children to make sure that they are identified and provided with timely protection, while taking into account the provisions of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS N° 108);
 - 7.3. ensuring that unaccompanied and separated migrant children on their arrival to Europe are properly informed of their rights in a form and language they can understand, and that they can benefit from free legal advice before any decision on their future is taken;
 - 7.4. allocating the necessary financial, technical and human resources at national and local level to ensure that every unaccompanied migrant child is provided with guardian immediately on reception;
 - 7.5. reinforcing the guardianship institutions, which must provide clear guidance to guardians on their duties, monitor their performance and ensure the existence of accessible complaints mechanisms for migrant children as well as providing guardians with the necessary training, paying special attention to the problems of children who have suffered from violence and trauma, and those with physical and mental health issues;

² Draft resolution adopted by the committee on 29 May 2020.

7.6. ensuring that a gender-sensitive approach is taken to the preparation of professionals for guardianship, which can be essential to guaranteeing children's security and physical and psychological well-being;

7.7. providing young migrants who have benefited from guardianship protection and reached 18 years of age, and who are in a vulnerable situation, with the necessary assistance for their integration into adult life, maintaining guardianship up until they turn 21 years old, when possible;

7.8. ensuring effective cooperation between all relevant stakeholders involved in the guardianship system at the national level, in order to provide seamless protection and accompaniment during all procedures.

8. Upon arrival of migrant children, member States should identify family reunification needs, work to improve cross-border cooperation in family reunification matters, and ensure that guardians and legal representatives are trained on the procedure to be followed at national level. The Assembly also calls on the Council of Europe to study the possibility of creating a mechanism to allow the quick and safe relocation of unaccompanied migrant children who are not eligible for family reunification to countries with the most developed child protection systems, taking into account the child's opinion. For this purpose, a European register of guardians for unaccompanied migrant minors could be set up.

9. The Assembly also invites the European Union to consider earmarking financial resources from the European Refugee Fund for the support and implementation of guardianship systems for unaccompanied migrant children.

B. Draft recommendation³

1. Referring to its Resolution... (2020) on unaccompanied and separated migrant children: the need for effective guardianship, the Parliamentary Assembly emphasises the importance of the creation of effective guardianship systems in all Council of Europe member States with particular focus on unaccompanied and separated children, with the aim of ensuring their protection and providing them with assistance as soon as they arrive in Europe.
2. Welcoming the adoption by the Committee of Ministers of the Council of Europe of Recommendation CM/Rec(2019)11 on effective guardianship for unaccompanied and separated children in the context of migration the Assembly, with a view to its successful implementation, recommends that the Committee of Ministers:
 - 2.1. include in the Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe those activities which will facilitate its successful implementation;
 - 2.2. invite the Steering Committee for the Rights of the Child (CDENF) to promote European best practices in guardianship of unaccompanied and separated migrant children, and to study the possibility of setting up a mechanism for the quick and safe relocation of unaccompanied migrant children to countries with the most developed child protection systems in accordance with their best interests;
 - 2.3. invite the Drafting Group on Human Rights and Migration (CDDH- MIG) to study the issue of foster care for unaccompanied migrant children and explore the possibility of creating a European register of foster care families with the aim of finding rapid solutions for the protection of unaccompanied migrant children.

³ Draft recommendation adopted by the committee on 3 July 2020.

C. Explanatory memorandum by the rapporteur, Ms Rósa Björk Brynjólfssdóttir

1. Introduction

1. In a context where many unaccompanied and separated migrant children arrive in Europe, the question of the safeguard of their rights is primordial. All migrants are vulnerable, but children and young people are even more likely to be subject to violence – including sexual abuse – and therefore need specific protection. Unaccompanied and separated children are more likely to be victims of human trafficking or criminal networks that will lead to prejudicial consequences. By offering them the protection of a dedicated guardian, their rights will be safeguarded, and solutions concerning their future will be found.

2. Guardians' priority should be to ensure unaccompanied migrant children's access to their rights and to consideration of their best interests. They can build a relationship of trust with a child and ensure his or her wellbeing, including during integration periods, in cooperation with other actors. Guardians can also help prevent children from going missing or being trafficked. Guardianship is a key to the transition into adulthood and integration in a new country.

3. The Parliamentary Assembly of the Council of Europe has touched upon the problem of guardianship in several reports. Aware of the interests at stake, the Assembly called for harmonised rules “concerning the designation of guardians and legal representatives and a common definition of their mandate and role” in its Resolution 2136 (2016).⁴ In its Resolution 2243 (2018) on family reunification of refugees and migrants in the Council of Europe member States,⁵ the Assembly stressed that the appointment of a guardian is a “vital measure”. The Assembly also called on member States to “appoint a guardian to support each unaccompanied migrant child individually during the age-assessment procedure⁶” (Resolution 2195 (2017)).

4. For the purpose of this report, I will use the EU Asylum Procedures Regulation's definition,⁷ according to which a guardian is “a person or an organisation appointed to assist and represent an unaccompanied minor with a view to safeguarding the best interests of the child and his or her general well-being in procedures provided for in this Regulation and exercising legal capacity for the minor where necessary”. Recalling this definition is crucial in order to compare it with how the roles and responsibilities of guardians are defined in different EU member States.

2. Relevant international standards

5. Several international and European legal instruments provide standards related to the rights of unaccompanied and separated migrant children. United Nations provisions (see below) are used as a reference in Europe and have an impact on national policies. Nevertheless, each member State has established its own provisions regarding the application of international laws on its territory and they are not always in line with international standards. This inconsistency undermines children's rights in terms of access to a comprehensive and harmonised system of guardianship.

2.1. The United Nations

6. The UN Convention on the Rights of the Child (CRC)⁸ adopted in 1989 clearly puts the responsibility on States for the protection of unaccompanied and separated migrant children on their territory. The Committee on the Rights of the Child provided four main principles which should guide all actions concerning children: the best interest of the child as a primary consideration in all actions concerning the child (Article 3), the principle of non-discrimination on any ground ensuring equal treatment of all children (Article 2), the right of the child to be heard and due weight to be given to his or her views (Article 12) and the right of the child to life, survival and development (Article 6).

7. Appointing a guardian is key to ensuring that unaccompanied and separated children's best interests are guaranteed. Guardians are on equal terms with parents in their responsibilities in this respect, as stated in

⁴ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23179&lang=en>.

⁵ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25185&lang=en>.

⁶ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24273&lang=en>.

⁷ Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/proposal_for_a_common_procedure_for_international_protection_in_the_union_en.pdf.

⁸ <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

Articles 18 of the CRC. More specifically, Article 18.1 states that “parents or, as the case may be, guardians, have the primary responsibility for the upbringing and development of the child”.

8. Joint General Comment No. 3 (2017) of the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22 in §32 stress that States parties should: (...) (c), (h): “Ensure that children are identified promptly in border controls and other migration-control procedures within the State’s jurisdiction, and that anyone claiming to be a child is treated as such, promptly referred to child protection authorities and other relevant services, and appointed a guardian, if unaccompanied or separated; and §36: “States parties should appoint a (...) trained guardian for unaccompanied and separated children, as soon as possible on arrival, free of charge”.⁹

9. In Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23: §17 (6) it is stated that :“(...) children should be guaranteed the right to (...) have appointed a competent guardian, as expeditiously as possible, who serves as a key procedural safeguard to ensure respect for their best interests”; and in §30: “States should provide appropriate assistance to (...) legal guardians in the performance of their childrearing responsibilities, including by providing social benefits and child allowances and other social support services regardless of the migration status of the parents or the child”.¹⁰

10. General Comment No. 6 provides a clear time-frame for the appointment of a guardian. Paragraph 33 stipulates that “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 or has permanently left the territory and/or jurisdiction of the State (...)”.

11. The same paragraph 33 clearly defines the responsibilities of the guardian, who should “ensure that the interests of the child are safeguarded and that the child’s legal, social, health, psychological, material and educational needs are appropriately covered by, inter alia, the guardian acting as a link between the child and existing specialist agencies/individuals who provide the continuum of care required by the child”.

12. According to UNHCR, a guardian “is an independent person who safeguards a child’s best interests and general well-being and complements the limited legal capacity of the child.”¹¹ As stated by UNHCR, “an independent, qualified guardian needs to be appointed immediately¹² [and] free of charge”¹³. In its Conclusion No. 107 (LVIII), UNHCR’s Executive Committee called upon States to facilitate the appointment of a guardian or adviser when an unaccompanied or separated child is identified.¹⁴

13. Unaccompanied and separated migrant children often feel overwhelmed by administrative procedures related to their asylum claim because of the complexity of the process and the lack of knowledge of the language in which it is conducted. The tasks guardians need to fulfil are listed in paragraph 104 of the 2010 UN Resolution on Guidelines for the Alternative Care of Children.¹⁵ These responsibilities include: “ensuring that the rights of the child are protected” and “ensuring that the child has access to legal and other representation where necessary”. Moreover, paragraph 36 of General Comment No. 6 includes the necessity

⁹ https://tbinternet.ohchr.org/Treaties/CMW/Shared%20Documents/1_Global/INT_CMW_INF_8219_E.pdf.

¹⁰ <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqKb7yhSrMulHhdD50s6dX7ewCBgoc3aRFSDe0ukyIqphiFFs8N%2Fk1uf0mPUJgdK2vXMEFXwBUJydRTZ4IILcOtT9GDUqemWeCc2%2BI%2F6qJkKBzFDWgi>.

¹¹ UNHCR *Guidelines on Assessing and Determining the Best Interests of the Child*, November 2018, p.107, available at: <https://www.refworld.org/docid/5c18d7254.html>.

¹² it is important that a qualified independent guardian is appointed to advise the child even before an age assessment procedure is carried out, *Ibid.* §75.

¹³ UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, §69, available at: <https://www.refworld.org/docid/4b2f4f6d2.html>.

¹⁴ UNHCR, *Conclusion on Children at Risk*, 5 October 2007, No. 107(LVIII) – 2007, para. (e), available at: <http://www.unhcr.org/refworld/docid/471897232.html>.

¹⁵ https://www.unicef.org/protection/alternative_care_Guidelines-English.pdf.

of appointing a legal representative for unaccompanied minors in order to help them to fill in their asylum or residence permit application, in case of legal proceedings involving the child.

14. To ensure sufficient protection of unaccompanied and separated migrant children, States should respect their obligations and commitments, especially those set out in the CRC, but also its optional protocols and other, related texts, including the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the Convention against Transnational Organized Crime (2000), the Convention on the Rights of Persons with Disabilities (2006), the Convention concerning the powers of authorities and the law applicable in respect of the protection of infants (1961), the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993) and the related Recommendation Concerning the Application to Refugee Children and Other Internally Displaced Children (1994), and the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (1996).

2.2. The European Union

15. The protection of the rights of children is one of the requirements of the European Union clearly underlined in its treaties, as the supreme sources of EU law and the directives, as secondary law. According to Article 3.3 of the consolidated version of the Treaty on European Union¹⁶ and the Charter of Fundamental Rights of the European Union,¹⁷ the rights of the child must be protected within member States. Nevertheless, there is a lack of enforcement of these regulations in national systems, especially when it comes to the rights of unaccompanied and separated migrant children.

16. Unaccompanied and separated migrant children are the most vulnerable category of asylum seekers. Several EU directives refer to the necessity of appointing a guardian, including the 2011 Directive on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted¹⁸ which states that Member States should as soon as possible, “take the necessary measures to ensure the 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.” (Article 31).

17. Procedural safeguards related to the appointment of a legal representative are included in the Directive laying down standards for the reception of applicants for international protection,¹⁹ which states that unaccompanied minors should be taken care of by a representative “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”.

18. The European Union has provided specific legislation for the protection of children who are victims of trafficking in its EU Directive 2011/36 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims²⁰. According to Paragraph 23 of the Preamble of the directive, “necessary measures should be taken to ensure that, where appropriate, a guardian and/or a representative are appointed in order to safeguard the minor’s best interests. Paragraph 24 specifies that the guardian and/or representative could be “the same person [*both legal representative and guardian*], a legal person, an institution or an authority”.

19. It should be stressed that there is no consistency in the use of the term “guardian” in EU directives. The term “legal (special or other) representative” is also used in different contexts, without any apparent distinction.

2.3. Council of Europe

20. Several Council of Europe legal instruments set out the rights and obligations of member States relating to children, including the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) and the protocols thereto, the European Social Charter (ETS No. 35) and the European Social Charter (Revised) (ETS No. 163), the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) and its protocol (CETS No. 223), the European Convention for the Prevention

¹⁶ https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF.

¹⁷ https://www.europarl.europa.eu/charter/pdf/text_en.pdf.

¹⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0095>.

¹⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013L0033>.

²⁰ Directive 2011/36/EU : <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>.

of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 126) the European Convention on the Exercise of Children's Rights (ETS No. 160), the Convention on Action Against Trafficking in Human Beings (CETS No. 197), the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) and the Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210).

21. In particular, Article 10 paragraph 4 of the Council of Europe Convention against Trafficking in Human Beings²¹ clearly specifies that as soon as an unaccompanied child is identified as a victim, the State should "provide for representation of the child by a legal guardian, organisation or authority which shall act in the best interests of that child".

22. The Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (the "Lanzarote Committee") addressed the issue of guardianship in its Special report on protecting children affected by the refugee crisis from sexual exploitation and sexual abuse, adopted on 3 March 2017. It recommends States parties to the convention to ensure that unaccompanied children affected by the refugee crisis, regardless of their age, are provided with a guardian in order to build trust and enable disclosure of possible sexual exploitation and sexual abuse.²²

23. On 12 July 2007, the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec(2007)9 on life projects for unaccompanied migrant minors,²³ which specifies that "The competent authorities should undertake to ensure that the life project comprises measures to protect the minors [...]. These measures should include [...] appointment of specially trained guardians and/or legal representatives."

24. The Parliamentary Assembly of the Council of Europe adopted Resolution 2136 (2016)²⁴ to address the lack of harmonisation in the protection of unaccompanied minors. It calls for harmonisation of the rules on the appointment of guardians and/or legal representatives in reference to "their mandate and role". As mentioned earlier, the Assembly also referred to the issue of guardianship in its Resolution 2243 (2018)²⁵ and stressed the role of the guardian during age-assessment procedures for the unaccompanied migrant child in Resolution 2195 (2017).²⁶

25. The European Court of Human Rights has already proved the vulnerability of unaccompanied and separated migrant children in several cases (*Rahimi v. Greece* and *Khan v. France* for example), where it underlined the necessity of appointing a guardian for these children. *The Housein v. Greece* case also mentions the failure of the Greek state to appoint a guardian who could act as a representative in a case which concerned a violation of article 5(1) of the Convention.

2.3.1. Recommendation CM/Rec(2019)11 of the Committee of Ministers to member States on effective guardianship for unaccompanied and separated children in the context of migration²⁷

26. On 11 December 2019, the Committee of Ministers of the Council of Europe adopted a Recommendation CM/Rec(2019)11 on effective guardianship for unaccompanied and separated children in the context of migration. This recommendation, which was prepared by the Ad hoc Committee for the Rights of the Child sets clear guiding principles for putting at the forefront the protection, assistance and safety of children in migration through guardianship.

27. The adoption of this Recommendation by the 47 member States of the Council of Europe illustrates that there is uniform agreement that the specific needs of children in migration must be catered for at every level.

²¹ Council of Europe, Convention on Action against trafficking in Human Beings, CETS No.197, Warsaw, 15 May 2005, available at: <https://rm.coe.int/168008371d>.

²² <https://rm.coe.int/special-report-protecting-children-affected-by-the-refugee-crisis-from/16807912a5> (Recommendation 25).

²³ https://www.coe.int/t/dg3/migration/archives/Source/Recommendations/Recommendation%20CM%20Rec_2007_9_en.pdf.

²⁴ <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=23179&lang=en>.

²⁵ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25185&lang=en>.

²⁶ <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=24273&lang=en>.

²⁷ https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680993db7.

28. It seeks to ensure that guardianship is effectively provided, is appropriate to the rights and specific needs of the children concerned and secure their best interests in line with international and Council of Europe standards.

29. The instrument is based on nine essential principles and targets both decision-makers and practitioners working to secure the protection, reception, care and wellbeing of unaccompanied and separated children through guardianship. It also provides concrete guidance for the formulation of legislation, the planning of public policies and institutional measures, ensuring these children's access to justice and effective remedies, and for the concrete aspects of cooperation and coordination among relevant stakeholders, including at international level.

30. The Guidelines for an effective guardianship system recommend the adoption of comprehensive frameworks whereby guardians are appointed without delay, are adequately screened, qualified and supported throughout their mandate by a competent authority. Governments should also ensure that children are provided with information and advice that they have access to an independent complaint mechanism and remedies to exercise rights or act upon violations of their rights. Also, through regular collection of data, and adequate institutional measures, States should ensure that guardianship measures respond to changing needs, including emergency situations.

31. The implementation of this recommendation will be promoted through the Steering Committee for the Rights of the Child (CDENF) which will also act as a regular pan European forum for exchanges of good practices in reinforcing the national guardianship systems.

2.4. Legal basis in different member States

32. The challenges linked to the increase in the number of unaccompanied and separated migrant children arriving in Europe has pushed some countries to adapt their legal frameworks to enhance the protection of these children. However, if many European countries have legal frameworks specifying which national authority should provide the necessary protection to unaccompanied migrant children, legislative norms differ substantially from country to country. Whereas most countries have legal provisions included in general child protection system, some States have recently passed specific laws dedicated to the protection of unaccompanied and separated migrant children.

33. In Malta, the 2017 Child Protection Act²⁸ includes a clause that refers to the assignment of a "special guardian" in the case of most vulnerable children, including unaccompanied migrant children. The law provides that the residential care facility where the migrant child resides could perform the role of a guardian, in case there is no private person to take this position. Guardianship is only managed at the national level in this country.

34. In Italy, unaccompanied and migrant children are protected under the 2017 "Zampa Law".²⁹ After having recognised that guardianship was not effective in the country, the Italian Parliament passed this law as the first comprehensive national act to promote the appointment of guardians for children. The "Zampa Law" also seeks a better uniformity of guardianship at national level. According to this law, the guardianship system is decentralised in Italy and is provided at the local level, involving individuals, local authorities and Ombudspersons. The ordinary citizens could be appointed as volunteer guardians. Regional Ombudspersons' offices are in charge of the selection and training of volunteer guardians, who are then formally appointed by juvenile courts.³⁰

35. In Belgium, the "Tabitha Law" on legal guardianship was passed in 2004. It highlights the main criteria for legal guardians who are individual persons and act under the responsibility of the Guardianship Service of the Ministry of Justice. This law also defines the procedure to appoint a guardian to unaccompanied migrant children and the necessity to train guardians to better perform their tasks.

36. The Greek Law 4554/2018³¹ was the first national framework defending the necessity to appoint legal representatives to unaccompanied migrant children. The law sets the terms of the appointment and replacement of a Guardianship Commissioner for Unaccompanied Minors. It also defines the responsibilities

²⁸ <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=28245&l=1>.

²⁹ <https://www.gazzettaufficiale.it/eli/id/2017/04/21/17G00062/sg>.

³⁰ The importance of the 'Human factor' for refugee and migrant unaccompanied children in Italy, UNICEF, December 2019, p.3.

³¹ <https://ec.europa.eu/migrant-integration/?action=media.download&uuid=40D40704-B037-696F-139D16276E3FC0EB>.

of a Supervisory Guardianship Board ensuring the protection for unaccompanied minors with respect to disabilities, religious beliefs and custody issues. It also establishes the Department for the Protection of Unaccompanied Minors at the national Centre for Social Solidarity responsible for safe accommodation for unaccompanied minors.

37. In the United Kingdom, guardianship and legal representation is regulated by the 1989 Children Act. Section 20 of the Act highlights that “every local authority shall provide accommodation for any child in need within their area”. It specifies the duties of local authorities looking after a child and refers to care and supervision of these children. Local and regional authorities are in charge of guardianship but do not exercise legal representation for unaccompanied children.

38. Turkey’s Law No.5395³² on child protection provides for the relevant procedures for protecting children on its territory. The law refers to their fundamental rights, as well as measures to protect them. In addition, according to the Civil Code, guardians should be appointed to all children under the responsibility of the State. This appointment is done by the courts and all matters related to the guardianship itself are delegated to the Civil Courts. The mandate of guardians has narrow time limitation, as re-appointment is required every two years.

39. To sum up, it is obvious that there is general consensus at the international and European levels that all unaccompanied migrant children should benefit from State protection in the form of guardianship. However, at the national level the legal provisions on guardianship vary significantly and are not properly enforced.

3. Examples of guardianship practices in different Council of Europe countries

40. Guardianship systems are not harmonized across Europe and differ from country to country. There is no single definition of a guardian nor the functions he or she should perform. Different countries apply the terms “guardian”, “legal representative” and “representative”. In general terms, the term “guardian” is used to define a person appointed to support a child. The term “legal representative” is more often used to define an organisation or a person who will represent the legal interests of the child in all procedures.

41. In many European countries, the guardianship system is decentralized, and each local authority decides on the appointment of guardians. In Germany³³ for example, local institutions are the only entities responsible. In Poland,³⁴ guardianship system exists at national, regional and local levels. The decentralisation of guardianship creates discrepancies within countries, where regions may have different approaches. In Italy³⁵ for example, specific training is provided for guardians only in some regions.

42. Guardianship duties can be undertaken by different categories of people, either a natural person or a legal entity (or an employee of the guardianship institution, depending on the country). In many countries, both categories of guardians coexist, but in some, as in Poland³⁶, only natural persons can be appointed as guardians. Guardianship in Greece is provided by the public prosecutors, but effective guardianship is ensured by the NGO METAdrasi.

43. Thus, guardians’ duties, such as legal representation, are defined in national legislation, and the tasks entrusted to guardians vary across countries. For example, in Denmark³⁷, a guardian is legally responsible for the child’s finances, whereas in the United Kingdom³⁸, social workers, appointed in some cases, never have legal responsibility to represent a child.

44. One of the most common and serious problems is the delay in the appointment of guardians. In some countries, they are appointed as soon as children receive accommodation, but in other countries, like in Germany³⁹, the appointment of a guardian can take up to four months. Bulgaria⁴⁰ is the only country that

³² <http://www.lawsturkey.com/law/juvenile-protection-law-5395>.

³³ https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_synthesis_report_unaccompanied_minors_2017_en.pdf.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_synthesis_report_unaccompanied_minors_2017_en.pdf.

³⁹ *Ibid.*

⁴⁰ <https://fra.europa.eu/en/publication/2015/guardianship-children-deprived-parental-care>.

specifies deadlines in its legislation, as the appointment must take maximum seven days from the moment the child has been accommodated. The lack of employees and structural equipment contributes to the increase in delays.

45. Another problem is the absence of accommodation for children on arrival. In Greece, about 260 children stay in police custody in detention. More than 1000 children live in the streets. Police put UMC in protective custody, as no other facilities for accommodation of children are available. The NGOs, whom I met in Greece, pointed out that the solution to this problem could be the use of transitional accommodation, foster care and independent apartment accommodation. The main challenge is an absence of the social welfare system for children which should support the role of guardians. It is also important that other European countries react more responsively to the family reunification requests by the unaccompanied and separated migrant children.

46. As regards temporary arrangements, most guardians are appointed prior to the status determination of the migrant child, as is the case in Belgium, while other countries, like France, opt for the appointment of an ad-hoc administrator as a temporary guardian before the status determination.⁴¹ After the determination, a long-term guardian is chosen.

47. It is regrettable to stress that some European states do not foresee the appointment of a guardian for unaccompanied or separated migrant children. This is often the case when it is believed that the child will turn 18 before the decision on his or her asylum claim is made. In addition, some member States consider that unaccompanied children have the legal capacity to complete administrative formalities related to their asylum or residence permit application by themselves before they turn 18. It is the case in Germany,⁴² where children are considered capable to complete these formalities from the age of 16. These States use this argument to avoid the appointment of guardians.

48. Independence and impartiality of guardianship systems are not always ensured at national level, despite applicable international standards. In Latvia, when no guardian is appointed to a child, national legislation obliges the head of the care institution to fulfil guardianship duties.⁴³ This, however, raises the question of his impartiality and poses a risk of a conflict of interests. In Finland⁴⁴ for example, the Immigration Service is responsible for the guardianship of unaccompanied migrant children. To avoid this problem, countries like Denmark⁴⁵ provide that guardians cannot be related to any national migration and asylum institutions.

49. Practices of guardianship in Europe reveal a lack of quality standards. It is reported that guardians are often overloaded, with sometimes more than a hundred children under their responsibility. According to the METAdrasi NGO, 6375 unaccompanied migrant children arrived in Greece in 2019, and only 1300 of them had received the guardianship protection. It is difficult to talk about the effective guardianship in the absence of necessary infrastructure and accommodation conditions. In some countries the ratio of guardian to children is 1:20. In these cases, guardians cannot carry out the entrusted tasks efficiently to ensure the wellbeing of unaccompanied migrant children.

50. In only a few Council of Europe countries, such as the Netherlands⁴⁶, Finland⁴⁷ and recently Greece the national legislation foresees a minimum qualification to perform guardianship tasks. The common requirements for guardians working for an institution are to have educational and professional experiences related to unaccompanied children.

51. Many European countries do not provide training for guardians. In Finland⁴⁸ for example, training is not compulsory. Even if the national legislation of some countries obliges guardians to undertake training, this is not always the case in practice.

52. Monitoring of guardians' work is not provided in all member States either. Even if some States apply both external and internal monitoring, as it is the case in Estonia, many of them do not use external monitoring procedures, which are essential to an independent and neutral assessment of effective protection of the children concerned. It has also been pointed out that children's opinions are not sufficiently taken into account

⁴¹ [ibid.](#)

⁴² [ibid.](#)

⁴³ [ibid.](#)

⁴⁴ [ibid.](#)

⁴⁵ [ibid.](#)

⁴⁶ <https://publications.iom.int/fr/books/children-move>.

⁴⁷ <https://fra.europa.eu/en/publication/2015/guardianship-children-deprived-parental-care>.

⁴⁸ [ibid.](#)

in the process of monitoring guardians, whereas their point of view is crucial to a proper assessment of the quality of guardianship. In many countries, this lack of consideration goes hand in hand with a lack of effective complaint mechanisms for unaccompanied and separated migrant children⁴⁹ and this is a barrier to efficient monitoring. Only a few countries apply such system, among them the Netherlands⁵⁰ through the Nidos Foundation.

53. One of the major challenges unaccompanied and separated migrant children face when they reach majority is that safeguards for children no longer apply. It is the case in Austria, where unaccompanied children lose their designated social worker when they turn 18. This sudden change is a barrier to the transition to adulthood and is against the principle of the well-being of unaccompanied migrants. Nevertheless, in most Council of Europe member States, guardianship continues to be provided to the person at the beginning of his or her adulthood. In Sweden⁵¹, a guardian can assist an unaccompanied young person until he or she turns 21.

54. Many member States do not invest enough financial resources in supporting guardians. Guardians do not systematically receive financial compensation for their work. Even when they do, as it is the case in Germany,⁵² it does not allow them to earn a decent living from it.

55. To sum-up, each Council of Europe member State faces difficulties with regards to the process of guardianship. Provisions specified in national legislation are only partially applied, which results in gaps between what is done and what should be done to ensure that unaccompanied and separated migrant children are well protected in the receiving country.

56. Differences in national guardianship systems exacerbate the lack of a uniform approach in Europe. In addition, disparities in terms of knowledge and skills of guardians, appointment procedures and their tasks are noticeable on the ground. All those factors are not in line with the child's best interests' principle and neglect the well-being of unaccompanied children in Europe.

4. The need for a holistic European guardianship system

57. In a context of increasing arrivals in Europe, member States do not ensure effective guardianship systems to provide unaccompanied migrant children the protection they deserve and have the right to.

58. As has also been pointed out by the European Commission⁵³ the major shortcomings in the functioning of guardianship systems in European countries concern the number of suitably qualified guardians available and the speed at which they are appointed. It is very important to strengthen the guardianship institutions in the countries concerned and to train enough specialists, who can perform the tasks of guardians. Their appointment should not be delayed, and they should be adequately prepared to perform their tasks. The guardianship authorities should provide clear guidance to guardians and monitor their performance.

59. One of the solutions to enhancing protection of the rights of unaccompanied and separated migrant children is to elaborate a holistic and effective guardianship system in Europe and to empower the relevant expert committee of the Council of Europe to monitor its implementation. This would help member States to implement guidelines, exchange good practices, reinforce their national guardianship systems and increase cross-border cooperation, including on family reunification. Measures must be taken to review domestic and European legislations, policies and practices, to share the progress made and learn from such an exchange of good practices.

60. The adoption by the Committee of Ministers of the Council of Europe of the Recommendation CM/Rec(2019)11 on effective guardianship for unaccompanied and separated children in the context of migration is a big step forward in this direction. Now, it is time for the member States to step up their action and assess their legislation, policies and practices and where appropriate, take measures and allocate resources to ensure the necessary reforms to implement this recommendation.

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ <https://pjp-eu.coe.int/documents/1017981/9488616/Migrants+transition+to+adulthood.pdf/9a064fa1-ee97-be3f-84fd-5a27d85e15a6>.

⁵² <https://fra.europa.eu/en/publication/2015/guardianship-children-deprived-parental-care>.

⁵³ The protection of children in migration. Communication from the Commission to the European Parliament and the Council, COM(2017) 211 final, Brussels, 12.4.2017.

61. Finally, monitoring guardianship processes must be compulsory in order to assess the quality of guardianship in Europe. No progress can be made without an analysis of proper quantitative and qualitative data. There is a need to work on a case-by-case study to make sure every unaccompanied or separate migrant child will receive the care he or she deserves. All parties involved in working with unaccompanied children must be included in the monitoring process.