

Guardianship Solutions and Services for Unaccompanied and Separated Children under Temporary Protection in the EU: The case of Ukrainian children

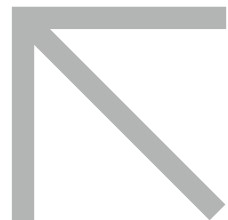
Pierre Cazenave

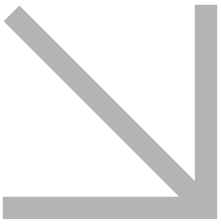




Guardianship Solutions and Services for Unaccompanied and Separated Children under Temporary Protection in the EU: The case of Ukrainian children

Pierre Cazenave





Background

This paper¹ aims to shed light on the different guardianship models and practices that have been developed and implemented within the European Union (EU) for unaccompanied and separated children (UASCs) who have fled Russia's invasion of Ukraine. The review draws particularly on the findings of a prior project publication which analysed Poland's approach to the administration and delivery of guardianship solutions and services for Ukrainian UASCs since 2022.

In unpacking relevant EU legal concepts that directly correspond to or otherwise impact different guardianship systems and policies, some of the guardianship approaches that have been adopted by EU Member States (MS) in this context are first highlighted. The second section then turns to scrutinising the obligations that MSs must comply with in relation to the *necessary representation* arrangements for UASCs, with a focus on Ukrainian children.

In part three, the paper provides a snapshot of different guardianship solutions and services that MSs have put in place to provide for the *necessary representation* of UASCs who have fled the war in Ukraine. A spotlight is put on measures that best address challenges that were identified in the aforementioned Polish case study.

In doing so, the paper also critically examines the policies of MSs, including their inclusiveness and compliance with minimum quality standards as established (or supported) by the European Commission (EC). Do governments strike the right balance between the need to appoint guardians as expeditiously as possible for large numbers of UASCs and their duty to safeguard and protect children under their jurisdiction? Do they address the needs of the

¹ This paper was prepared in the framework of the KOMPLEKS project which aims to support the Polish migration and asylum management system to address the needs of vulnerable migrants. The project is implemented by ICMPD. The paper was drafted by Pierre Cazenave and benefited from expert contributions from members of ICMPD's Anti Trafficking Programme as well as ICMPD's Policy Unit.

wider population of UASCs who fall (or should have fallen) under the temporary protection regime, including Ukrainian children as well as non-Ukrainian third country national minors who were permanent residents in Ukraine prior to Russia's invasion of Ukraine?

The above questions are addressed here, scrutinising a set of solutions grounded in different areas of EU law, ranging from the Common European Asylum System and general migration legislation to judicial cooperation in civil matters (providing for important elements in relation to parental responsibility, jurisdiction, recognition and enforcement of decisions, etc.).

Part I: Understanding guardianship in the European context

While guardianship as an institution dates back to Babylonian times,² statutory guardianship appears to have been first established in early modern Europe in England in the late 17th century.³ At that time, the main rationale underpinning guardianship was to administer the property of children who faced the loss of their parents (or a person deemed to be *incompetent* or *insane*) rather than the “representation of their best interests”.⁴

The importance of interests other than those linked to property only emerged later, when considerations connected to the education, development, and overall welfare of minors gained prominence, alongside individual rights and the protection of the most vulnerable.⁵

Today, the concept of guardianship for UASCs is fundamentally linked to the representation of the interests of UASCs, including in judicial and/or administrative procedures where their interests are to be legally represented by a guardian to complement their limited legal capacity.

2 David G Lyon, The structure of the Hammurabi Code, *Journal of the American Oriental Society*, Vol. 25 (1904), pp. 248-265, available at <https://www.jstor.org/stable/592564>

3 Cheryl L. Nixon, *Creating the Text of Guardianship: 12 Car. II.c.24 and “Cutter of Coleman Street”*, *Studies in English Literary Culture, 1660-1700* Vol. 19, No. 1 (Spring, 1995), pp. 1-28, University of Maryland, available at <https://www.jstor.org/stable/43293594>

4 Lawrence M. Friedman, Joanna L. Grossman & Chris Guthrie, *Guardianship: A Research Note*, 40 *Am. J. of Legal Hist.* 146 (1996), available at https://scholar.smu.edu/cgi/viewcontent.cgi?article=1090&context=law_faculty

5 Graham R., *The Evolution of Guardianship Law: A Historical Overview*, Graham and Associate Lawyers, 2023, available at <https://www.rgraham.com.au/blog/2023/3/25/the-evolution-of-guardianship-law-a-historical-overview#:~:text=The%20concept%20of%20guardianship%20dates,of%20managing%20their%20own%20affairs>

Differences between guardianship, parental responsibility and custody

Under EU law, the term *parental responsibility* refers to all rights and duties of a holder of parental responsibility relating to the person or the property of a child. Parental responsibility can be the result of a court decision (e.g. determination of the custody and access rights in cases concerning the divorce of parents), the operation of law, or *by any agreement having legal effect under the law of the Member State where the child is habitually resident*.⁶

The concept of *custody* differs from that of parental responsibility in that it does not *necessarily* entrust holders of custody rights with the full range of rights that holders of parental responsibility possess, such as taking important decisions that will affect a child's future. Custody refers more to the *care of the person of a child* and is therefore primarily associated with the day-to-day supervision and care that custodian(s) provide to a child with whom they generally live. In that sense, custody rights are intrinsically linked to the right to determine the place of residence of a child as well as the right of access to the child. Custody rights will not necessarily encompass activities that concern the administration, preservation, or disposal of the property of children or the right to legally represent children in official procedures, which are often exercised by holders of parental responsibility rights, such as guardians.

In situations when foreign children are identified as UASCs and the whereabouts of their parents (or other persons holding parental responsibility) are unknown, the appointment of a guardian may result in the transfer of parental responsibility rights to the persons or institutions designated by a court or other competent authority to fulfil this mandate. Such interventions have significant legal implications, which have been assessed differently across the EU. Some MSs, notably, initially took a cautious approach based

⁶ Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) available at <https://eur-lex.europa.eu/eli/reg/2019/1111/oj>

on sovereignty or conflict of jurisdiction grounds, leading to the development of a variety of guardianship systems across the EU, as well as differences in the scope of guardianship arrangements available in different MSs.

A variety of guardianship systems and policies across the EU

While the concept and understanding of guardianship may vary across the different jurisdictions of the EU 27, the arrangements have all become integral components to functioning child protection systems, which are tailored towards the protection and legal representation needs of children temporarily or permanently deprived of parental care, regardless of their origin (be they national citizens, EU citizens, or third country nationals).

Every EU MS has an established guardianship system dedicated to national children who are deprived of parental care, generally relying on the competence and decisions of independent courts specialised in civil and/or family law matters. However, guardianship systems for national children may differ from those in place for foreign children deprived of parental care (i.e. minors who are unaccompanied or separated from their parents or primary caregiver entrusted with parental responsibility duties as per national or customary law).

Indeed, across the EU 27, specific guardianship modalities (and in some cases full-fledged systems) have been put in place to protect and represent the best interests of UASCs coming from third countries. The rules and administration of guardianship systems for UASCs from third countries can also vary within countries, based on considerations linked to the legal status of UASCs (asylum applicant or not, a trafficked child, etc...) or their country of origin (e.g. EU MSs may have signed bi-lateral or multilateral agreements with some countries).

Guardianship for Ukrainian children deprived of parental care

The child protection systems of MSs in general - and guardianship systems in particular - were put under significant strain following the substantial arrivals of vulnerable persons fleeing Russia's military aggression, especially MSs sharing a border with Ukraine. This situation called for new legal and operational solutions to address the challenges posed by the significant number of vulnerable persons crossing the EU's borders and in need of protection, in particular UASCs.

The activation of the EU Temporary Protection Directive⁷ (TPD) - the first time since its 2001 inception - addressed a number of challenges by providing Temporary Protection Status to individuals fleeing Russia's invasion. The status has removed obstacles and enabled vulnerable populations (as well as those who held a permanent residence permit prior to the war) to gain swift access to legal residence (and all the rights derived from it) in the EU.

Yet, even after the activation of TPD, several legal and operational challenges hindered governments from providing adequate protection and addressing the needs of persons falling under the scope of the directive. These barriers have necessitated the development of new (or the adaptation/use of existing) legal and procedural tools, including for children who did not travel with their parents or other primary caregivers entrusted with parental responsibility.

⁷ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001L0055&qid=1648223587338>

Part II: Applicable law and standards on guardianship for UASCs who fled Russia's aggression in Ukraine

A plethora of EU instruments are pertinent to guardianship arrangements under migration and asylum law and towards combatting human trafficking⁸ as well as child sexual abuse and exploitation⁹, in addition to the tools on judicial cooperation in civil matters described above¹⁰. While these have been scrutinised in different contexts, particular attention in this paper is placed on the provisions of the EU Temporary Protection Directive.

Guardianship of Ukrainian UASCs under the TPD:

The Temporary Protection Directive, via article 16, provides that “[...] *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***

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- 8 Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ 2011 L 101 (Anti-Trafficking Directive)
 - 9 Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 combating the sexual abuse and exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, OJ 2011 L 335.
 - 10 See for example COUNCIL REGULATION (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1111&from=en>. The Brussels IIb regulation incorporated the provisions of the 1996 Hague Convention on Child Protection into the EU legal order (while furthering its scope).

*necessary, representation by an organisation which is responsible for the care and well-being of minors, or **by any other appropriate representation***” (emphasis added).

The representation of the interests of UASCs, as per the EU TPD, is therefore not necessarily exercised *only* through legal guardianship, leaving a relatively wide margin of manoeuvre for EU MSs to determine what type of “necessary representation” is to be ensured for UASCs falling under its application scope. Yet, the EC outlined a number of standards¹¹ that need to be met if any EU MS decides to opt for “other appropriate representation” instead of formal (be it temporary or permanent) guardianship measures. The EC stressed the need to ensure the “suitability” of persons representing UASCs in light of their specific needs, especially with regard to the ability of guardians to “assess and act in the best interests of the child”.¹² Such standards can be interpreted as requiring a close and regular relationship between a guardian and a child under their supervision, which is unlikely to be cultivated in situations where the guardianship role is entrusted to heads of institutions where UASCs are placed or to social workers with large caseloads.

Article 16 further provides a list of options that EU MSs may consider when deciding on where a child is to be placed: “[d]uring 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 child”.*

¹¹ These standards have - in the author’s view - an interpretative authority rather than an authoritative one and are therefore not binding on EU MS.

¹² European Commission, Unaccompanied and Separated Children fleeing from war in Ukraine – FAQs on Registration, Reception and Care, July 2022, available at https://home-affairs.ec.europa.eu/system/files/2022-07/FAQs%20UAMs%20and%20separated%20children%20TPD_en_1.pdf

It is important to differentiate here between the *placement* of UASCs and the *appointment of guardians* (or the employment of other *appropriate representation* arrangements) for UASCs. For example, a child may be placed in a reception centre with special provisions for minors (as described in option c), yet be appointed a guardian that does not live, stay, or work within the premises of the reception centre where the child is placed. Similarly, UASCs may be placed under the care of foster families even if the foster care providers are not necessarily entrusted with the guardianship of the children concerned.

As for the participation of UASCs in placement decisions, EU MSs should ensure that their views are duly taken into account, a rule which does not appear to apply, as per the TPD, to the appointment of guardians or other appropriate representation arrangements.

Ukrainian children travelling with a guardian appointed by competent authorities in Ukraine

The situation of children who come accompanied by persons or representatives of institutions designated as legal guardians by Ukrainian authorities has posed a number of challenges, with such minors not strictly falling under the ‘unaccompanied or separated’ children category. Yet, their particular vulnerability (in addition to that of their guardians or primary care givers who also are persons in need of temporary protection) has called for the introduction of safeguarding measures at different levels.

The legal situation of such children falls under the scope of the 1996 Hague Convention on Child Protection to which Ukraine and all EU MSs are party to.¹³ The convention aims, among other things, to “determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or

13 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-Operation in Respect of Parental Responsibility and Measures for the Protection of Children, Hague Conference on Private International Law, available at: <https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf-47-110866e171d4.pdf>

property of the child, [...] to determine the law applicable to parental responsibility” as well as to “[...] provide for the recognition and enforcement of such measures of protection in all Contracting States”. The convention further defines parental responsibility as including “[...] parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child”.

Article 3 of the 1996 Child Protection Convention provides that measures of protection falling under its scope may deal, among others, with “[t]he attribution, exercise, termination or restriction of parental responsibility, as well as its delegation”, “rights of custody”, “guardianship, curatorship and analogous institutions” as well as the placement and supervision of children.

Persons entrusted with the guardianship of children coming from Ukraine, therefore, should be automatically recognised as rightful guardians by the authorities of the EU MS where they sought refuge (or countries of transit through which they had to register), since Ukraine and all EU MSs are party to the 1996 Child Protection Convention.

In such cases, technical and material support, as well as registration, regular monitoring, and oversight of appointed guardians may need to be exercised by relevant child protection authorities. In addition, to ascertain their authenticity, background checks should be carried out whenever the validity of guardianship documents may be in doubt. These measures could benefit from the support of Ukrainian consular authorities present on their territory or can be carried out in coordination with the Ukrainian Central Authority or competent child protection services in Ukraine.¹⁴

Authentication processes should not, however, be lengthy nor disrupt the relationship established between UASCs and their guardians: instances of refusal by EU MSs authorities to recognise

14 The government of Ukraine, following the invasion of its territory by Russia, notified in a Reservation the Depositary of the 1996 Child Protection Convention “of the inability to guarantee the fulfilment by the Ukrainian side of obligations [under the above Convention] to the full extent for the period of the armed aggression of the Russian Federation” See: <https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=996&disp=resdn>

valid documents issued by Ukrainian guardianship authorities were still occurring in February 2023 in different countries, as reported by the Regional Child-Protection Sub-Working Group on the situation in Ukraine.¹⁵

Other guardianship avenues available under EU law for UASCs who fled the war in Ukraine

Temporary protection status granted under the TPD comes with an array of rights and entitlements that extend beyond legal residence. These include access to the labour market, housing, and social welfare and assistance, including healthcare, among other benefits.

While the rights and entitlements foreseen in the TPD have been considered to be weaker than those provided to persons who are granted refugee status (including, for example, in relation to health care which can be limited to “emergency care and essential treatment of illness, a much lower standard than in the qualification directive¹⁶”; or in relation to family reunification issues etc.), they remain far more encompassing than the benefits afforded by subsidiary protection status. Given that the majority of those who fled Ukraine are unlikely to qualify for refugee status as per the criteria laid out in the Refugee Convention, filing an asylum claim under the current circumstances (or at least until the TPD is ‘deactivated’¹⁷) is not likely to yield favourable legal and material outcomes for the majority of TPD beneficiaries, who instead would be merely granted subsidiary protection.

15 UNHCR, Minutes of the Child Protection Sub Working, 20 February 2023, available at <https://data2.unhcr.org/en/documents/details/99642>

16 Küçük, E. (2023). Temporary Protection Directive: Testing New Frontiers?. *European Journal of Migration and Law*, 25(1), 1-30, available at: <https://doi.org/10.1163/15718166-12340142>

17 While temporary protection was granted for an initial period of 1 year, it has since been prolonged for an additional year, until 4 March 2024. It may be further prolonged for one additional year depending on the evolution of the situation in Ukraine.

However, it is important to note that, under article 17 of the TPD, “[p]ersons enjoying temporary protection must be able to lodge an application for asylum at any time”, leaving the door open to any person under temporary protection, including children who are unaccompanied or separated, to file an asylum claim.

If UASCs under temporary protection decide to file an asylum application, their status will change from temporary protection beneficiary to asylum applicant. Thereafter, the applicable guardianship rules and standards under EU law would fall under Common European Asylum System instruments such as the Asylum Reception Directive and the Asylum Procedure Directive which provide for the appointment of a “representative”, a term used interchangeably with the term “guardian”, with a similar scope¹⁸. In some EU MSs, the domestic legislation that transposed these rules provides for different guardianship mechanisms in the case of asylum claims, entrusting decision-making power as well as the administration of guardianship to different authorities than those in charge of guardianship under the TPD.

This may have disruptive consequences to the guardianship arrangements adopted for UASCs initially granted temporary protection status. For example, where MSs have implemented distinct guardianship systems aimed at UASCs under the scope of the TPD (e.g. Poland), guardianship arrangements may need to be changed for UASCs initially under temporary protection who are subsequently granted international protection status (e.g. refugee, subsidiary protection, etc.) after filing an asylum claim.

This type of situation is largely the result of the organisation of guardianship administration in some MSs. Governance in this area continues to be exercised by different ministries and agencies, sometimes at different federal levels (in the case of decentralised administrations), depending on the legal status of children.

18 The Commission in a 2017 Communication put an end to the debate by referring to both terms (representative and guardians) as “guardianship”. See COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, The protection of children in migration (2017) 129, available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52017DC0211>

This unfortunate situation is, however, not without precedent, as such discrepancies already existed in relation to third country national UASCs, between those deciding to apply for asylum and those refraining from doing so, as well as in some countries between UASCs holding citizenship from other EU MSs and third-country national UASCs.

EU standards on guardianship and placement of UASCs

Several EU agencies were commissioned by the EC to carry out EU-wide studies on guardianship and reception conditions of UASCs, with a view to supporting the development of guidance on setting up functional and effective guardianship systems across the EU. Minimum standards on guardianship for and placement of UASCs were developed by the European Guardianship Network¹⁹, drawing on best practices identified in selected EU MSs (but also in widely ratified instruments of international law, including the UN Convention on the Rights of the Child as interpreted by the Committee on the Rights of the Child in its General Comment on the treatment of unaccompanied and separated children outside their country of origin)²⁰. These standards should be applied and enforced regardless of the legal status of UASCs, be they beneficiaries of temporary protection under the TPD, asylum applicants, or recognised beneficiaries of international protection under the EU Asylum Acquis.

The Temporary Protection Directive was developed in 2001, at a time when MS experience on guardianship for UASCs was limited. While its provisions on guardianship are less well developed than parallel sections in subsequent instruments, they, nonetheless,

19 European Guardianship Network, 7 standards of guardianship, available at <https://www.egnetwork.eu/wp-content/uploads/2022/12/7-standards-of-guardianship-Infographic.pdf>

20 UN Committee on the Rights of the Child, General Comment Number 6: treatment of unaccompanied and separated children outside their country of origin, 2005, available at: <https://www.egnetwork.eu/wp-content/uploads/2022/12/7-standards-of-guardianship-Infographic.pdf>

should be interpreted in light of the overall EU *Acquis* and accompanying standards. Guardianship systems and arrangements for Ukrainian UASCs (as well as children from third countries who were beneficiaries of international protection or stateless on the territory of Ukraine prior to the conflict) should therefore ensure:

- the effective application of the principle of non-discrimination (standard 1: Non-discrimination)
- the responsibility and accountability of guardianship systems (standard 2: Responsibility and accountability)
- the independence and impartiality of guardians (as well as the independence and impartiality of guardianship systems who appoint guardians) (standard 3: Independence and Impartiality)
- children's rights are respected and fulfilled (standard 4: Child-centred approach)
- the right of children to be heard is respected (standard 5: Child participation)
- children are supported and assisted by qualified and adequately trained guardians (factoring in the significant strain on guardianship systems who provide for the needs of a large number of UASCs) (Standard 6: Quality)
- the integration of guardianship within the wider child protection system, its collaborative pairing with other key frameworks, and its effective monitoring (standard 7: Collaboration and sustainability)²¹

²¹ European Guardianship Network, 7 standards of guardianship.

Part III: Making guardianship effective for Ukrainian UASCs fleeing the war in Ukraine

A key focus of the KOMPLEKS project is children fleeing the war in Ukraine and arriving in Poland. Warsaw indeed adopted a distinct approach to the management of Ukrainian UASC cases compared to other countries. This concerns the administration of guardianship (and the authority entrusted with the mandate to appoint, manage, and monitor temporary guardians), as well as the scope of guardianship arrangements adopted for Ukrainian UASCs under temporary protection.

The practices presented below may offer useful guidance and inspiration to authorities (in Poland as well as in other countries) to overcome the challenges they face in administering and delivering guardianship services to UASCs from Ukraine.

1. Integrated guardianship system and arrangements: the case of Latvia

A number of EU MSs have passed special legislation to address the needs of vulnerable persons fleeing Russia's aggression in Ukraine, covering Ukrainians who either transited through or decided to settle in these respective countries. In some countries, such norms (be they laws, decrees, or other types of regulatory acts) - which were generally adopted swiftly - also addressed the situation of children arriving unaccompanied or separated on their territory, encompassing measures ranging from the legal registration of UASCs and the notification of and/or referral of UASC cases to child protection authorities to the administration and delivery of guardianship services.

A comprehensive act was, for example, adopted in Latvia via the *Law on Assistance to Ukrainian Civilians* which covered guardianship arrangements for Ukrainians UASCs in sections 18 and 19 of the legislation. The Latvian law is one of the most acclaimed pieces of legislation adopted throughout the EU, integrating most of the standards outlined above and setting up a clear, integrated, and expeditious procedure governing the appointment of guardians to UASCs from Ukraine.

Section 18 introduces the role of *extraordinary guardian* whose overall mandate is to “protect the rights of a minor Ukrainian civilian [...] and to provide assistance to him or her”. Extraordinary guardians are appointed by the Orphans and Custody Court²² which has a duty to vet persons willing to take on the guardianship of Ukrainian UASCs. Candidates for extraordinary guardians must first file applications to the local Orphans and Custody Court²³ and then undergo screening which includes a criminal background check, a mental health records evaluation, and an assessment of motivation, representation capability, and living arrangements²⁴. This role can be granted to any person who wishes to become an *extraordinary guardian* for Ukrainian UASCs (including national foster care providers) but also to persons who accompanied UASCs on the Latvian territory but who were not formally designated as their guardian. In such cases, it is worth noting that the Latvian regime obliges the Orphans and Custody Court to consult and take into account the views of UASCs on the initiation of guardianship proceedings.

The procedure is to be expedited within two days after receipt of requests to become an *extraordinary guardian*, with positive decisions leading to the mandatory notification of different child protection actors at national and local levels. The State Inspectorate for the Protection of Children’s Rights is mandated to create and maintain a unified register of unaccompanied children and their registration²⁵, in accordance with international best

22 Republic of Latvia, Law on Assistance to Ukrainian Civilians, Section 18 (1), accessible at: <https://likumi.lv/ta/en/en/id/330546-law-on-assistance-to-ukrainian-civilians>

23 Ibid, Section 18 (4)

24 Ibid, Section 18 (5)

25 Ibid, Section 18 (11)

practices. Coordination between local social protection services, the State Inspectorate for the Protection of Children's Rights and the Orphans and the Custody Court is also expected, with an emphasis placed on electronic communication.²⁶

Apart from the appointment matter (and the safeguards attached to the appointment process), the scope of guardianship arrangements for Ukrainian UASCs is also defined, both **temporally** (until the unaccompanied child attains legal age or until the decision to terminate the extraordinary guardianship is taken by the Orphans and Custody Court)²⁷ and **materially** (a clear list of both obligations and rights defines what *extraordinary guardianship* entails). In addition, a set of cash assistance measures are included to support *extraordinary guardians* in carrying out their duties. This assistance includes remuneration, social benefits, as well as an allowance for the purchase of clothing and soft furnishings, all of which can be further supplemented by local government support.²⁸

Finally, a clear process for the supervision and monitoring of *extraordinary guardians* is set out, under the auspices of the Orphans and Custody Court. The rules entail mandatory checks at least once in the first three months and subsequently a minimum of once a year (which may be considered insufficient in light of the particular vulnerability of UASCs).

This comprehensive system of guardianship established by the Law on Assistance to Ukrainian Civilians in Latvia, however, applies differently to UASCs that were previously under the supervision of childcare institutions in Ukraine. In such cases, placement in a Latvian institution for long-term social care and social rehabilitation is prioritised, with the Orphans and Custody Court precluded from considering the option of establishing *extraordinary guardianship* for children falling under this category.²⁹

²⁶ Ibid, Section 18 (12)

²⁷ Ibid, Section 18 (14)

²⁸ Ibid, Section 19

²⁹ Ibid, Section 18 (19)

2. Guardians across borders: maintaining a link with parents and other family members in a transnational context

The situation of UASCs who fled Russia's aggression in Ukraine is strikingly different from that of UASCs from other third countries who have fled potential harm and persecution and sought asylum in the EU. The latter have often arrived in Europe following perilous journeys and extremely vulnerable situations, compelled to cross borders in an irregular manner to effectively exercise their right to seek asylum, resulting in documented cases of separation from primary care givers. The former, by contrast, were granted safe passage to Europe and could travel under the supervision of trusted adults often directed by parents to take their children to safety. As a result, most Ukrainians UASCs that arrived in EU MSs were separated children, with a minority of them arriving unaccompanied. This pattern has necessitated that child protection authorities recognise the central importance of persons accompanying UASCs from a protection capacity perspective, including in terms of child well-being and welfare. Formalising the status of these trusted adults became straightforward, yet it also posed a challenge for guardianship authorities across the EU who also must uphold their duty to safeguard the best interests of UASCs and protect them from harm. Some EU MSs managed to strike a good balance between the need to adopt flexible solutions and abide by safeguarding and protection standards.

Such best practices were evident, for example, in the Netherlands with respect to NIDOS, the guardianship authority, drawing a line between UASCs who needed "acute care and reception" and UASCs who were already under the care of family members or family friends hosting them (including those who stayed in municipal accommodation facilities together with trusted adults).

NIDOS recognises the need to ascertain (through *investigations*) whether parental authority is adequately exercised over Ukrainian UASCs that are present in the Netherlands without their parents. An assessment framework was, consequently, developed to determine whether guardianship arrangements needed to be made (or changed) if the findings of an investigation indicate inadequate guardianship arrangements agreed in Ukraine. An intake interview

is organised with UASCs, their primary caregiver, and also their parents still in Ukraine, whenever the situation allows. If the findings of the assessment confirm that the current arrangements appear to fulfil the protection situation of UASCs comprehensively (including from a legal perspective) and provide for the wellness of any respective children, NIDOS refrains from requesting formal guardianship as long as the parents in Ukraine and the current caretakers consider such measures to be unnecessary. If necessary, however, guardianship measures are requested by NIDOS to the competent court which is, in turn, responsible for granting guardianship rights and obligations to a professional guardian (working for NIDOS). The guardian is expected to act as *an extension of and together with* the parent(s) (who will keep parental responsibility) at a distance as well as with the current caretakers. It is reported that decisions are to be made jointly when touching upon important matters in children's lives (e.g. adequate reception and guidance, education, banking, medical care, support with the residence law procedure, care/assistance, and possible return).

3. Striking the right balance between protection concerns and the recognition of guardianship measures agreed in Ukraine

Ukrainian children routinely arrive in destination countries with friends or family members who have been formally assigned a guardian by the competent Ukrainian authorities before departing Ukraine. Guardians appointed in Ukraine, who are themselves displaced persons as well, may need support in two aspects.

As mentioned above, Ukraine and all EU Member States are contracting states to the 1996 Hague Convention on Parental Responsibility and Protection of Children. Under Article 23(1) of this Convention, the act of appointment of a guardian is to be automatically recognised in Member States without the need for a formal procedure, if in the best interests of the child. Yet, the *authenticity* of the guardianship documents should be verified for individual cases with the support of Central Authorities and Ukrainian

consulates with due respect for personal data protection and safety considerations. Central Authorities can assist in obtaining evidence and clarifications from Ukrainian officials regarding the situation of unaccompanied children (contacting parents in Ukraine, family tracing, documentation, etc.).

Once the relevant checks have been carried out and the authenticity of guardianship documents confirmed, Ukrainian guardians may need support in carrying out their guardianship duties, particularly with respect to navigating domestic procedures that may seem rather nebulous for newcomers and supporting minors in achieving economic independence as well as social (and cultural) inclusion, especially if the guardians are also responsible for providing daily care to others. Many guardians lack professional experience and the qualifications for undertaking guardianship tasks that extend beyond daily care and which may involve vitally important statutory authorities.

Several countries have developed systems that have integrated this dimension by providing support and guidance to persons accompanying UASCs from Ukraine that hold guardianship rights prior to departure or following their appointment in the EU MS where they settled.

For example, in Finland, several online/digital solutions have been developed to support guardians in fulfilling their roles: discussion groups for guardians were created on social media where both Ukrainian and Finnish guardians of Ukrainian UASCs can exchange their experiences as well as seek responses to the challenges they face in everyday life, including support in navigating the Finnish administrative system.

Finland also developed online trainings for guardians³⁰ and planned to publish an updated version by the end of 2023 which would reflect on the recent legal and policy changes that impacted on guardianship following the activation of the Temporary Protection Directive and respond to the challenges faced by guardians of UASCs who fled the war in Ukraine.

30 Osaava edustaja -verkkokoulutus, available at: <https://kotoutuminen.fi/osaavaedustaja>

Part IV: Conclusions and key recommendations

Ensuring proper guardianship arrangements for unaccompanied and separated children who have fled the war in Ukraine is a complex endeavour, complicated by the diversity of contexts and measures adopted across the EU 27 for UASCs. These institutional and legal contexts indeed often partly shape the circumstances the children find themselves in.

While some countries decided to integrate guardianship for Ukrainian UASCs within their existing national child protection systems, including guardianship institutions and various arrangements, others created separate systems targeted towards ensuring that necessary representation arrangements are put in place for Ukrainian UASCs.

A range of approaches have also been identified across the EU that distinguish differently between arriving children who are Ukrainian citizens and third-country nationals lawfully residing in Ukraine (prior to the Russian invasion) as well as between Ukrainian children that were accompanied by trusted adults (including relatives) and those who travelled in a group accompanied by a representative of an institution officially supervising them for a variety of reasons.

While EU MSs, particularly neighbouring countries such as Poland, have exerted considerable effort to provide for the needs of UASCs, including by implementing measures to ensure that appropriate guardianship arrangements were promptly put in place after Russia's invasion of Ukraine began, there is still room for improvement. This paper highlighted different good practices, ranging from integrating child protection responses at the institutional level to operational solutions aimed at maintaining a link – both legal and personal – between custodians in countries of destination and parents in countries of origin. Leveraging promising technologies and digital tools can further support UASCs and individuals who have demonstrated courage in assuming the difficult task of representing the interests of UASCs and providing them a nurturing environment.

With few signs that the current situation will drastically change in the coming months, Member States are advised to invest in continuously refining their responses towards ensuring adequate guardianship arrangements for Ukrainian UASCs in an inclusive manner, complying at least with the minimum quality standards.

To that end, the following recommendations may yield positive outcomes in the short term and help support a seamless transition when the war ends, recognising the importance of ensuring sustained care and protection for all Ukrainian UASCs, including those who age out of this status.

Competent authorities in all EU Member States are advised to:

1. Prioritise the prevention of family separation and promote ethical and dignified referrals of vulnerable children's cases

As per general child protection emergency guidelines³¹, authorities should NOT assume children who are alone are lost or necessarily unaccompanied. Such situations require verification that parents or primary caregivers are not close by, especially as numerous cases of system-induced separation have been reported, particularly in the context of large-scale displacement instances. In the same vein, and unless there are reasons to believe that a child is facing an imminent threat or in danger, separated children and the adults accompanying them should remain together. While efforts need to subsequently be made to ascertain whether genuine links between children and accompanying adults exist, immediately separating children from accompanying adults can prove to be a traumatising experience with far reaching consequences for children, particularly when authorities need to forge a relationship based on trust with them afterwards. From an institutional capacity perspective, the situation requires competent authorities to foster awareness among all stakeholders involved in these responses, including relevant communities, about ways to prevent separation and review current practices and policies that have either helped prevent or cause separation.

2. Foster an integrated approach to guardianship for all UASCs and avoid the creation of different guardianship pathways such as those based on international protection status

Whenever possible, the competent authorities should ensure that measures aimed at protecting children (be they unaccompanied, separated, or not) are embedded within broader child protection

³¹ See, among others: The Alliance for Child Protection in Humanitarian Action, Unaccompanied and Separated Children Information Sheet, March 2022

system responses. While such an approach does not conflict with the design and delivery of responses tailored to the needs of particular groups of children (such as UASCs), it requires decision-making and case management processes to be incorporated into existing child protection mechanisms rather than creating new processes and mechanisms disconnected from child protection services. This includes when the needs for the governance and administration of child protection services are distinct from those for other groups of children. The development of status-driven responses is likely to result in operational interventions working in silos, which will eventually hamper children's access to holistic and adequate child protection responses.

3. Invest in the training of professional guardians AND facilitate access to knowledge and resources for trusted accompanying adults appointed as guardians

The competent authorities sorely need to develop, resource, and institutionalise capacity building mechanisms that support professional guardians, including equipping them with specialised knowledge on the distinct situation of particular groups of UASCs (e.g. Ukrainian UASCs) to better calibrate their approach and provide tailored services.

Equally, investments in the development of guidelines and tools – as well as social schemes and mechanisms – aimed at supporting guardians appointed in Ukraine (or primary caregivers who were appointed as guardians by the competent authorities in one EU Member State) would allow countries and communities to reap positive benefits in the short to medium term. The ability to navigate the national social security and protection systems of the EU MSs of their choice would facilitate access to essential services and boost social inclusion outcomes and economic integration of guardians appointed in Ukraine, benefits that will trickle down to the children under their supervision.

4. Make the most of available digital solutions, including by maintaining a transnational link

Leveraging the potential of digital solutions and technology is key to responding to the diverse needs of UASCs from Ukraine and their guardians. Though a vast array of solutions exists to address the lack of numerous protection services or their non-adaptation to the needs of specific groups, these options remain under-tapped. Measures that have been developed range from the provision of translation and interpretation services (be they geared at connecting volunteer translators and interpreters or powered by AI) to the sustainable development and publication of information resources and tools to specialist mental health services.

5. Allocate resources for preparedness and contingency planning

Even though a quick resolution to the conflict in Ukraine is nowhere in sight, there are many reasons why governments should already start thinking about and investing in preparedness and contingency planning. Any structural or political changes in Ukraine or in the EU could indeed impact the circumstances of Ukrainians under temporary protection in the EU and/or their prospects of returning to Ukraine or staying in the EU MSs where they currently reside. Likewise, legal and personal factors, such as a significant number of UASCs aging out of care or a change in the status of the application of the temporary protection directive, may also trigger child protection challenges that are currently either not foreseen or whose consequences are underestimated. Given the large number of individuals who would be affected and the socio-economic consequences accompanying status changes, current guardianship arrangements for individual UASCs may need to be revised, with important systemic ramifications on the functioning of largely under-resourced guardianship systems. This could result in abrupt disruptions to the stability of much needed guardianship arrangements for thousands of UASCs from Ukraine scattered across the EU.

A close monitoring of trends in the evolution of individual cases of UASCs and prospective planning in cooperation with child protection services (e.g. guardianship authorities) in Ukraine, including with a view towards restoring family life, could prove more urgent than the current situation suggests.

Annex 1: Key Resources for Professionals

Legal Texts

- COUNCIL DIRECTIVE (EU) 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, (20.07.2001, OJ L 2125) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001L0055&qid=1648223587338>
- COUNCIL REGULATION (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1111&from=en>
- Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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 granted (recast) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>
- Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32013L0032>

Legal and Operational Guidance

- Council of Europe, *Effective guardianship for unaccompanied and separated children in the context of migration*, Recommendation CM/Rec(2019)11 of the Committee of Ministers and Explanatory Memorandum, available at <https://rm.coe.int/cm-rec-2019-11-guardianship-en/16809ccfe2>

- ↘ European Commission, *Unaccompanied and Separated Children fleeing from war in Ukraine – FAQs on Registration, Reception and Care*, July 2022, available at https://home-affairs.ec.europa.eu/system/files/2022-07/FAQs%20UAMs%20and%20separated%20children%20TPD_en_1.pdf
- ↘ European Commission, Communication from the Commission on Operational guidelines for the implementation of Council implementing Decision 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection 2022/C 126 I/01 available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022XC0321%2803%29&qid=1647940863274>
- ↘ European Commission, Directorate-General for Justice and Consumers, Musseva, B., Practice guide for the application of the Brussels IIb Regulation, Publications Office of the European Union, 2023, <https://data.europa.eu/doi/10.2838/426843>
- ↘ European Guardianship Network, Spotlight on practices regarding guardianship for unaccompanied and separated children arriving in the EU from Ukraine, 21 July 2022, available at <https://www.egnetwork.eu/wp-content/uploads/2022/07/Practices-regarding-unaccompanied-and-separated-children-from-Ukraine-.pdf>
- ↘ European Union Agency for Asylum, *Temporary protection for unaccompanied children fleeing Ukraine – Practical guide for guardians*, Publications Office of the European Union, 2022, <https://data.europa.eu/doi/10.2847/237447>
- ↘ European Union Agency for Fundamental Rights, *Guardianship for Unaccompanied Children – A Manual for Trainers of Guardians*, available at <https://fra.europa.eu/en/publication/2023/guardianship-unaccompanied-children-trainers-manual>
- ↘ The Alliance for Child Protection in Humanitarian Action, *Unaccompanied and Separated Children Information Sheet*, March 2022, available at: <https://alliancecpha.org/sites/default/files/technical/attachments/Alliance%20UASC%20Tipsheet%20v1.pdf>
- ↘ The Hague Conference on Private International Law, Practitioners’ Tool: Cross-Border Recognition and Enforcement

of Agreements Reached in the Course of Family Matters Involving Children, January 2022, available at: <https://assets.hcch.net/docs/c7696f38-9469-4f18-a897-e9b0e-1f6505a.pdf>

Research Reports and Papers

- Eurochild, Discussion Paper on guardianship, care arrangements and custodial responsibilities for unaccompanied and separated children fleeing Ukraine and arriving in the European Union, 6 May 2022, available at <https://eurochild.org/uploads/2022/05/Child-Circle-Discussion-Paper-on-guardianship-and-care-for-UASC-from-UA.pdf>
- European Union Agency for Fundamental Rights, *Guardianship Systems for Unaccompanied Minors in the European Union – Developments Since 2014*; 2022, available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2022-guardianship-systems-developments_en.pdf

**KOMPLEKS. Comprehensive Support
for People in a Vulnerable Situation
in the Polish Migration Management System**

The aim of the project is to support the Polish migration and asylum management system to address the needs of vulnerable migrants. The KOMPLEKS project is co-financed by the „Home Affairs” Programme implemented under the Norwegian Financial Mechanism for 2014-2021. The programme is at the disposal of the Polish Minister of the Interior and Administration.

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