

Legal framework regulating UASC/legal guardianship in the EU and how it has been applied following the Ukraine crisis and the Temporary Protection Order

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“Economic, social and cultural rights of migrant children in the European Union”

Key Definitions

- **Unaccompanied children** (also called unaccompanied minors) are children, as defined in article 1 of the CRC, who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.
- **Separated children** are children, as defined in article 1 of the CRC, who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.
- **A guardian** is an independent person who safeguards a child's best interests and general well-being. To this effect, the guardian complements the limited legal capacity of the child. The guardian acts as a statutory representative of the child in all proceedings in the same way that a parent represents his or her child.

-Source: UNCRC General Comment No 6

Overview Refugee Data Ukraine Crisis

As of 21 June:

- **5,261,278 refugees from Ukraine recorded across Europe**
 - @ 2.6 million present in neighboring countries: 1.1 million in Poland, 89,784 in Romania, 86,254 in the Republic of Moldova, 77,141 in Slovakia, 24,091 in Hungary;
 - @ 2.3 million are in other European countries.
- **3,514,970 refugees from Ukraine registered for Temporary Protection or similar national protection schemes in Europe**

90% of these refugees are women and children

Source: <https://data.unhcr.org/en/situations/ukraine>

Overview of UASC – Ukraine Crisis

- **There is no accurate total number of the total number of UASC from Ukraine**, most recent data from UNICEF Country Offices states: 3,152 UASCs identified and referred to competent authorities in Romania, 139 in the Czech Republic, 285 in Croatia, 457 in Bulgaria, and 396 in Greece. The Ministry of Justice in Poland has appointed guardians to 21,360 UASC.

Source: [UNICEF - Humanitarian Situation Report N.13](#)

- Core characteristics are also more varied than those who have arrived in Europe in recent years, for example:
 - more of them are girls
 - age range is also broader, younger than the teenagers who are typically seeking asylum in the EU
 - there are a large number of children who were in were previously been in institutional care so have specific vulnerabilities

Different situations of UASC crossing from Ukraine

Children who have crossed the border include:

- Children who have crossed the border alone
- Children who crossed the border with a parent, formal guardian or other relative and then become unaccompanied
- Children who are crossing the border with a relative who does not have formal guardianship nor a notarized authorization
- Children who crossed the border without parent or formal guardianship but travelling with a relative or other adult who may have a notarized authorization from both or one parent
- Groups of children previously in institutional care in Ukraine where there was a formal guardian and who have crossed the border with said guardian

Also to note: vision that these children will one day return, so guardianship may be “temporary”.

Temporary Protection Directive

The *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* speaks of UASC in Article 16:

1. The Member States shall as soon as possible take measures to **ensure the necessary representation of unaccompanied minors enjoying temporary protection by legal guardianship**, or, where necessary, representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation.
2. During the period of temporary protection Member States shall provide for unaccompanied minors to be placed:
 - (a) with adult relatives;
 - (b) with a foster-family;
 - (c) in reception centres with special provisions for minors, or in other accommodation suitable for minors;
 - (d) **with the person who looked after the child when fleeing.**
3. 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.

Council of Europe Decision of Implementing the TPD - Scope

The **COUNCIL IMPLEMENTING DECISION (EU) 2022/382 of 4 March 2022 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** does not reference UASC directly. But states in its **Article 2**:

- That **temporary protection** applies to:
 - a) **Ukrainian nationals** residing in Ukraine before 24 February 2022;
 - b) stateless persons, and nationals of third countries other than Ukraine, who **benefited from international protection** or equivalent national protection in Ukraine before 24 February 2022; and,
 - c) **family members** of the persons referred to in points (a) and (b).
- That **temporary protection or adequate protection** under national law shall apply to stateless persons and third country nationals who were **legally residing in Ukraine on a valid permanent residence permit** and are unable to return in safe and durable conditions to their country or region of origin.

Operational Guidelines for the Implementation of the Council Decision - Scope

The **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)** recommends:

- **Extending** temporary protection to those who left Ukraine **not long before the 24 February 2022**.
- **Extending** temporary protection or adequate protection to the **family members of stateless persons or nationals of third countries who were legally residing in Ukraine on the basis of a valid permanent residence permit** and are unable to return in safe and durable conditions to their country or region of origin.

But: Not binding. As of 31 May 2022, only 10 EU MS have extended TP to TCNs and stateless persons, 8 have extended the temporal scope to Ukrainians who left before the 24 February 2022. Other States have further restricted the scope of the TPD (e.g.: Poland provides TP only to Ukrainian citizens entering Poland directly from Ukraine).

Source: <https://ecre.org/wp-content/uploads/2022/03/Information-Sheet-%E2%80%93-Access-to-territory-asylum-procedures-and-reception-conditions-for-Ukrainian-nationals-in-European-countries.pdf>

This leads to the **exclusion of certain groups of children** from TP. These children can go through the asylum system and must thereby be provided with a guardian or representative (cf slide 10).

Operational Guidelines for the Implementation of the Council Decision

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- 1.) **Representation must be ensured as soon as possible in the Member State of first entry**, by ensuring the presence...of a representative of the child protection services, or, where necessary, individuals or organisations appointed to act on behalf of the child protection services.
- 2.) For the **Member States of destination** the Commission recommends setting up a swift procedure for registering the presence of unaccompanied children taking up residence on their territory, **and to initiate as soon as possible the procedures for the appointment of the guardian/legal representative and for entrusting the care of the children**, as foreseen by national law **...the procedures for entrusting the care of the children may be separate from the procedures for the appointment of guardians/legal representatives for the same children, as foreseen by national law.**
- 3.) For those unaccompanied children who do not continue their journey towards another Member State in one of the two types of circumstances described above, **the Member State of first entry should ensure, in addition to the appointment of a guardian/legal representative**, that these children have as soon as possible suitable accommodation.

Framework for Guardianship

- **The United Nations Convention on the Rights of the Child (CRC)**, ratified by all EU Member States, obliges states to ensure the protection of children who are without parental care. Assigning a guardian to support the child is a key element of that protection (**art.20**).
- The **European Commission proposals on migration and asylum of 2016 and the Pact on Migration and Asylum of 2020** provide a number of guarantees to strengthen and standardise guardianship for unaccompanied children across EU Member States. The EU has not yet adopted the proposals.
- Since 2011, the protection of children, including the appointment of a guardian or a representative, has been a requirement of the **EU Human Trafficking Directive and the Directive on combating the sexual abuse and sexual exploitation of children and child pornography**.
- With regards to non-EU nationals, the **Reception Conditions Directive (art. 24) and the Qualification Directive (art. 31)** which have remained unchanged since 2013. These require the appointment of a ‘representative’ or ‘legal guardian’ for unaccompanied children.

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- **In 2017 the European Commission adopted a communication on the protection of children in migration.** This also covers issues of guardianship for unaccompanied children.
- **Since 2014, many Member States have adopted legislative changes that have affected asylum, integration, family reunion and other related areas.** 17 Member States implemented legislative changes that had an impact on the protection of unaccompanied children and their guardianship but differences remain across Member States and standards vary significantly.

1996 Hague Convention on parental responsibility and protection of children

- With regard to unaccompanied and separated children internationally displaced from Ukraine, the 1996 Convention, to which Ukraine is a Contracting Party, constitutes an important complement to other global and regional instruments.
- The 1996 Convention **allows orders made in the child's state of habitual residence to be registered and made enforceable in other Convention countries**. It establishes a framework for the co-ordination of legal systems, and for international judicial and administrative co-operation.
- The **Council Decisions of 19 December 2002 (2003/93/EC) and 5 June 2008 (2008/431/EC)** authorised Member States of the EU to sign and ratify or accede to the 1996 Hague Convention. **All EU MS have now ratified or acceded to the 1996 Hague Convention.**
- The **Brussels IIa Regulation** concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (EC/2201/2003), states in its article 61:

As concerns the relation with the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, this Regulation shall apply:

- (a) where the child concerned has his or her habitual residence on the territory of a Member State;
- (b) as concerns the **recognition and enforcement of a judgment given in a court of a Member State on the territory of another Member State**, even if the child concerned has his or her habitual residence on the territory of a third State which is a **contracting Party to the said Convention**.

Ukraine's Engagement in the protection of UASC outside the country

- Situation of these children is different from that of other children arriving in the EU from third countries and because of this Ukraine is actively engaged in seeking to put in place new rules concerning their departure from Ukraine, including care and custodial arrangements.
- Ukraine has been actively engaged in the bilateral memoranda of understanding with EU Member States concerning mechanisms for the care, protection and return of unaccompanied children to Ukraine.

Key Considerations on Guardianship in the EU

- In general, the law and policy in the EU which regulates guardianship and care is a **combination of EU and national law**.
- The **EU does not have competence** to adopt rules on national family law arrangements or general child protection system measures.
- The EU migration provisions (such as safeguards for unaccompanied children under the EU Temporary Protection Directive) and cross border family law mechanisms sit alongside general obligations to children deprived of parental care under national child protection systems.
- **Different bodies of EU and national laws**, such as temporary or international protection law, anti-trafficking law on the one hand, and child protection and/or family law on the other hand, **may apply simultaneously** to different aspects of a child's situation.

Additional Reflections

1. The TPD regulates protection for UASC at article 16 which is then referenced in the Operational Guidelines (which are not binding) but the Implementing Decision does not.
2. The TPD allowed for a swift entry into the neighboring EU Member States, and initially border officials reportedly did not have the capacity to register all UASC properly due to high number of children crossing nor the ability to support them in the State of first entry, so a lot of the onus is on the the Member State of Arrival.
3. The question as to how these new rules and arrangements including those that the Ukraine Government will sit alongside or supersede existing laws on care and custodial arrangements remains to be fully explored.
4. Many TCN children may not be entitled to TP and will have to go through the regular asylum system. The fact that these children are less likely to return to Ukraine may be a factor in their processing. Will and should this affect how these children are welcomed?

Italian Case Study

Background: The Tribunal of Bolzano did not recognize the nomination of a Ukrainian woman as the legal guardian in Italy of a group of children from a “small group home” in Ukraine whom she had been the legal guardian of. Though there was legal documentation (though in Ukrainian) proving the legal relationship of this woman to these children and also a clear personal relationship the Prosecutor decided that these children needed to be considered as unaccompanied, and therefore the children were separated from this guardian/caregiver and amongst themselves and placed into different forms of care in accordance with art.19 of the legislative decree 142/2015.

This prompted the intervention of the Ministry of Justice in Ukraine and also of the Ukrainian Consulate in Milan who sent the Tribunal specific communication confirming the existence of this form of alternative care in Ukraine and the validity of different measures taken by the Ukrainian government which should have been recognized by the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. The appeal resulted in custody being given to the Ukrainian woman with support in accessing Italian services including education.

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Decision: Tribunal therefore clarified:

1. That the **absence of a parent should not automatically translate into defining a child as unaccompanied** and therefore the automatic application of art. 19 of the Decree 142/2015
2. That the **concept of family member should be understood in a broad sense** including cohabitants
3. That **unaccompanied children from Ukraine should not be automatically considered as other “foreign unaccompanied minors”**
4. It confirmed that **Ukrainian legal documentation was recognized in line with art.23 the 1996 Hague Convention** which states that measures taken by the authorities of a Contracting State shall be recognised in all other Contracting States

Source: <https://www.asgi.it/famiglia-minori/ucraina-minori-soli-convenzione-aja/>

Link to TPD: Important to point out as mentioned before the COM Guidelines on Implementation of the TPD: “The procedures for entrusting the care of the children may be separate from the procedures for the appointment of guardians/legal representatives for the same children, as foreseen by national law.” (Section 5).

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The general rule in Italy however remains that children arriving with Ukrainian guardians are considered UASC. Each Italian Juvenile Court must therefore interpret whether Ukrainian guardians can be considered legal guardians in Italy. The issue is currently being examined at inter-ministerial level.

Source: <https://eurochild.org/uploads/2022/05/Italy-IT-country-profile-for-Alt-Care-and-UASC-for-Ukrainian-children.pdf>

In Poland, according to the Act of 12 March 2022 on Assistance for Ukrainian Citizens in connection with the armed conflict on the territory of the country, those entering Poland with Ukrainian children in their care (foster parents and caregivers) will be established as the temporary guardians of those children.

Source: <https://eurochild.org/uploads/2022/05/Poland-PL-country-profile-for-Alt-Care-and-UASC-for-Ukrainian-children.pdf>

Thank you!