

FREEDOMS

Guardianship systems for children deprived of parental care in the European Union

With a particular focus on their role
in responding to child trafficking



EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS



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Foreword

Children who are deprived of parental care and are unaccompanied or separated from their primary caregiver are particularly vulnerable to abuse and exploitation. They are entitled to special protection.

Effective guardianship systems are key to preventing abuse, neglect and exploitation and they protect child victims of trafficking. Children who are separated from the parents are at heightened risk of exploitation, including falling victims of trafficking in human beings. In other cases, children have been separated from their primary care givers as they were also involved in exploiting the child they were responsible for.

The EU Strategy towards the eradication of trafficking in human beings 2012–2016 underlines the importance of comprehensive child-sensitive protection systems to prevent and address child trafficking. Robust guardianship arrangements are a cornerstone of such child protection systems. Yet the roles, qualifications and competences of guardians vary substantially from one Member State to another.

In June 2014, the European Union Agency for Fundamental Rights (FRA), in close cooperation with the European Commission, published a handbook on *Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*. The handbook offers EU Member States comprehensive guidance and recommendations on strengthening national guardianship systems. The handbook lays down the core principles that should guide national guardianship systems and suggests how national authorities, as well as guardians, could strengthen guardianship arrangements to respond better to the needs of child victims of trafficking. By promoting a shared understanding of the main features of a guardianship system, the handbook aimed at improving conditions and respect for the fundamental rights for all children deprived of parental care. It also sought to respond better to the specific needs of child victims of trafficking.

The agency mapped national guardianship systems with the aim of identifying common challenges and promising practises. This report presents the main findings of this background research, which were also used to develop the handbook. These two publications are the latest results from FRA's longstanding commitment to promote and protect the rights of the child.

This comparative report may assist Member States to understand better the strengths and weaknesses of their national system. It may also assist them to take measures to promote the effective protection of all children and, more specifically, find an adequate response to the needs and rights of those who are in the most vulnerable situation, such as child victims of trafficking.

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Country codes

Country code	Country
AT	Austria
BE	Belgium
BG	Bulgaria
CY	Cyprus
CZ	Czech Republic
DE	Germany
DK	Denmark
EE	Estonia
EL	Greece
ES	Spain
FI	Finland
FR	France
HR	Croatia
HU	Hungary
IE	Ireland
IT	Italy
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NL	Netherlands
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SK	Slovakia
SI	Slovenia
UK	United Kingdom



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Executive summary

As the numerous references to “legal guardian” in the United Nations (UN) Convention on the Rights of the Child (CRC) indicate, legal guardians are a key element of a protection system for children who are temporarily or permanently deprived of their family environment and cannot have their interests represented by their parents. The European Union (EU) Strategy towards the eradication of trafficking in human beings 2012–2016, which the European Commission adopted in June 2012, notes the absence of a “uniform definition of a guardian and/or representative across the Member States and their roles, qualifications and understanding of competencies vary from one Member State to another”. To address this gap, the European Commission together with FRA will develop a good practice model on the role of guardians and/or legal representatives of child victims of trafficking (priority 2.1, action 3).

FRA conducted desk research to map guardianship systems in the 28 EU Member States. The research covers four specific areas, namely:

- the type of guardianship systems in place;
- the profile of appointed guardians;
- the appointment procedures; and
- the tasks of the guardians.

The research findings primarily served to inform FRA’s work on a guardianship handbook to provide guidance to EU Member States on how to strengthen national child protection systems. The FRA handbook, *Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, published in June 2014, was developed in cooperation with the EU Anti-Trafficking Coordinator’s Office in the European Commission to implement the EU Anti-Trafficking Strategy and protect children’s rights. This comparative analysis should thus be read in conjunction with the handbook.

This comparative report explores the key features of guardianship systems put in place to cater for the needs of all children requiring such protection and those at risk of becoming victims of trafficking or of other forms of exploitation. In this way, the report looks at how existing guardianship systems for children deprived of parental care respond to the particular needs and vulnerabilities of presumed or identified child victims, or children at risk of trafficking and exploitation, such as unaccompanied children.

It aims to assist EU Member States to understand better the strengths and weaknesses of their national system. It may also assist them to take adequate measures to

reinforce their guardianship systems to protect children better.

Legal and policy framework in the European Union

Addressing trafficking in human beings is one of the strategic priorities for the EU and its Member States. Trafficking in human beings is a grave human rights violation, expressly prohibited in Article 5 of the EU Charter on Fundamental Rights. It is a particularly serious crime listed in Article 83 of the Treaty on the Functioning of the European Union (TFEU).

The cornerstone of the EU anti-trafficking policy is Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (Anti-Trafficking Directive), adopted on the basis of Article 82 (2) and Article 83 (1) of the TFEU. The directive places victims’ rights at the centre, providing a number of measures specifically addressing child victims, such as the appointment of guardians.

Dealing with child victims of trafficking, the EU Strategy towards the eradication of trafficking in human beings 2012–2016 seeks to promote victims’ rights and safeguard their protection while ensuring appropriate support and access to justice. The strategy underlines that “comprehensive child-sensitive protection systems that ensure interagency and multidisciplinary coordination are key in catering to diverse needs of diverse groups of children, including victims of trafficking”. It also calls on Member States to strengthen their child protection systems. It further notes the importance of guardianship as a key element of child protection systems and calls on FRA to work together with the European Commission on this issue.

National guardianship systems

Each EU Member State has a national child protection system, which provides for the protection of children deprived of parental care. It safeguards the child’s best interests, provides legal representation to the child and, more generally, promotes the well-being of children, when parents are unable, unwilling or precluded from doing so, in line with Article 20 of the CRC and Article 24 of the Charter.

When a child is deprived of parental care, EU Member State law provides for the appointment of a guardian or a representative to exercise the tasks usually

carried out by parents. In different Member States, however, the term guardian is used to describe persons with differing mandates and functions. Sometimes, other terms' are used to describe persons exercising guardianship duties.

Lack of uniform approach

The majority of EU Member States have entrusted guardianship functions to municipal or local level social services, and only a few Member States have a central guardianship authority at national level. When guardianship is implemented at regional or local levels, different approaches are sometimes applied in different parts of the country.

Most of the EU Member States assign guardianship duties to natural or legal persons. Guardianship duties are usually assigned in priority to close relatives or persons coming from the broader family environment, thus acknowledging the importance of maintaining family links and of the personal relationship between the future guardian and the child.

If, however, no suitable person to act as guardian can be found among the child's relatives or within the child's family environment, national child protection authorities are responsible for the care of the child. In such cases, either employees of the guardianship institution or entity designated by law, or natural persons, following their appointment by a court or other competent authority, perform the guardianship duties. This often occurs in cases of unaccompanied children and of child victims of trafficking, exploited and identified outside their country of origin, since they usually do not have close relatives or other family members residing in the country. This report focuses on situations in which guardianship is not assigned to a child's relatives or other persons within a child's family environment.

Guardianship system for foreign children

Constitutional or other domestic law provisions in all Member States usually protect all children in their territory irrespective of the child's nationality or status. Notwithstanding this, children's specific migration and residence status is often key to determining the level and type of protection granted to them and, more specifically, their guardianship and representation arrangements. A few Member States have set up a separate guardianship system for unaccompanied children who only have a temporary right to stay in the Member State or have no right to stay at all. However, in practice, differentiated arrangements are in place in many more Member States depending on the specific status of

the child. Even with regard to the treatment of EU and European Economic Area (EEA) unaccompanied children found in the territory of another EU Member State, FRA's research reveals that there is no uniform approach across Member States, where law and practice is often unclear or inconsistent.

Guardianship for child victims of trafficking

No EU Member State has developed a separate guardianship system exclusively for child victims of trafficking. In principle, guardianship of child victims of trafficking falls under the scope of the general guardianship provisions set forth in civil and/or family law, irrespective of the migration or residence status of the child victim, even in Member States where a separate guardianship system for unaccompanied children is in place. Migration and asylum law provisions, however, apply to child victims who are third-country nationals as long as they are not formally identified as victims of human trafficking by the competent national authorities.

Ensuring independency and impartiality of guardians

The absence of any conflict of interest between the potential guardian and the child is a key criterion in the selection of individual persons or institutions as guardians. The way in which a guardian's independence is understood, however, varies among EU Member States. This is particularly relevant for the appointment as guardians of persons responsible for providing material or other types of care to the child, namely staff working in reception centres or other accommodation facilities where the child resides, or for the appointment of social workers within social services. The guardians' independence from migration and asylum authorities is also vital for unaccompanied children who are subject to migration law or seek international protection. In some EU Member States, migration authorities nevertheless play a role in the appointment of guardians or representatives of third-country national children.

Employment status of guardians

In practice, guardianship duties in EU Member States are exercised either by employees of institutions or other entities designated by law, or by private persons, who competent national authorities appoint as guardians for a particular child. It is therefore possible to distinguish three categories of natural persons who can exercise a guardianship role:



- close relatives or persons coming from the broader family environment chosen and designated by an appointing authority;
- professionals employed by guardianship institutions or similar legal entities; and
- individuals unrelated to the child who offer their services to act as guardians (referred to as ‘volunteer guardians’ in this report) and who are either designated by an appointing authority or, more often, are offering their services on behalf of the entity assigned with guardianship duties.

In most EU Member States, the different categories of guardians coexist.

In a few Member States, guardians are primarily ‘volunteer guardians’, usually entitled to some form of compensation for their time and the expenses incurred while performing their duties. In some Member States where guardians are primarily volunteers, a specific system of recruitment, placement and supervision of guardians has been developed. The responsible guardianship authority or another designated institution or non-governmental organisation (NGO) is in charge of recruiting volunteers.

Qualifications and skills of guardians

Although legislation in the majority of Member States provides for the appointment of competent and qualified guardians, the requirements set concerning their professional or educational background are typically very general. Legislation does only exceptionally regulate the length and the content of training courses for guardians, and few Member States make it mandatory for guardians to participate in training activities. Overall, the training of guardians is not organised in a systematic and consistent way, allowing them to be equipped to address effectively the needs and vulnerabilities of particular groups of children.

Specialised or advanced training offered to guardians, focusing on the needs and vulnerabilities of particular groups of children, such as child victims of trafficking or unaccompanied children, differ considerably among Member States. Typically, they do not provide any systematic specialised training on identification, protection and assistance to child victims of trafficking. When such courses are available, NGOs working with victims of trafficking usually organise these.

Appointment procedures

In principle, the competent judicial authorities and courts appoint a guardian. In many cases, however,

guardianship is assigned by a court decision or by virtue of law to an institution. It is then the task of this institution to assign a person – usually one of its employees or a volunteer as guardian – to a specific child. In that case, the assignment of the natural person exercising the guardianship role takes place internally.

In cases of child victims of trafficking, it is most often the police or the migration authorities who identify a victim and report a case either to the court, the child protection authorities or the victims support service. Some EU Member States have set up a referral mechanism for child victims of trafficking that ensures timely appointment of guardians and protection of victims.

Despite legal provisions requiring the immediate appointment of or a relatively short timeframe for appointing guardians, the actual time taken to appoint a guardian can in practice last from a few days to several months, or sometimes even over a year. Variations exist in the appointment process and in the length of appointment procedures within EU Member States. Such differences are more evident in decentralised states where the responsibility for guardianship lies at regional or local level.

Duties and tasks of guardians

The guardian’s mandate can be either broad, covering all aspects related to guardianship, or be delimited upon appointment by the competent authority. When the second of these two possibilities occurs, the duties assigned and the duration of the appointment depend on the particular situation of the child, often his or her migration and/or residence status, or the particular legal procedures that the child is involved in. It is also possible that the duties of ensuring the child’s well-being and representing his or hers best interests are dissociated and performed by different persons or institutions.

Guardians’ duties and tasks are often defined by law in a general manner. The most common tasks that Member States assign to guardians encompass ensuring that the child receives care, accommodation, education and healthcare, and managing the child’s finances and the child’s legal representation (i.e. complementing the limited legal capacity of the child). How these tasks are performed varies. Guardians of unaccompanied children are to some extent also involved in decisions on long-term solutions for the child.

Legal representation duties of guardians

The duty to legally represent the child is one of the main tasks of a guardian included in national legislation. The

guardian has to complement the limited legal capacity of the child and assist the child in all actions concerning his/her legal status for which the child lacks full legal capacity. Guardians complement the child's limited legal capacity in all civil, administrative or judicial proceedings. The guardian's rights and duties in such proceedings are in principle clearly defined in national legislation.

In certain legal proceedings, a professional lawyer needs to represent the child. National legislation, however, does not always stipulate any clear rules concerning the interaction between the guardian, acting as legal representative of the child, and the child's lawyer. The guardian should, however, be fully involved and ensure that the competent authorities appoint a lawyer or another qualified professional for the child, in accordance with the national law. In certain cases, the guardian may need to authorise the lawyer to act on behalf of the child, especially in the context of court proceedings.

Legal representation and legal aid for child victims of trafficking

Specialised legal assistance and legal representation in court proceedings are key for child victims of trafficking.

Nevertheless, appointing a lawyer to the child victim is not always mandatory for the proceedings, and in some cases free legal assistance is provided only subject to a means test. In most Member States there are a limited number of lawyers who have specialised knowledge in trafficking in human beings and of working with child victims, and they may not always be available to deal with particular cases.

Accountability and monitoring system

Effective supervision and monitoring of guardians is essential to ensure the quality of guardianship systems. It safeguards the best interests of children under care and protects them from abuse or the violation of their rights. In general terms, all Member States' guardianship authorities have developed an internal system of supervision and monitoring of guardians, while external monitoring is exercised by judicial or other legal authorities, such as the public prosecution service. Such monitoring systems are often not clearly structured and efficient. Complaint mechanisms accessible to children are missing. In the majority of EU Member States, external monitoring by independent authorities other than the court is lacking, although positive examples exist.



Introduction

As noted by the European Commission in its EU Strategy towards the eradication of trafficking in human beings 2012–2016, trafficking in human beings “is a severe violation of individual freedom and dignity and a serious form of crime that often has implications which individual countries cannot effectively address on their own”.

Several EU Member States are major destination countries for trafficking in human beings. It is reasonably estimated from the available figures that every year several hundred thousand people are trafficked into the EU or within the EU area.¹ Available Eurostat figures suggest that the majority of victims (65 %) are trafficked *within* the Union. Child victims, girls and boys, constitute a large percentage (16 %) of identified or presumed victims in EU Member States.²

Legal and policy framework

Addressing trafficking in human beings is one of the strategic priorities for the EU and its Member States. It is a particularly serious crime listed in Article 83 of the TFEU. The cornerstone of EU anti-trafficking policy is Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (Anti-Trafficking Directive),³ adopted on the basis of Article 82 (2) and Article 83 (1) of the TFEU. The EU response to trafficking in human beings is a comprehensive one, and complements other significant actions taken by the international community, as briefly summarised in Chapter 1. The response not only focuses on the prevention and prosecution of this type of crime, but also on the rights of the victims, which are a key concern.

Certain categories of children are at heightened risk of trafficking, and children in general fall prey more often than adults to certain forms of exploitation. The EU’s law enforcement agency, Europol, currently identifies the fight against child trafficking as one of its main priorities⁴ and draws attention to particular forms of exploitation such as forced criminality or commercial sexual exploitation of children on line.⁵ In its intelligence notification on *Child trafficking for exploitation*

in forced criminal activities and forced begging in 2014, Europol noted that children falling prey to trafficking in human beings typically come from difficult socio-economic backgrounds and are at high risk of undergoing secondary victimisation by being considered perpetrators of petty crime rather than victims of exploitation.⁶

Over the last five years, the European Commission issued three important policy documents on child protection.

- In May 2010 the European Commission published an **EU Action Plan on unaccompanied minors (2010–2014)**⁷ calling for more coherence in the response by the EU and its Member States to address the specific situation of unaccompanied children. This response must be based on the respect for the rights of the child, as set out in the EU Charter of Fundamental Rights and the UN Convention on the Rights of the Child.⁸ The document notes the need for enacting legislation on combating trafficking in human beings and the sexual exploitation of children, and underlines that such legislation must be adequately implemented. Regarding guardianship, it calls on Member States to introduce, if necessary, common standards and to “consider introducing review mechanisms to monitor the quality of guardianship in order to ensure that the best interests of the child are represented throughout the decision-making process and, in particular, to prevent abuse”. More information on the implementation of the Commission’s Action Plan on Unaccompanied Minors can be found in the Commission’s mid-term report on the implementation of the Action Plan.⁹
- In February 2011, the **EU Agenda for the rights of the child**¹⁰ aimed to strengthen the position of the rights of the child as an integral part of the EU’s fundamental rights policy. Highlighting the vulnerability of child victims of exploitation and abuse and child victims of trafficking, the document expresses a commitment towards the elimination of all forms of violence against children, taking action against child labour and strengthening child protection, while promoting the right of the child to be heard.
- More specifically on child victims of trafficking, the **EU Strategy towards the eradication of trafficking in human beings 2012–2016**,¹¹ launched by the European Commission in June 2012, seeks to pro-

1 European Commission (2014a).

2 Eurostat (2014), pp. 10–11.

3 Directive 2011/36/EU of the European Parliament and of 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, 15 April 2011, pp. 1–11.

4 European Union’s law enforcement agency (Europol) (2014a).

5 European Financial Coalition against Commercial Sexual Exploitation of Children Online (2015).

6 Europol (2014b).

7 European Commission (2010).

8 United Nations (UN), Convention on the Rights of the Child, New York, 20 November 1989.

9 European Commission (2012a).

10 European Commission (2011).

11 European Commission (2012b).

mote victims' rights and safeguard their protection while ensuring appropriate support and access to justice. The strategy underlines that "comprehensive child-sensitive protection systems that ensure interagency and multidisciplinary coordination are key in catering to diverse needs of diverse groups of children, including victims of trafficking" and calls on Member States to strengthen their child protection systems.

For child victims of trafficking, separation from the parents can either be the result or a risk factor for being trafficked. In practice, unaccompanied children may already be in need of or have a guardian before being identified as a victim, and in these cases qualified guardians can contribute to their identification as victims. Separation from parents and family happens for various reasons – it may be the result of migration, poverty, violence or parental abuse. Various studies have highlighted the link between separation and exploitation, including for the purpose of trafficking.¹² FRA's 2009 study on child trafficking in the EU also points out the link between the increased number of missing children from alternative care institutions and reception facilities for unaccompanied children and child trafficking.

Guardians are one of the most important elements of a protection system for children who are temporarily or permanently deprived of their family environment and cannot have their interests represented by their parents. The EU Strategy towards the eradication of trafficking in human beings 2012–2016 notes the absence of a "uniform definition of a guardian and/or representative across the Member States", and that "their roles, qualifications and understanding of competencies vary from one Member State to another". To address this gap, the strategy provides that the European Commission together with FRA will develop a good practice model on the role of guardians and/or legal representatives of child victims of trafficking (priority 2.1, action 3).

FRA research in the field

The concept of legal guardian is not uniformly defined across EU Member States,¹³ as shown in the 2009 FRA report on *Child trafficking in the European Union*. Similarly, the tasks assigned to guardians, as well as their qualifications, can differ significantly across and within Member States. Furthermore, there is evidence that the quality of the services and the degree of protection offered to children under guardianship systems vary

considerably, even within the same state.¹⁴ As pointed out by FRA in its 2010 report on *Separated, asylum-seeking children in European Union Member States*, the functions, organisation and implementation of guardianship systems all have an impact on the level of protection children receive. However, these systems vary broadly between EU Member States.¹⁵ The effectiveness of the protection provided to separated, asylum-seeking children largely depends on the nature of the guardianship functions and how they are carried out.

Building upon the findings of its previous work on child victims of trafficking and separated asylum-seeking children, FRA conducted desk research, using secondary sources, to map guardianship systems in the 28 EU Member States. The research covers four particular areas, namely the:

- type of guardianship systems in place;
- profile of appointed guardians;
- appointment procedures; and
- tasks of the guardians.

The research collected information on these basic components of national guardianship systems for children deprived of parental care, focusing on the situation of child victims of trafficking in human beings and on how national systems cater for the needs and rights of child victims. Child victims of trafficking may be nationals of the country in which they are exploited and/or identified as victims, may have another EU nationality, or be third-country nationals. The research looks into guardianship provisions for those children at heightened risk of exploitation, such as unaccompanied children – third-country or EU nationals.¹⁶ When possible, such provisions were analysed in relation to those in place for national children deprived of parental care.

¹⁴ FRA (2010a).

¹⁵ *Ibid.*

¹⁶ The term 'unaccompanied' is used to refer to both unaccompanied and/or separated children, in order to be in line with the term 'unaccompanied', as used in EU law, and to avoid possible confusions and inconsistencies. The term 'unaccompanied' is used in EU law (e.g. Qualification Directive (2011/95/EU), Art. 2) to refer to a child "who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person; it includes a [child] who is left unaccompanied after he or she has entered the territory of the Member States". A 'separated child' is defined as child who has 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. The Separated Children in Europe Programme (SCEP) uses the word 'separated' rather than 'unaccompanied' because it more accurately defines the essential problem that such children face, namely that they lack the care and protection of their parents or primary caregiver and, consequently, suffer socially and psychologically from this separation.

¹² The United Nations Children's Fund (UNICEF) (2008).

¹³ FRA (European Union Agency for Fundamental Rights) (2009).

The current report presents a comparative analysis of the research findings on guardianship systems in 28 EU Member States. This comparative study is grounded only on legislation (*law in text*) without entering into either case law or practice (*law in action*). On certain issues, however, that are more critical and/or controversial – as, for example, the issue of ensuring independence of the system – the report provides some assessments, based on reliable material published by other sources. Comparable data on EU Member States are included in tables and figures. The country-specific information included in the report was selected to provide illustrative examples of certain situations.

Data presented in the report reflect the situation as of September 2013. Changes that occurred thereafter have only been taken into account when they were brought to the attention of FRA. The [Annex](#) shows the full references of all national legislation referred to in this report, while the footnotes only contain the short name of a legislation. The national laws are displayed in a table in the Annex by EU Member State, with a link to the original language version and an English version when available. Articles of particular importance are also listed.

The research findings were primarily used to inform FRA's work on the handbook on guardianship systems that was developed in cooperation with the EU Anti-trafficking Coordinator's Office to implement the EU Anti-Trafficking Strategy and protect the rights of the child.¹⁷ The current comparative analysis should therefore be read in conjunction with the handbook on *Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking* published by FRA in June 2014. This comparative report aims to further assist Member States to better understand the strengths and weaknesses of their national system. It may also assist them to take measures to promote the effective protection of all children and find an adequate response to the needs and rights of those who are in the most vulnerable situation, such as child victims of trafficking.

In broad terms, guardians may have different roles, depending on the national context. This report focuses on three particular roles:

- legal responsibility for ensuring the well-being of the child; and
- legal responsibility for safeguarding the best interests of the child;
- legal representation in various legal procedures (e.g. criminal investigation against traffickers and criminal proceedings related to trafficking in human

beings, procedure for obtaining residence permits, asylum procedures).

This report does not cover those individuals who provide day-to-day care to a child, unless they also exercise one of the three other functions listed above.

This report explores the key features of guardianship systems in place catering for the needs of all children at risk. It looks at how existing guardianship systems respond to the particular needs and vulnerabilities of presumed or identified child victims, or children at risk of trafficking and exploitation, such as unaccompanied children. In addition to specific chapters of the report addressing identified victims of human trafficking, other parts that also relate specifically to child victims of trafficking are highlighted in grey boxes.

The research further aimed to identify existing promising practices implemented in EU Member States that could be shared with all relevant stakeholders, to strengthen the protection and the rights of child victims of trafficking in the EU. Promising practices on guardianship systems that this research identified are included in the handbook.

This report complements other publications on guardianship, including: the EU grant-aided project which resulted in the formulation of *Core Standards for guardians for separated children in Europe*;¹⁸ the project aiming to establish a European network of guardianship institutions to promote cooperation named '*Towards a European Network of Guardianship Institutions*';¹⁹ and the *Guiding principles for quality legal assistance for unaccompanied children* developed by the European Council on Refugees and Exiles (ECRE) within the framework of the project '*Right to justice: Quality legal assistance for unaccompanied children*'.²⁰

17 FRA (2014).

18 Defense for Children, ECPAT the Netherlands (2011).

19 Nidos Foundation (2010).

20 European Council for Refugees and Exiles (ECRE) (2014).

1

International and European legal framework relating to guardianship



This chapter lists the main international and European instruments relating to guardians for child victims of trafficking. It intends to give the reader an overview of the core documents as they relate to guardianship for child victims of trafficking, without providing a detailed analysis. Where necessary, these documents are referenced in the following chapters of this report.

1.1. European Union

Article 3 (3) of the Treaty on European Union explicitly requires the EU to promote the protection of the rights of the child.²¹ The rights of the child are also enshrined in the EU Charter of Fundamental Rights: its Article 24 protects children as independent and autonomous right holders as well as subjects of specific rights. It also makes the child's best interests a primary consideration for public authorities and private institutions in all their actions relating to children.²²

Addressing trafficking in human beings is at the core of EU policy and has led to a number of political initiatives and legislative actions in recent years. This has culminated in the adoption of the EU Anti-Trafficking Directive (2011/36/EU)²³ on 5 April 2011. The directive contains significant child-specific measures. In addition to references to the best interests of the child, several of its provisions concern the appointment of a guardian or a representative for child victims:

- Articles 14 (2) and 16 – contain the duty to appoint a guardian or a representative from the moment a child victim is identified by the authorities where, by national law, the holders of parental responsibility are, as a result of conflict of interests between them and the child victim, precluded from ensuring the child's best interest and/or representing the child;
- Articles 15 (1) and 16 (4) – include the duty to appoint a representative in criminal investigations and proceedings when a child is unaccompanied as well as in cases where there is conflict of interest between the holders of parental responsibility and the child;
- Article 15 (2) – covers the duty to provide free legal counselling and free legal representation to child victims involved in criminal investigations and proceedings, unless they have sufficient resources.

Similar provisions can be found in Directive 2011/93/EU of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography.²⁴ This directive urges Member States to appoint a special representative in cases of conflict of interest between the child and his/her parents or legal representatives and ensure free legal counselling and assistance in criminal investigations and proceedings (Articles 20 (1) and (2)). The special representative could be a legal person, an institution or an authority (recital 30). The best interests of the child must be taken into account when providing assistance, support and protection to victims in accordance with the respective provisions of the directive.

²¹ Consolidated version of the Treaty on European Union, OJ 2010 C 83/13, 30 March 2010.

²² Charter of Fundamental Rights of the European Union, Official Journal of the European Communities, 2000/C 364/01, 18 December 2000.

²³ 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*).

²⁴ 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.

In addition, the Victims Directive (2012/29/EU)²⁵ requires that for child victims, the child's best interests be a primary consideration and that these interests be assessed on an individual basis (Article 1). The directive obliges Member States to take a "child-sensitive approach, taking due accounts of the child's age, maturity, views, needs and concerns" (Article 1 (2)). The directive contains provisions on the rights of the child to be heard (Article 10). Provisions on legal guardianship and legal assistance in case of criminal investigations and proceedings are also included.

The EU asylum *acquis* also contains provisions relating to legal representation and the appointment of a guardian for applicants for international protection who are unaccompanied by their parents.

- The Qualification Directive (2011/95/EU),²⁶ establishes in Article 31 the duty to ensure that unaccompanied children granted protection are represented by a legal guardian or, where necessary, by an organisation responsible for the care and well-being of minors.
- Article 24 of the Reception Conditions Directive (2013/33/EU) and Article 25 of the Asylum Procedures Directive (2013/32/EU) provide for the appointment of a "representative" to unaccompanied children (without referring to a "guardian" specifically), to enable these children to benefit from the rights and comply with the obligations provided for in these directives.²⁷

While the Qualification Directive does not provide a definition of the guardian and his/her functions, the representative to be appointed under the Reception Conditions Directive (Article 2 (j)) and the Asylum Procedures Directive (Article 2 (n)) is defined as "a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor [...] with a view to ensuring the best interests of the child and exercising legal capacity for the minor where

necessary". It is further provided that "where an organisation is appointed as a representative, it shall designate a person responsible for carrying out the duties of representative in respect of the unaccompanied minor". Article 25 (a) and (b) of the Reception Conditions Directive provides for particular safeguards, underlining that the work of the representative should be guided by the best interests of the child principle, and stressing the duty to appoint *promptly a qualified* representative. Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor are eligible to become representatives.

The EU asylum *acquis* does not list the tasks assigned to representatives but it contains a number of provisions that describe their involvement. These include the following: providing information to the child on the procedures, giving consent to the age assessment determination process, accompanying the child in a series of proceedings (asylum interview, age assessment), and safeguarding the child's well-being.

Although EU law recognises the importance of a legal guardian and of legal representation for child victims, it does not follow a consistent approach. In addition to the term 'legal guardian', the terms 'legal', 'other' or 'special' representative are used to describe a person appointed to assist and support children in cases where they are unaccompanied by their parents or where there is a conflict of interest between the child and his/her parents, or in cases where parents are incapable/unable to represent the child's interest

1.2. Council of Europe

The 2005 Council of Europe Convention on Action against Trafficking in Human Beings²⁸ provides a comprehensive and coherent framework on prevention, cooperation between different actors, protection of and assistance for victims, and an obligation to criminalise trafficking in human beings. Chapter III of the convention is devoted to measures to protect and promote the rights of victims and to guarantee gender equality. It contains various child-specific measures. Article 10 (4) (a) specifically states that as soon as an unaccompanied child is identified as a victim, each party shall "provide for representation of the child by a legal guardian, organisation or authority which shall act in the best interests of that child".

The 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse,²⁹ known as the Lanzarote Convention,

25 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ 2012 L 315 (*Victims Directive*), pp. 57-73.

26 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), OJ 2011 L 337 (*Qualification Directive*).

27 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ 2013 L 180 (*Reception Conditions Directive*); 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), OJ 2013 L 180 (*Asylum Procedures Directive*).

28 Council of Europe, Convention on Action against Trafficking in Human Beings, CETS No. 197, Warsaw, 15 May 2005.

29 Council of Europe, Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No. 21, Lanzarote, 25 October 2007.

deals with the protection of children against sexual exploitation and abuse. It does, however, not make any reference to the appointment of a guardian or representative to child victims, even though it refers in Article 14 to the need or the possibility to remove the child from the family environment in cases where parents or persons who take care of the child are involved in his/her sexual exploitation or sexual abuse, noting that “[t]he conditions and duration of such removal shall be determined in accordance with the best interests of the child”.

1.3. United Nations

The 1989 UN Convention on the Rights of the Child (CRC) contains provisions for the protection of children from all forms of abuse and exploitation, including exploitation and abuse connected to trafficking in human beings, and the rehabilitation of victims (see in particular Article 19 and Articles 32–39). Interestingly, the CRC includes multiple references to legal guardians, presented together with, and parallel to, references to parents. For instance, Article 18 requires States Parties “render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities” and “ensure the development of institutions, facilities and services for the care of children”. Therefore, CRC provisions present the parental and guardianship roles and responsibilities as similar and alternative. This is notwithstanding the fact that although Article 20 of the CRC stipulates that states should care for and protect children temporarily or permanently deprived of their family environment, it does not expressly refer to the obligation of appointing a guardian and/or representative.

The CRC and the four core principles, which derive from its provisions, along with the General Comment No. 6 of Committee on the Rights of the Child, which provides

comprehensive guidance on unaccompanied children outside their country of origin, contribute to determining the requirements of guardianship systems. They provide an adequate framework to define the role of guardians for the protection of children.

The four core principles of the CRC are the best interests 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 for due given weight to be given to his or her views (Article 12) and the right of the child to life, survival and development (Article 6).

Committee on the Rights of the Child, General Comment No. 5.

Although the CRC refers to the role of the legal guardian, in conjunction with the role of the child’s parents, it does not regulate the actual content of the legal guardianship function. Guidance has, however, been developed by the treaty body entrusted with the supervision of the implementation of the convention, the Committee on the Rights of the Child. In its General Comment No. 6 (2005), the committee notes that “the appointment of a competent guardian as expeditiously as possible serves as a key procedural safeguard to ensure respect for the best interests of an unaccompanied or separated child” (para. 21).

The committee calls on states to secure the proper representation of an unaccompanied child’s best interests, by appointing a guardian as soon as the unaccompanied child is identified. It explicitly distinguishes the guardian from the legal representative who should be appointed in addition to the guardian in cases where the child is involved in asylum, administrative or other judicial proceedings.

For the committee, the guardian must “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” (para. 33). The main responsibility assigned to the guardian should be to safeguard children’s rights and to effectively represent the best interests of the child and ensure the child’s right to be heard and for due weight to be given to his or her views. For that, the guardian should be consulted and informed on all actions taken in relation to the child and should have the possibility to be present in all planning and decision-making processes, including immigration and appeal hearings, care arrangements and all efforts to identify and implement a durable solution. There must be an independent and accountable guardianship authority, and persons appointed as guardians must have the necessary expertise and receive on-going training.

The committee calls for regular monitoring and oversight of the guardian’s actions. It also requires that special protection be given to child victims of trafficking by establishing priority procedures.

The Optional Protocol to the CRC on the sale of children, child prostitution and child pornography, although not regulating guardianship specifically, requires additional protection of child victims of sexual exploitation and/or abuse, children in forced labour and children used for the purpose of transferring their organs for profit, as well as prosecution of such crimes.

The UN also adopted a Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against

Transnational Organized Crime. This protocol is the first comprehensive international instrument dealing with trafficking in human beings. It contains provisions on victims' protection and assistance, notably in Article 6, which stresses the need to take into account "the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children" (Article 6 (4)). Similarly to the aforementioned CRC protocol, this protocol makes no specific reference to the appointment of a legal guardian.

The UN Guidelines for the alternative care of children (2010) set out concrete guidance for policy and practice on the protection and well-being of children deprived of parental care or those who are at risk of being so. In paragraph 101, they state that "in situations where the child's parents are absent or are incapable of making day-to-day decisions in the best interests of the child, [...] a designated individual or competent entity should be vested with the legal right and responsibility to make such decisions in the place of parents, in full consultation with the child. States should ensure that a mechanism is in place to designate such individuals or entity." Besides stressing the importance of ensuring independence of the designated person and expert knowledge, the guidelines also contain a non-exhaustive list of tasks assigned to this person or entity. According to paragraph 103, these should include:

- ensuring that the rights of the child are protected and that, in particular, the child has appropriate care, accommodation, healthcare provision, developmental opportunities, psychosocial support, education and language support;
- ensuring that the child has access to legal and other representation where necessary, consulting with the child so that the child's views are taken into account by decision-making authorities, and advising and keeping the child informed of his/her rights;
- contributing to the identification of a stable solution in the child's best interests;
- providing a link between the child and various organisations that may provide services to the child;
- assisting the child in family tracing;
- ensuring that if repatriation or family reunification is carried out, it is done in the best interests of the child;
- helping the child to keep in touch with his/her family, when appropriate.

1.4. Legal instruments clarifying which Member State has guardianship responsibilities

Trafficking in human beings often entails cross-border movement of victims, either across EU Member States or from a third country. For children who are outside their country of habitual residence the question arises whether it is the host state or the state of habitual residence who has jurisdiction to take parental responsibility measures over the child, including the appointment of a guardian. There are two main legal instruments establishing such jurisdiction:

- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention). As all EU Member States are party to the convention, it applies between an EU Member State and a third-country that is also party to the convention; and
- Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (Brussels II Regulation) as amended by Regulation (EC) No. 2116/2004 of 2 December 2004. The Brussels II Regulation applies in all EU Member States with the sole exception of Denmark. The regulation applies when both countries are EU Member States.

Both instruments provide that as a rule jurisdiction lies with the country of habitual residence of the child, envisaging, however, exceptions which are important for certain categories of children, including child victims of trafficking. Article 5 of the 1996 Hague Convention – to which all EU Member States but Italy are party³⁰ – sets out the general rule according to which the authorities of the state of the child's habitual residence have jurisdiction to take measures directed to the protection of the child's person or property, thus including the appointment of a guardian. The same approach is taken in Article 8 of the Brussels II Regulation as regards matters of parental

30 Italy has signed the 1996 Hague Convention in 2003 but has not ratified it yet.



responsibility. The concept of “habitual residence” is not defined by the Brussels II Regulation but has to be determined by the judge in each case on the basis of factual elements. “Consideration by the judge on a case-by-case basis implies that whilst the adjective ‘habitual’ tends to indicate a certain duration, it should not be excluded that a child might acquire habitual residence in a Member State the very day of the arrival, depending on the factual elements of the concrete case.”³¹

The habitual residence rule does not apply to all categories of children: for refugee children and children whose habitual residence cannot be established, jurisdiction lies in the state in which the child is at present (Article 6 of the 1996 Hague Convention and Article 13 of the Brussels II Regulation).

In addition, even when a state does not have jurisdiction, it can take urgent and provisional measures under Articles 11 and 12 of the 1996 Hague Convention. Similarly,

Article 20 of the Brussels II Regulation enables a court to take provisional, including protective, measures in accordance with its national law in respect of a child on its territory, even if a court of another Member State has jurisdiction as to the substance of the application.³² The practical handbook on the operation of the 1996 Hague Convention suggests that a useful way for authorities to determine whether a particular situation is ‘urgent’ may be to consider whether the child is likely to suffer irreparable harm or to have his or her protection or interests compromised if a measure is not taken to protect him or her.³³ These provisions are of particular importance as they can be used to take swift protective measures for child victims of trafficking. The handbook on the implementation of the 1996 Hague Convention also notes that “if the authorities in the State of the child’s habitual residence are not in a position to take measures of protection relating to the child, a longer-term solution will have to be designed by the Contracting State on whose territory the child is present”³⁴

31 European Commission (2005), p. 12.

32 See also European Commission (2014b), p. 23.

33 Permanent Bureau of the Hague Conference on Private International Law (May 2011), Ch. 6.

34 *Ibid.*, p. 163.

2

Guardianship systems in EU Member States



Each EU Member State has a national child protection system, which provides protection for children deprived of parental care. The role of the system is to safeguard the child's best interests, to provide legal representation and, more generally, to promote the well-being of a child when parents are unable, unwilling or precluded from doing so. Parents are responsible for a child's upbringing and for representing the child, when necessary. If they are not available or are otherwise precluded from exercising this duty, public authorities must step in.

There are in principle two different scenarios in which a child may be deprived of his or her family environment:

- the child is lacking parents, i.e. is an orphan, is abandoned by the parents, is unaccompanied or separated from his/her parents and/or legal guardians in the country where the child is identified;
- his or her parents are precluded from exercising parental responsibilities as a result of abuse or neglect, for instance if they are involved in the exploitation of the child or in child trafficking. Any decision on separating a child from his/her parents must be taken by the competent authorities, respecting all procedural safeguards of Article 9 of the CRC and only when in the best interests of the child.

When a child is deprived of parental care, domestic law provides for the appointment of a guardian or a representative to exercise the tasks usually carried out by parents. However, the appointment procedures as well as the persons or institutions that are assigned with guardianship duties vary substantially among EU Member States. In addition, the mandate, responsibilities and tasks of appointed persons or institutions can also differ.

Guardianship is usually regulated by civil law and specifically by family law. Competent judicial authorities

are responsible for appointing guardians, although in some Member States this responsibility lies with administrative or local authorities. In Latvia, for instance, the Orphan's court – an entity within the municipality – appoints guardians. In some EU Member States, the law assigns guardianship to an institution or legal person, which or who then takes an internal decision to assign a specific person as an individual guardian to each child. This form of assignment is frequently used for unaccompanied children coming from third countries, when an institution is appointed as guardian or legal representative under asylum or migration law.

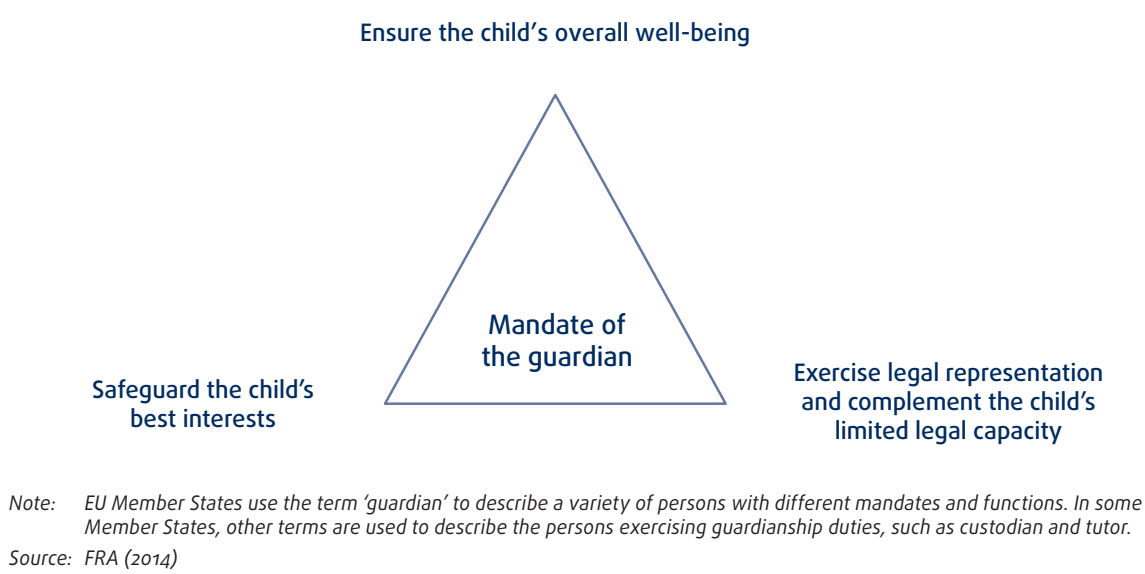
No EU Member State has a guardianship system only for child victims of trafficking. The appointment of a guardian for child victims of trafficking is subject to the same conditions as for other children, often depending on the particular migration and residence status of the child.

2.1. Lack of a uniform approach

In this report, the term 'guardian' is used to describe the person responsible for safeguarding the well-being and the best interests of the child, and to represent him or her in judicial or administrative proceedings, thus complementing the child's limited legal capacity when required. [Figure 1](#) illustrates the three main functions of a guardian.³⁵

35 FRA (2014).

Figure 1: Guardian’s tasks



The term guardian is used in this report to refer to persons who are named differently under national law, e.g. as ‘legal representatives’, when their role and mandate extends beyond pure legal representation to include tasks relating to the promotion of a child’s well-being and best interests. In contrast, the term ‘legal representatives’ or ‘representatives’ is used to refer to persons with the limited mandate of uniquely exercising a legal representative function, as that often engaged in the framework of asylum procedures.

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

In many Member States (such as the Czech Republic or Denmark for instance), provisions for appointing a guardian coexist with provisions for appointing **custodians**. In other Member States, they coexist with provisions for the appointment of **representatives**. While the appointment of a guardian or custodian is envisaged under general welfare law, stemming from the state’s responsibility to safeguard the child’s well-being and protect children deprived of parental care, the appointment of representatives or so-called **guardians ad litem** is envisaged to enable children to participate in administrative, criminal or other proceedings. This is the case in Ireland, for example.

The mandate and duration of the term of appointment also differs. The mandate can either be broad, covering all aspects related to guardianship, or be limited and determined upon appointment by the competent authority. In the latter case, the duties assigned and the duration of the appointment depend on the

There is no commonly agreed definition of a guardian.

While EU law recognises the importance of guardianship and legal representation to safeguard the child’s best interests and well-being, it does not define the notion of guardian, nor does it define his or her functions.

At national level, the use of the terms ‘guardian’, ‘representative’ and ‘legal representative’ is inconsistent, and national terminologies also vary. As such, the emphasis should be on the functions of the appointed person rather than on the title or terminology used.

The *Handbook on guardianship for children deprived of parental care* aims to foster a common understanding of the functions and the role of guardians. A guardian is considered to be an independent person who safeguards the child’s best interests and general well-being, and to this effect complements the limited legal capacity of the child, when necessary, in the same way that parents do.

FRA (2014), Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking, Luxembourg, Publications Office

particular situation of the child, often on his or her migration status, or on the particular legal procedures that the child is involved in. In France for example, in cases of foreign children the law provides for the appointment of an **ad hoc administrator** (*administrateur ad hoc*). The duration of the appointment but also the specific tasks assigned to him or her are decided upon appointment by the competent judicial authorities.

In the case of third-country national children holding only a temporary right or no right to stay in the



country, their migration status prevails over their status as children in need of protection in a number of Member States. For these children, a representative with a more limited mandate is frequently appointed. The representative is often affiliated with the migration authorities and lacks comprehensive child welfare skills and qualifications. This may undermine the protection of the child. In the case of these children, a guardian under the national child-welfare law provisions is often appointed only when the child obtains the right to reside in the country.

There are also cases in which the duties to ensure the child's well-being and to represent the child's interests are dissociated and performed by different persons or institutions. In these instances, care providers, such as foster families or accommodation institutions, are assigned responsibility for the well-being of the child and exercise custody rights, while the representation of the child is assigned to another person or institution, for example a guardian or an ad-hoc administrator. The following examples provide an illustration of the diversity of approaches.

In Denmark, the guardian (*værge*) is responsible for the child's finances,³⁶ while the custody holder (*forældremyndighedsindehaver*) is responsible for the child's well-being and for promoting the child's best interests, while also exercising responsibility for the child's finances. However, in cases of asylum-seeking children or children lacking residence permits, a personal representative (*personlig repræsentant*) is appointed under migration law.³⁷ Only after the award of residence status is a *custody holder* appointed, as envisaged under civil law.

In the Czech Republic, a custodian (*poručník*) is responsible for the well-being and best interests of the child, while the guardian (*opatrovník*) has a limited mandate to represent the child in certain proceedings. The same situation exists in Portugal, where the appointed guardian (*guardião*) represents the child in different legal proceedings while a so-called tutor (*tutor*) exercises other parental rights and duties of child care.

Some regions in Germany – mainly family courts in Hesse – used to appoint lawyers as complementary guardians (*Ergänzungspfleger*), according to Section 1909 of the German Civil Code (BGB) for specific tasks, e.g. in respect of the asylum and migration procedures. The *Ergänzungspfleger*, as foreseen in German law, is tasked with assisting the parents and/or legal guardians of the child to perform certain tasks because, for example, she/he

lacks specific legal knowledge needed in the child's situation. In this instance, a guardian represents the child in matters of housing or education and, at the same time, an *Ergänzungspfleger* represents the child in asylum procedures. This was common practice for cases of unaccompanied children in a few federal states (*Länder*), such as Hesse. However, on 29 May 2013 the Supreme Court decided (Decision XII ZB 530/11³⁸) that a guardian (*Erziehungsberechtigten*) is not eligible for being supported by a complementary guardian (*Ergänzungspfleger*). Following the Supreme Court decision, family courts in some *Länder* now appoint a co-guardian (*Mitvormund*, according to Section 1775 BGB).

In Slovakia, a custodian (*opatrovník*) is appointed to perform specific actions determined by the court, in the framework of preliminary measures taken for the child's safety, while a guardian (*poručník*) with a broader mandate, which can last until the child reaches adulthood, may be appointed at a later stage of the proceedings. In Ireland, the appointment of a guardian ad litem is envisaged to represent the child at various proceedings, such as civil proceedings related to care. The Child and Family Agency (which replaces the previously existing 'Health Service Executive') is responsible for the well-being of the child. The agency assigns a social worker to the child in care to look after care arrangements and all other aspects related to the child's well-being, such as education and health.³⁹

2.2. Institutions or individual persons acting as guardians

National law in all Member States sets a clear preference for appointing individual persons close to the child as guardians. Priority is given to assign guardianship duties to close relatives or persons coming from the broader family environment, thus acknowledging the importance of maintaining family links and the personal relationship between the future guardian and the child. National law sets forth certain criteria to be fulfilled and the suitability of each potential guardian is assessed by the competent authority on a case-by-case basis, taking into consideration the best interests of the child. When appointment of relatives is not possible, due, for example, to conflicts of interest, lack of consent of the potential guardian or of compliance with other requirements, guardianship is either assigned to an institution or entity designated

³⁶ Denmark, Act on Guardianship.

³⁷ Denmark, Aliens Act.

³⁸ Germany, Bundesgerichtshof (BGH), *Beschluss vom 29. Mai 2013 – Az. XII ZB 530/11*.

³⁹ For more information, see www.tusla.ie/.

by law or to a private person unrelated to the child who has undergone a vetting procedure. For unaccompanied children, appointing relatives is usually not an option, as in the majority of cases the child lacks a family environment in the host country.

This report deals with situations where no suitable person to act as guardian is found within the child's family environment. In such cases, either employees of the guardianship institution or entity designated by law or natural persons, following their appointment by a court or other competent authority, perform the guardianship duties. Institutions designated by law cannot refuse to take on guardianship duties for a particular child. The guardianship responsibility is often assigned to the person acting as director or legal representative of the respective institution. In contrast, if natural persons not representing an institution are appointed, these persons need to give their consent before they are assigned guardianship of an individual child. These persons often work for an NGO, either as employees or volunteers, and offer their availability to perform guardianship duties. Less frequently they are self-employed professional guardians (see also [Section 2.7](#))

In most EU Member States, guardianship duties can be assigned either to natural or to legal persons, although in some Member States – for example Poland – guardianship can only be exercised by natural persons. However, according to Polish law, where it is impossible to appoint a guardian because the parents of the child have not been formally deprived of parental responsibilities, the care institution may represent the child in some proceedings. This is very often the practice followed with unaccompanied children.

Institutional guardianship is frequently applied in cases of unaccompanied children and in cases of child victims of trafficking, exploited and identified outside their country of origin, since they usually do not have close relatives or other family members residing in the country. As an illustration, Spanish law establishes two possibilities:

- civil guardianship (Articles 222 to 228 of the Civil Code), where a suitable individual from the child's family environment is appointed as guardian; and
- administrative guardianship, when in the absence of a civil guardian, responsibility of guardianship is thus awarded by law to a competent public authority (Articles 172 to 174 of the Civil Code).

Greek law has similar provisions: if the court determines that there is no suitable natural person to undertake parental responsibilities, it may assign the guardianship of a child to a special foundation

or society, or else to the competent social services (Article 1600 of the Greek Civil Code).⁴⁰

Institutions entrusted with guardianship duties are required to assign each child to a particular individual. Therefore, guardianship duties are in practice exercised by employees or other persons affiliated to such institutions. In these cases, the individual assignment might take place internally, as for example in Austria, Ireland and the Netherlands, or following a court decision, as is the case in Poland. In almost one third of EU Member States (Bulgaria, Cyprus, Hungary, Italy, Latvia, Lithuania, Portugal and Romania), when an institution is appointed as a guardian, guardianship is specifically assigned to the director or legal representative of that institution. In practice, the related duties are performed on a daily basis by its employees, following instructions by the director.

Frequently, guardianship institutions are allowed to delegate particular duties and responsibilities to third parties. In Austria, for instance, when the Child and Youth Welfare Office (*Kinder- und Jugendwohlfahrtsträger*) is assigned guardianship duties, it may hand over particular tasks (such as care) to third parties.⁴¹ A third party can be the residential care facility or other private organisation, for example Caritas, which runs shelters for children. However, the ultimate full guardianship responsibility remains with the Child and Youth Welfare Office. Similarly, in Slovenia, Article 185 (3) of the Law on marriage and family relations provides that the Social Work Centre (*Center za socialno*), when assigned guardianship responsibility, may entrust other professionals to exercise some of the guardian's duties on its behalf and under its supervision.⁴² In Greece, too, the public prosecutor acting as provisional guardian may delegate certain tasks (such as school registration) to a third party, for instance a social worker affiliated with an NGO assisting the child or a reception facilities, when this is considered to be in the best interests of the child.

In Ireland, the Child and Family Agency takes into care all unaccompanied children and allocates a dedicated social worker to each of them. The Child and Family Agency holds parental responsibility, and assigns a specific social worker to a child to perform guardianship duties (Child Care Act as amended, Section 18). In practice, different sections of the Child Care Act 1991 are used to take unaccompanied minors into care. The decision on which section of the act to apply – which is taken

40 Such social service, although foreseen in law (Art. 49-52, Greek Law 2447/96), has not yet been established. Currently, the Public Prosecutors are acting as temporary guardians until the appointment of a guardian.

41 Information taken from an (unpublished) project report of *Asylkoordination Austria* for a DAPHNE III project.

42 Slovenia, The Law on marriage and family relations, Art. 178 (1) and (3); Art. 179; Art. 185 (1), (2) and (3); Art. 186; Art. 187; Art. 192; Art. 201; Art. 202.

Table 1: Institutions to which guardianship is assigned by law, when no natural person is appointed, EU-28

EU Member State	Name of institution	EU Member State	Name of institution
AT	Child and Youth Welfare Office (<i>Kinder- und Jugendwohlfahrtsträger</i>)	IE	Child and Family Agency
BE	Guardianship Authority (<i>Service des tutelles</i>)	IT	Local Social Services through the mayor (and residential care facility in case of emergency)
BG	Social Assistance Department (<i>Агенцията за социално подпомагане</i>) or the director of the residential care facility	LT	Municipal Child Rights Protection Unit (establishes temporary guardianship)
CY	Social Welfare Service (<i>Υπηρεσιών Κοινωνικής Ευημερίας</i>) through its director	LU	Public institutions including residential care centres through their directors
CZ	Authority for Social and Legal Protection of Children (<i>Orgán sociálně-právní ochrany dětí</i>)	LV	Municipal Child Rights Protection Unit (Orphan's court, <i>Bāriņtiesu</i>) The head of childcare institution The head of the Prevention Centre for Minors under the State Police
DE	Youth Welfare Office (<i>Landesjugendamt</i>)	MT	The residential care facility where the child resides
DK	State Administration (<i>Statsforvaltningen</i>)	NL	Nidos Youth Care Agency (<i>Bureau Jeugdzorg</i>) for national children
EE	Municipal child protection Authority	PL	The residential care facility where the child resides
EL	First Instance Public Prosecutor Child protection service (not yet created)	PT	Care Agency The residential care facility where the child resides
ES	Youth Welfare Authority of the respective region "Autonomous Community"	RO	Director of residential care institution facilities General Direction for Social Assistance and Child Protection (GDSACP) (<i>Directia generala de asistenta sociala si protectia copilului</i>) through its director
FI	Social Welfare Service of the Municipal Authority The director of the reception facility	SE	Social Welfare Service at municipal level (<i>Socialnämnden</i>)
FR	Child protection service (<i>Aide sociale à l'enfance, Conseil Général</i>) of the local authority (<i>Département</i>)	SI	Social Work Centres (<i>Centri za socialno delo</i>)
HR	Social Welfare Centre	SK	Office of Labour Social Affairs and Family (<i>Úradov Práce, Sociálnych Vecí A Rodiny</i>)
HU	District Guardianship Offices (<i>járásí gyámhivatalok</i>) under the coordination of Social Welfare- and Guardianship-Authority (<i>Szociális és Gyámhivatal</i>)	UK	No guardianship system in England, Wales and Northern Ireland. Local authorities take children into care but do not exercise legal representation. In Scotland, Scottish guardianship service is set up, in non-statutory basis, for unaccompanied children.

Notes: Four EU Member States, listed in Table 3 of this report, have developed a different guardianship system for unaccompanied children.

The relevant national legislation is listed in the Annex.

Source: FRA, 2013

at local level – has a key impact on a child’s guardianship, since only Section 18 of the Child Care Act assigns parental responsibilities to the Child and Family Agency.⁴³ A guardian ad litem is normally appointed where an unaccompanied child is a party to care proceedings under the Child Care Act 1991 (as amended), following the request of the social worker. Guardians ad litem do, however, not have a role outside care proceedings. The Group of Experts on Action against Trafficking in Human Beings (GRETA) has urged the Irish authorities to enact broader statutory rights to assistance and protection, particularly regarding possible victims of trafficking.⁴⁴

Considering the complexity of the system in the United Kingdom, this report explains the situation in this country in more detail. On the whole, there is no fully-fledged guardianship system for unaccompanied children in the United Kingdom. However, there are differences across the devolved administrations. Unaccompanied children in England and Wales are provided with accommodation and support as ‘looked after children’ by local authorities, in accordance with the Children Act 1989. In most cases, however, social workers – although responsible for the care of the child – do not exercise legal representation duties. This applies to cases in which the child is accommodated under Section 20 of the Children Act 1989. Local authorities will only be granted parental responsibility – the power to give consent on behalf of the child when necessary due to his/her limited legal capacity – in cases where a care order has been granted by the family courts under Section 31 of Children Act 1989. Moreover, no care order may be granted with respect to children above the age of 16 years old in England and Wales and Northern Ireland and 15 years old in Scotland.

Unaccompanied children are usually accommodated and looked after by local authorities under Section 20 of the Children Act rather than Section 31. Therefore, social workers assigned to children do not acquire legal responsibility to represent the child in any proceedings the child might be involved in, and do not represent the child in court proceedings even if the child only has limited legal capacity.⁴⁵

GRETA, as well as national organisations such as ECPAT UK⁴⁶ and the Refugee Children’s Consortium,⁴⁷ have highlighted this protection gap on guardianship provisions in the United Kingdom.

GRETA, in response to the British government’s position that the existing measures of having a state-allocated social worker and advocate are adequate, points out

that “a social worker or a voluntary advocate fall short of providing a legal guardian who can act independently with authority and uphold the child’s best interests. A system of guardianship is essential to ensure the children’s protection and rehabilitation, assist in severing links with traffickers and minimise the risk of children going missing.”⁴⁸

In Scotland, provisions for unaccompanied children similar to England and Wales exist. Section 25 of the Children (Scotland) Act 1995 establishes a “guardianship” system whereby a “guardian” is assigned to unaccompanied children, complementing the tasks of social workers from local authorities. The Scottish Guardianship Service, however, was established on a non-statutory footing. Such “guardians” therefore only act as independent advocates and assist children throughout the asylum process, without exercising parental responsibilities, legal representation of children, or having any statutory powers.⁴⁹

In Northern Ireland, the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) (Northern Ireland) Act 2015 introduces independent guardians for child victims and potential victims of human trafficking as well as for unaccompanied children, but regulations have yet to be adopted to implement this provision. The guardianship system envisaged in the act provides for the appointment of independent guardians with legal responsibility for the child and with the power to represent the child when necessary, including the power to instruct lawyers on behalf of the child. Appointed guardians have an independent coordinating role and other professionals must give due regard to their views.⁵⁰ Steps are being taken to draft the regulations needed to implement this provision.

In 2014, the UK government announced that it was testing the use of independent child trafficking advocates for children who may have been victims of trafficking. This was implemented in a number of local authority areas in England, and ends in the autumn of 2015. The forthcoming Human Slavery Act 2015 includes an enabling clause that will give these independent child trafficking advocates similar powers to the independent guardians in Northern Ireland. Nevertheless, they will only be appointed to child victims of trafficking and not to all unaccompanied children.

43 The economic and social research institute (ESRI) (2014).

44 Council of Europe, GRETA (2013), p. 48.

45 CONNECT (2014).

46 ECPAT United Kingdom (2014).

47 Refugee Children’s Consortium (2014).

48 Council of Europe, Group of Experts on Action against Trafficking in Human Beings (GRETA) (2012), p. 58.

49 United Kingdom, Parliament, Human Rights Joint Committee (2013).

50 Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.



2.3. Central or local guardianship authority

The institution in charge of implementing guardianship responsibilities can be a central institution responsible for the whole country or a regional or local institution, as illustrated in [Table 2](#). Most EU Member States entrust guardianship functions to municipal or local-level social services, and less than one in four has a central guardianship authority at national level. When guardianship is implemented at a regional or local level, different approaches may be applied in different parts of the country, as occurs in Austria and Germany, for instance.

In some Member States, responsibilities are shared between regional and local level. In Poland for instance, the social services at local and regional level identify relevant cases, organise foster care and signal the need to appoint a representative or a guardian under Polish family law. For foreign nationals, the Law of 13 June 2003 on Granting Protection to Foreigners in Poland states

that a guardian can be appointed upon the request of the President of the Office (a national level institution). The only body with the competence to issue decisions on guardianship is the family court, operating at local level. In Belgium, the Guardianship Service under the Ministry of Justice is the responsible guardianship authority for third-country and EEA unaccompanied children, whereas guardianship for national children deprived of parental care is regulated at local level. This is also the case in Finland, where the Migration Service is responsible for unaccompanied asylum-seeking children, while local child protection services are responsible for national children (see also [Section 2.6](#)).

2.4. Independence of guardianship and legal representation systems

A key element of a guardianship system is independence. It is a pre-condition for appointed guardians to be able to make impartial decisions that safeguard the

Table 2: Institution in charge of guardianship, level of government, EU-28

EU Member State	National	Regional	Local	EU Member State	National	Regional	Local
AT			✓	IE	✓		
BE	(✓)		✓	IT			✓
BG			✓	LT			✓
CY	✓			LU	✓		
CZ			✓	LV			✓
DE			✓	MT	✓		
DK		(✓)	✓	NL	✓		
EE			✓	PL	(✓)	✓	✓
EL		✓		PT	✓		
ES		✓	✓	RO			✓
FI	(✓)		✓	SE			✓
FR			✓	SI			✓
HR			✓	SK			✓
HU			✓	UK		(✓)	✓

Notes: (✓) Concerns only unaccompanied children. In the United Kingdom, it covers the situation in Scotland (Scottish guardianship service).

In the United Kingdom there is no uniform approach within the four nations; guardianship when in place is exercised by local authority's social workers. For more information on existing arrangement in the United Kingdom, see [Section 2.3](#) of the report.

The relevant national legislation is listed in the [Annex](#).

Source: FRA, 2013

best interests of the child. The absence of any conflict of interest between the potential guardian and the child is a key criterion for selecting individual persons or institutions as guardians.

The way in which independence is understood, however, varies among Member States. This is particularly the case as regards the appointment as guardians of persons responsible for providing material care to the child, namely staff responsible for or working in reception centres or other accommodation facilities where the children reside.

Guardians who are at the same time working for a reception facility may find themselves in a situation of conflict of interest between the management of the reception centre and the protection of the children. The best interests of the child may not correspond to those of the care facility. Employees are expected to perform their tasks in the interest of their employer (the care facility) and act under the instructions of its director. At the same time, in their capacity as guardians they have to hold the care facility, its director and staff, accountable for the care and protection offered to the child. Such considerations need to be seen in light of the fact that violence against children very often takes place in the care institutions where they reside. Still, in several Member States guardianship duties are assigned to the director of the care facility and performed by staff or volunteers affiliated to the facility, as illustrated in [Figure 2](#).

Most Member States in central Europe allow guardianship to be assigned to residential care facilities and alternative care institutions where children are placed. In Latvia for example, if a guardian is not appointed, the Law on Requirements for Social Service Providers assigns the duties of guardian to the head of the child-care institution. The Asylum Law provides that asylum-seeking children who are not represented either by the Orphan's court or by an appointed guardian will be represented by the head of a childcare institution.

It is, however, questionable whether the refugee reception centres for unaccompanied children qualify as child protection institutions. In Latvia, refugee reception centres are not considered to be child protection institutions and do not have the competence under national law to fulfil the guardian's responsibilities.⁵¹ A similar situation exists in Bulgaria, where, according to Article 173 of the Family Code, the director of the child care institution where the child is accommodated acts as a guardian *ex lege* (without the need for explicit appointment). However, reception centres for asylum seekers managed by the State Agency for Refugees where unaccompanied children are usually placed are not considered as child-care institutions and do not

have the competence under the Family Code to fulfil guardianship duties. Moreover, the State Agency for Refugees considers that it would create a conflict of interest for their staff to act as guardians as they are also the determining authorities in the asylum procedure⁵² (see below).

In western and northern Europe it is usually not possible to assign guardianship to the accommodation facility, except on a temporary basis. Sometimes, it is explicitly forbidden by the law: Article 175 of the Estonian Family Law Act, for example, stipulates that the (employees of) healthcare, social welfare or educational institution where the child is staying must not be appointed as guardians. In two Member States – Italy and Finland – care facilities can be assigned guardianship functions as a temporary, bridging measure, until the procedure for appointing a guardian is completed. In Italy, legal persons and institutions responsible for providing material care to the child (as is the case with residential facilities) should not be designated as guardians,⁵³ or only exceptionally and on a temporary basis, until a guardian is appointed. The legal representatives must, within 30 days of receiving the child, request that a guardian be assigned to the child. In Finland, although reception centres, like in Italy, can only exercise guardianship duties exceptionally, they play a vital role in the guardianship system for unaccompanied children, as they are responsible for the recruitment, supervision and appointment of representatives. The Finnish Ombudsman for minorities has noted that the independence of the representative of the child is to a certain extent compromised by the fact that he/she is proposed by the reception centre, which provides material care to the child. If the representative's understanding of the child's best interests as regards reception differs from that of the staff of the reception centre, the situation may at worst lead to a conflict between the two.⁵⁴

Conflict of interests may potentially also arise when the state child protection authority is assigned the guardianship of the children, for example in cases where the age of the child is disputed. In Ireland, for example, guardianship tasks for children taken into care are performed by social workers employed by the national child protection authority (Child and Family Agency), which is also responsible for providing care services for the child, and the social workers may lodge a claim disputing the age of the child. In principle, the appointment of a guardian *ad litem* in care proceedings and/or of an attorney for certain procedures mitigates situations of conflict of interest, thus contributing to the safeguard of the child's best interests. However, guardians *ad litem*

51 Latvia, Cabinet Regulation No. 291, Art. 10; Asylum Law, Section 6; Cabinet Regulation No 707, Art 16.

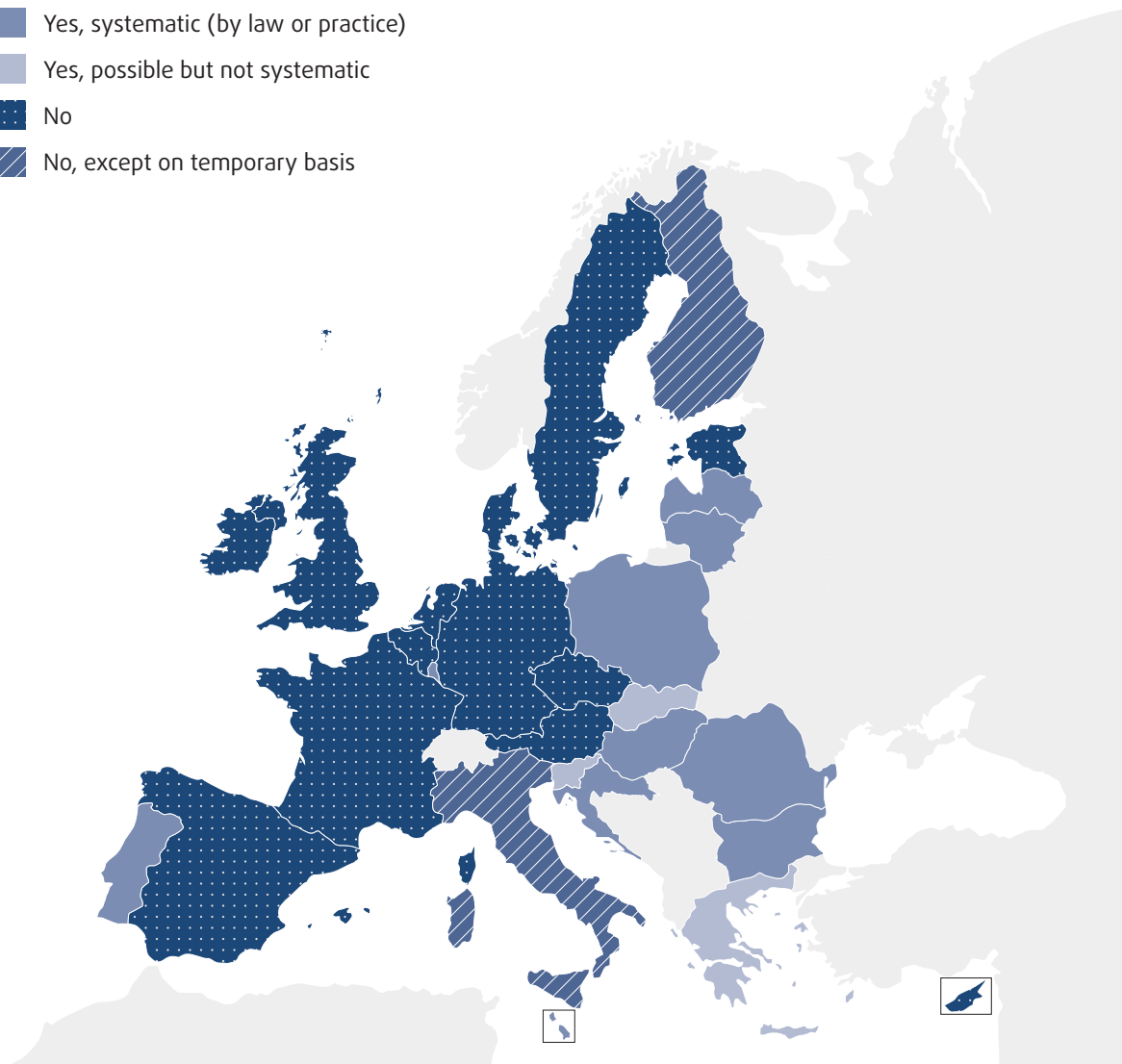
52 For more information on legal representation of unaccompanied children and legal aid, see also ECRE (2014), p. 29.

53 Italy, Law 184/1983, Art. 2.

54 Finland, Parsons, A., The Ombudsman for Minorities (2010), p. 47.

Figure 2: Guardianship assigned to the accommodation facility hosting the child, EU-28

- Yes, systematic (by law or practice)
- Yes, possible but not systematic
- No
- No, except on temporary basis



Notes: In the United Kingdom, there is no uniform approach within the four nations; guardianship when in place is exercised by local authority's social workers. For more information on existing arrangements in the United Kingdom, see [Section 2.3](#).

The relevant national legislation is listed in the [Annex](#).

Source: FRA, 2013

are not routinely appointed in all cases of unaccompanied children in the care of the national child protection authority. Moreover, guardians ad litem act as representatives of the child within specific proceedings and do not have any role outside these proceedings.

The same situation is identified in other Member States whenever local authorities are assigned parental responsibilities and social workers for local services are assigned with guardianship tasks, since they often have other duties which may conflict with the child's rights and best interests.

Independence of guardians from migration and asylum authorities is also vital for unaccompanied children

who are subject to migration law or seek international protection. Nevertheless, in some EU Member States migration authorities play a role in the appointment of guardians or representatives of third-country national children. In Finland, for example, the Finnish Immigration Service is responsible for the guardianship of unaccompanied children. Such responsibility includes recruitment, selection, training and supervision of representatives, which is done by the social workers in reception facilities run by the Finnish Immigration Service. Representatives are private persons who are paid for their work by the hour by the Finnish Immigration

Service.⁵⁵ Similarly in Estonia, Article 6.1 (4) of the Act on Granting International Protection to Aliens allows the Police and the Border Guard Board to sign contracts with a legal or natural person, to provide representation services to unaccompanied children and to represent their best interests in various procedures.

Contrastingly in Denmark, the law requires guardians to be independent from migration and asylum authorities.⁵⁶ This is also the case in the Netherlands, where Nidos, a separate institution operating under the same legal provisions as the youth welfare office, is responsible for guardianship of non-national children.

2.5. Employment status of guardians

As noted in Section 2.2, guardianship duties are either performed by employees of the institution or an entity designated by law, or by natural persons appointed by competent national authorities as guardians for a particular child. In general terms, it is possible to distinguish three categories of persons exercising guardianship responsibilities:

- a relative and/or another person affiliated with the child;
- professionals employed by guardianship institutions or other responsible authority;
- ‘volunteer guardians’ who are not related to the child and are recruited by the guardianship authority or other competent authority as guardians – such persons have volunteered to exercise guardianship duties and are often entitled to have their expenses remunerated, as well as usually receiving a compensation fee.

The information provided in this section concerns the natural persons that fall under the last two categories. Very often more than one type of guardian exists in one country. This is the case in Belgium and in Germany, where the different types of guardians coexist.

A first group of guardians has a working relationship with the institution or entity assigned guardianship duties by law or by agreement with the responsible authorities (as is often the case for NGOs). They can either be employed by these organisations or be recruited among self-employed professional guardians available on the market. In both cases, they are remunerated for their work as guardians. They are either employed full-time as guardians, as it is the case for many self-employed guardians in Belgium, for example,

or carry out guardianship assignments along with other child protection duties. This often occurs for the employees of guardianship institutions who in addition to being guardians also carry out social or legal work for the entity which employs them.

A second group of guardians is neither employed by an institution, entrusted with guardianship tasks, nor self-employed professionals. In this report, this group is referred to as ‘volunteer guardians’. Some of them are associated with an NGO. Although they do not receive a salary for their guardianship work, they may be compensated for the expenses they incur. In Latvia, for example, they receive a special benefit for the fulfilment of guardian’s duties.

Leaving the appointment of guardians related or otherwise associated with the child aside, Figure 3 illustrates that in half of the EU Member States, guardians are employees of the organisation designated by law to carry out guardianship duties. In Ireland, for instance, the guardianship of children taken into care is assigned to the Child and Family Agency and is strictly performed by the social workers it employs; in the Netherlands, guardianship is assigned to either Nidos or the Youth Welfare Service (depending on the child’s status) and is exercised by their staff. In these Member States, volunteers are in principle involved in the daily care of the child but not assigned guardianship duties.

In three Member States (Denmark, Italy and Sweden), guardians are primarily private persons who offer their availability and willingness to perform guardianship duties – and who are thus, in other words, volunteer guardians. In those systems, institutional guardianship is used a last resort, when nobody is identified to provide guardianship services. In Denmark, for example, the Aliens Act provides that the Red Cross can employ staff as representatives,⁵⁷ if there are no private persons available.⁵⁸ These three Member States have developed a particular system for the recruitment, placement and supervision of guardians. The recruitment of volunteers is undertaken by the responsible guardianship authority, namely the municipal authorities in Italy and Sweden, and the Red Cross as designated NGO in Denmark.

In the remaining Member States, the different categories of guardians coexist. In Germany, for example, guardians can be either employees of the guardianship institution, an association of guardians, the youth

55 Finland, Decree on Fees and Compensations for the Representatives of Unaccompanied Children.

56 Denmark, Bill No. L 37 of 28 October 2010, Section 2.2.2.

57 The representatives are nominated by an organisation (currently the Red Cross in Denmark), which has been appointed by the Ministry of Justice (*Justitsministeriet*), Section 56a (1) of the Aliens Act.

58 Denmark, Aliens Act, Section 56a (1) and Act No. 1543 of 21 December 2010.

welfare office, professional guardians, or private persons who, as volunteers (§§ 1791a Section 1 S.2; 1791b Abs.1 Section 1 BGB,) offer their availability and willingness to perform guardianship duties. However, although the law stipulates that volunteers must be preferred, in practice – due to the lack of volunteers – professional guardians (mainly civil servants of the Youth Welfare Office) are mostly nominated.

The lack of an adequate number of volunteers in many Member States leads to the appointment of professionals, employees of the guardianship institution or other competent authority. In Estonia the Family Law

Act allows volunteers to act as guardians, and there is also the possibility for professional guardianship organisations to act. In practice, however, due to the limited number of unaccompanied children arriving to Estonia, no particular system for volunteers or professional guardianship organisations has been developed so far.

Volunteer guardians are usually entitled to some form of compensation for their time and the expenses incurred while performing their duties. However, the amount received varies considerably and does not allow guardians to make a living out of it. In Germany, a guardian

Figure 3: Employment status of guardians, EU-28



Notes: In the United Kingdom, there is no uniform approach within the four nations; guardianship when in place is exercised by local authority's social workers. For more information on existing arrangement in the United Kingdom, see Section 2.3.

The relevant national legislation is listed in the Annex.

Source: FRA, 2013

may receive a lump sum, which as of March 2014 corresponded to €399 per year and per child.⁵⁹ Such reimbursement is to be paid annually and for the first time one year after a person's appointment as guardian.

2.6. Guardianship systems for unaccompanied children

In principle, constitutional or other domestic law provisions of all Member States recognise that all children in the territory of the state should benefit from equal protection, irrespective of the child's nationality or status. In practice, in many occasions the child's migration and residence status determines the type of protection granted and, more specifically, the specific guardianship and representation arrangements. Third-country nationals lacking lawful residence are often supported only by a 'representative' who does not have the full mandate of a guardian.

As illustrated in Table 3, only four Member States (Belgium, Denmark, Finland, and the Netherlands) have set up a separate guardianship system for unaccompanied children who only have a temporary right to stay in the Member State or have no right to stay at all. This usually includes children who are undocumented or seek asylum. Such a separate system, which in three of these Member States also covers unaccompanied children who are EU or EEA nationals, is different from the system in place for national children.

In these four Member States, guardians or legal representatives for unaccompanied children are nominated and administered by a different authority from the one that handles guardianship matters for national or resident children. This authority can be a child protection entity established to cater for the specific needs of foreign children with unclear residence prospects, as is the case with the Guardianship Service in Belgium, and the Nidos Foundation in the Netherlands. In Finland, it is the immigration authority, namely the Finnish Immigration Service, which is responsible for the reception of asylum seekers, including the guardianship of unaccompanied children. In Denmark, the appointing authority remains the same for all children (Regional State Administration), with the Red Cross (volunteers and personnel) exercising guardianship duties for unaccompanied children. According to the Danish migration law, a so-called 'personal representative' (*personlig repræsentant*) will be appointed for unaccompanied children based on a 'recommendation' from the Danish Red Cross, who also runs the reception facilities for them. Prior to the appointment, an 'observer' (*bisidder*), who is a professional employed by the Red Cross, acts as the representative of the child.

Although only four Member States have developed a separate system for unaccompanied children, in practice differentiated arrangements exist in more Member States. In Luxembourg, for example, in practice guardianship of unaccompanied children is assigned to the Red Cross and Caritas, who run the reception facilities for these children. In Lithuania, institutional

Table 3: EU Member States with different guardianship systems for unaccompanied children, entities responsible for guardianship and/or legal representation, four EU Member States

EU Member State	Resident children	Unaccompanied third-country national children	Unaccompanied EU/EEA-national children
BE	Youth Care Agency	Guardianship Service (<i>Service des tutelles</i>)	Guardianship Service (<i>Service des tutelles</i>)
DK	Regional State Administration (<i>Statsforvaltningen</i>) Municipality	Danish Red Cross Regional State Administration (<i>Statsforvaltningen</i>)	Regional State Administration (<i>Statsforvaltningen</i>) Municipality
FI	Social Welfare Service in the Municipality	Finnish Immigration Service (<i>Migrationsverket</i>)	Finnish Immigration Service and the Centres for Economic Development, Transport and the Environment (ELY Centres)
NL	Youth Care Agency (<i>Bureau Jeugdzorg</i>)	Nidos Foundation	Nidos Foundation (in practice)

Note: The relevant national legislation is listed in the Annex.
Source: FRA, 2013

⁵⁹ Germany, Section 1835a BGB iVm § 22 *Justizvergütungs- und entschädigungsgesetz*, JVEG.

guardianship is assigned to the State institution for the protection of the child's rights and other institutions referred to in the Civil Code. While Municipal Child Rights Protection Units establish temporary guardianship for children deprived of parental care, in the case of unaccompanied children seeking asylum, guardianship is assigned to the Refugee Reception Centre, where unaccompanied children are placed.

There are a few Member States where the same authority is in charge of all guardianship arrangements, yet foreign non-resident unaccompanied children are dealt with through a special procedure. This is the case in Hungary, for example, where the Budapest 5th District Guardianship Office (*Járási gyámhivatalok*) of the Central Government Office⁶⁰ is the responsible guardianship authority for all cases of foreign children, including those who are unaccompanied, seeking asylum or not, as well as those identified as victims of trafficking. Guardianship offices operating at local level, otherwise responsible, have no jurisdiction over this particular category of children. Similarly, in Italy, a different registry of accredited persons to be assigned as guardians for unaccompanied children is kept by the local authorities responsible for guardianship matters, although the situation varies among regions.

To address the specific needs of unaccompanied children in Ireland, a specialised team of social workers – the Child and Family Agency Social Work Team for Separated Children Seeking Asylum (SWTSCSA) – has been established in Dublin. The team receives referrals mostly from two national services, the Garda National Immigration Bureau (GNIB) and the Office of the Refugee Applications Commissioner (ORAC). Referrals may also be accepted from other social work teams in Ireland that do not have the necessary resources or experience to care for the separated child in question.

In the United Kingdom, the Scottish Guardianship Service (set up on a non-statutory basis) works with children and young people who arrive in Scotland unaccompanied and separated from their families. It supports and works with young people under 18 years of age who are seeking asylum or have been trafficked from outside the EU. It also works with anyone who is being treated as a child under 18 but whose age is disputed and is undergoing an age assessment. Children and young people are allocated a 'guardian' to help them understand, participate in and navigate the complex immigration, legal and welfare processes. They also act as a link between all services and professionals involved in their life, to help them to understand the

role and responsibilities of these professionals and to advocate on their behalf and ensure that their voices are heard within the various systems. The Scottish Guardianship Service is delivered in partnership with Aberlour Childcare Trust and the Scottish Refugee Council. Referrals to the service can be made from any local authority or agency in Scotland.⁶¹ Nevertheless, appointed 'guardians' do not have the power to represent children when necessary due to their limited legal capacity, as previously discussed.

2.6.1. Supremacy of migration and asylum law over child protection law

Another difference between national or resident children and unaccompanied children whose right to stay still needs to be clarified concerns the mandate of the person appointed to represent the child and to promote his or her best interests. Many EU Member States do not assign guardians to undocumented or asylum-seeking children, but only a legal representative to assist the child in the administrative or judicial procedures the child is involved in.

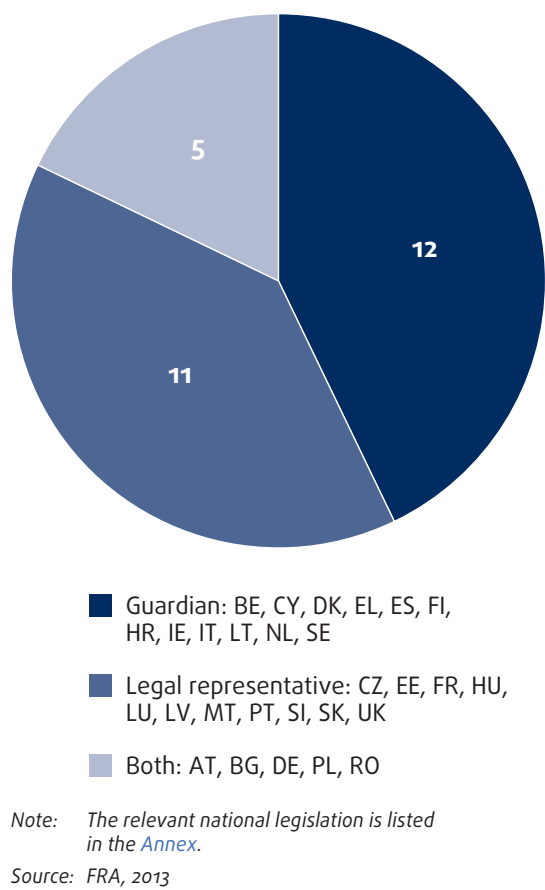
National child welfare law provisions relating to the appointment of guardians for children deprived of parental care, as a rule, do not exclude unaccompanied children. However, in many Member States there are special provisions within national migration and asylum law, addressing in particular unaccompanied children seeking asylum or those who are undocumented and who do not have a residence status in the country. In practice this results in the supremacy of migration and asylum law over children protection law, as is further discussed below.

In many Member States, migration and asylum laws provide for the appointment of a 'legal representative' to unaccompanied children, with a guardian only appointed to those children granted international protection. FRA analysis shows that in 12 EU Member States, migration and/or asylum law provides for the appointment of a guardian to unaccompanied children, in accordance with the provisions concerning children deprived of parental care under national child protection law. In the other 10 Member States, there are provisions for the appointment of a legal representative only, whilst in four Member States both types of provisions coexist. FRA analysis shows that when provisions for legal representatives are in place, they prevail over other provisions which envisage the appointment of a guardian.

60 Hungary, Government Decree No. 331 of 2006 (XII.23.).

61 For more information, see also www.scottishrefugeecouncil.org.uk/guardianship.

Figure 4: Provisions on guardians and legal representatives for unaccompanied children in national migration and asylum law, EU-28



In some Member States, despite the existence of a legal framework envisaging the appointment of guardian, in practice a guardian is rarely or never appointed. In France, for instance, an ‘ad hoc administrator’ (*administrateur ad hoc*) is appointed to support foreign children who are unaccompanied (*mineurs étrangers isolés*), who are either in ‘waiting zones’ (and considered by France as not having entered its state territory yet) or seeking asylum (once it is considered they have entered French territory). Unaccompanied children are also entitled to a guardian (*tutelle pour mineurs*) under civil law. The guardian has to be appointed by the judge upon request by the legal representative, the public prosecutor, the minor him/herself, or by the judge him/herself (Civil Code, Article 389-3). Guardianship may be ensured by the child protection service of the local authority (*Aide sociale à l’enfance, Conseil Général*) when there is no other adequate solution (*tutelle vacante* – Article 411 of the Civil Code). In practice, a guardian is often not appointed. In Greece as well, in practice, in the majority of the cases no guardian is appointed, mainly due to the lack of support services and persons to whom to assign such task.

In Bulgaria, the Refugees Act provides that unaccompanied minors should be appointed a legal guardian in accordance with the general procedure prescribed in the Family Code or the Child Protection Act. In some exceptional situations, asylum-seeking children are represented in asylum proceedings by the Directorate of Social Support at the Social Assistance Agency in the Bulgarian Ministry of Labour and Social Policy. In general, however, no guardian is appointed, and asylum-seeking children are assisted by a social worker who acts as an advisor but is not able to legally represent the child. Article 167 (1) of the Croatian Family Act states that unaccompanied children must be appointed a “special guardian” (*posebnog skrbnika*) by the Centre for Social Welfare. This centre appoints a guardian by its own decision and also determines the guardian’s rights and duties. Consequently, there is no guarantee that the appointed persons will be assigned full-fledged guardianship duties.

In other Member States, the appointment of a guardian depends on the length of time the child has stayed in the country. Omissions or delays in appointing a guardian are linked to the need to establish habitual residence for the child. In Austria, for example, the duty to appoint a guardian under civil law applies in all cases where the child has her/his habitual residence (*gewöhnlichen Aufenthalt*) in the country, which requires that he/she has stayed in Austria for longer than six months (Supreme Court, 12 ObS 2207/96y⁶²). However, the appointment of a guardian could be requested as an urgent measure if the best interests of the child are endangered, as would be the case in a situation of child trafficking.⁶³ Similarly, under Polish law a guardian may be appointed only when parents are dead, unknown or deprived of parental responsibility. If these conditions are not met but the parents are still unable to represent their child, a legal representative should be appointed. A temporary guardianship arrangement is a possible solution for this and similar cases. In Denmark, for instance, when it is not legally documented that a child’s parents are dead or deprived of parental care, a temporary guardian is appointed in accordance with Section 28 of the Act on Parental Responsibility; such provision can also be used if it is suspected that the child is a victim of trafficking (see also Section 4.3 on temporary guardianship).

Another important element that may prevent the appointment of a guardian or legal representative for unaccompanied children is the legal capacity of the child under national law. When unaccompanied

62 Austria, Supreme Court (*Oberster Gerichtshof, OGH*) (1996), 12 ObS 2207/96y.

63 Austria, *Gesetz vom 1. August 1895, über die Ausübung der Gerichtsbarkeit und die Zuständigkeit der ordentlichen Gerichte in bürgerlichen Rechtssachen (Jurisdiktionsnorm, JN)*, para. 110.

children have the legal capacity to act under national law in administrative proceedings and in particular in migration and asylum procedures, the appointment of a guardian and/or legal representative might be delayed or not take place at all. In Germany, children aged 16 are considered capable to submit an asylum claim without a legal representative. In Austria, persons above 16 years old⁶⁴ are deemed legally capable for certain procedures, including those under the migration and asylum law on return and detention. In Greece, children over 14 years of age are able to submit an asylum application without a legal representative, if they are deemed capable based on their maturity and evolving capacities. Nevertheless, despite the legal capacity of the child to act in certain proceedings, Member States should appoint a guardian, irrespective of the submission of the asylum application.

In practice, therefore, provisions on the legal capacity of the child often impact the timely appointment of guardian and or legal representative, particularly for older children aged 16 or above.

The creation of separate guardianship arrangements for unaccompanied children does not necessarily reflect efforts to develop a system that will accommodate and address their specific needs and vulnerabilities. Often, differentiations are the result of a challenging reality that requires dealing with a considerable number of unaccompanied children present in the country and relieving pressure from overwhelmed child protection and guardianship systems.

The effectiveness of the guardianship systems and the quality of services are not solely dependent on or determined by whether two separate guardianship authorities exist, although it is important for a system to be inclusive and to address the situation of all children residing in the territory of the Member States. The assessment of effectiveness should be conducted for each individual system, examining essential elements such as the qualifications required from the appointed persons, the training they receive, as well as the effectiveness of the monitoring and accountability measures in place.

2.6.2. Unaccompanied children who are EU citizens or citizens of the European Economic Area

There is a high degree of ambiguity in both law and practice concerning the treatment of EU and EEA unaccompanied children found in the territory of another EU Member State. In those Member States where

64 Following an amendment of the national law in 2014, all unaccompanied children now have to be represented in asylum and migration procedures

two separate entities are given guardianship responsibilities, depending on the migration and residence status of the child, it is not always clear who deals with unaccompanied children originating from another EU Member State or another EEA country. As shown in Table 3, different solutions have been found, sometimes giving this task to the entity dealing with nationals (Denmark), sometimes to the entity responsible for third-country nationals (Belgium and the Netherlands).

The example of Belgium illustrates the risk that EEA national children may not be covered by guardianship arrangements. A circular letter issued by the Ministers of Justice and Interior established an alternative guardianship system for vulnerable unaccompanied children from EEA countries, such as those EEA nationals identified as victims of human trafficking.⁶⁵ On 18 July 2013, the Belgian Constitutional Court considered the absence of guardianship for unaccompanied EEA minors to be discriminatory and in violation of Articles 10 and 11 of the Belgian Constitution, which enshrine the principles of equality and non-discrimination.

In Germany, to appoint a guardian for a child whose parents are still alive and within reach, as is often the case for EEA nationals, it is necessary to judicially declare suspension of the parents' custody (Sections 1666 and 1674 BGB). While this normally does not seem to create problems for children originating from third countries,⁶⁶ it can be problematic for children whose parents reside in an EEA state and can be easily reached via telephone but cannot (or are unwilling to) exercise their parental responsibilities.

2.7. Special considerations for child victims of trafficking

No Member State has developed a separate guardianship system exclusively for child victims of trafficking. Nevertheless, in the United Kingdom, guardianship provisions addressing in particular child victims of trafficking are currently being developed. More precisely, the testing of specialist, independent advocates to support

65 Belgium, Circular Letter of 2 August 2007.

66 Some courts in Germany, however, deny guardians for children from third countries, if the children mention that their parents are alive and that they are in contact with them. See, for example, the decision by the Regional Court (*Amtsgericht*) Brakel of 11 January 2013 (No. 9F162/12) concerning a child from Iraq whose parents were in telephone contacts with him. See also the decision by the Higher Regional Court (*Oberlandesgericht*) Hamm, 25 October 2012 (No. II-2 UF 185/12, 2 F 76/12).

child victims of trafficking began in September 2014⁶⁷ (see also [Section 2.3](#)).

Several EU Member States have adopted specific provisions requiring the appointment of a guardian⁶⁸ or a legal representative⁶⁹ for child victims of trafficking. Other countries elaborated non-binding texts regarding the appointment of a guardian to child victims of trafficking, such as protocols adopted in Croatia⁷⁰ and Spain.⁷¹ Besides any specific provisions or framework, their legal representation in criminal proceedings should also be provided in accordance with the general rules applicable to victims' rights, which in Member States such as France and Sweden explicitly mention victims of trafficking.

A more protective regime is envisaged in the majority of the Member States for child victims of trafficking, once identified as such. Guardianship of child victims of trafficking normally falls under the scope of the general guardianship provisions set forth in civil and/or family law, even in those Member States where a different system for unaccompanied children is in place, such as Denmark⁷² and Finland⁷³ or where restrictions relating to the legal status of the child apply in practice.

The examples of Ireland and Poland illustrate well the special arrangements setting up a higher level of protection for child victims of trafficking. In Poland, the La Strada Foundation against Human Trafficking and Slavery runs the National Consulting and Intervention Centre for Polish and Foreign Victims of Human Trafficking⁷⁴. La Strada is responsible for the well-being of the child, and upon individual appointment by a court, its employees exercise guardianship or custody for child victims of trafficking. In Ireland, additional support is given to unaccompanied child victims

of trafficking, with specific protocols in place between relevant migration, judicial and child protection authorities. Specialised accommodation facilities are available for child victims. The national child protection authority acts *in loco parentis* for all child victims of trafficking but not for all unaccompanied children taken into care. It has a clear responsibility, under the Child Care Act, to make all necessary provisions for any unaccompanied children identified as potential or suspected victims of trafficking. All children identified as victims of trafficking must immediately be referred to the specialised social work team in Dublin.

However, the fact that only identified victims of trafficking are entitled to or actually receive particular care and attention poses a serious limitation to the protection of victims. Only a limited number of victims are detected and identified as such by the competent authorities, with many remaining undetected.⁷⁵ It also undermines the role of guardianship systems in the identification of child victims of trafficking and in the prevention of child trafficking and exploitation of children at risk.⁷⁶ Conscious of this reality, the Finnish National Rapporteur on Trafficking in Human Beings has underlined the need for an integrated guardianship system under welfare law for all children.⁷⁷

Key findings

- In only a few EU Member States, a central guardianship authority exists at national level. The majority of Member States have entrusted guardianship functions to municipal or local level social services. Sometimes, when guardianship is implemented at regional or local levels, different approaches are applied in different parts of the country.
- In most EU Member States, guardianship duties can be assigned to both natural and legal persons. Priority is, nevertheless, given to assigning guardianship duties to close relatives or persons coming from the child's broader family environment.
- When no suitable person to act as guardian can be found among the child's relatives or within the child's family environment, national child protection

67 For more information, see also www.gov.uk/government/uploads/system/uploads/attachment_data/file/372791/ChildTraffickingAdvocates.pdf.

68 See, for example, Cyprus, Combating of Trafficking and Exploitation of Human Beings and the Protection of Victims Law of 2007, Sections 36(3) and 37(3); Denmark, Aliens Act, Section 56a (1); Finland, Act on the Promotion of Integration, Section 56(1) and Act on the Integration of Immigrants and Reception of Asylum Seekers, Section 26(1) and Luxembourg, Act of 9 April 2014 strengthening the rights of victims of trafficking in human beings, Art. 3.

69 See for example, Bulgaria, Combating trafficking in human beings Act, Art. 24; Greece, Law 3386/2005, Art. 47 (2); and Portugal, Law No. 23/2007 (Aliens Act), Art. 114 (4).

70 Croatia, Protocol for the identification, protection and assistance to victims of trafficking in human beings (consolidated text), and Protocol on the procedure during the voluntary return of victims of trafficking.

71 Spain, Framework protocol for the protection of victims of human trafficking.

72 Denmark, Bill No. L 23 of 2 October 2002, Section 3.4.4 and Bill No. L 197 of 28 March 2007.

73 Finland, Act on the Reception of Asylum Seekers, Section 33 and Act on the Promotion of Integration.

74 Poland, National Consulting and Intervention Centre for the Victims of Trafficking website.

75 See, for example, Europol (2014c). The [EU Strategy towards the eradication of trafficking in human beings 2012–2016](#) sets the increase of identification of victims of trafficking in human beings as one of its priorities: "Priority A: Identifying, protecting and assisting victims of trafficking".

76 For example, on challenges in identification of victims of trafficking in human beings in international protection procedures, see European Migration Network (EMN) (2014).

77 Finland, The Finnish National Rapporteur on Trafficking in Human Beings (2010), *Report 2010 – Trafficking in human beings, phenomena related to it, and implementation of the rights of human trafficking victims in Finland*, Helsinki, Vähemmistövaltuutettu, p. 63.

authorities are responsible for the child's care. In such cases, guardianship duties are either performed by employees of the guardianship institution or other entity designated by law or by natural persons, following their appointment by a court or other competent authority. This is most often the case with unaccompanied children and child victims of trafficking identified outside their country of origin.

- Constitutional or other domestic law provisions in all Member States usually protect all children in their territory irrespective of the child's nationality or status. Notwithstanding this, the specific migration and residence status of the children is often key to determining the level and type of protection granted to them and, more specifically, their guardianship and representation arrangements. With regard to the treatment of EU and EEA unaccompanied children found in the territory of another EU Member State, law and practice are often unclear or inconsistent and there is no uniform approach across EU Member States.
- Guardianship of child victims of trafficking falls in principle under the scope of the general guardianship provisions set forth in civil and/or family law, irrespective of the migration or residence status of the child victim, even in Member States where a separate guardianship system for unaccompanied children is in place. For child victims, however, who are foreigners until otherwise identified as victims of human trafficking by the competent national authorities, migration and asylum law provisions apply.
- The absence of any conflict of interest between the potential guardian and the child is a key criterion in the selection of individual persons or institutions as guardians. The way guardian independence is understood, however, varies among Member States.
- Natural persons who exercise the guardianship role fall into three different categories: close relatives or persons coming from the broader family environment, chosen and designated by an appointing authority; professionals employed by guardianship institutions or similar legal entities; and individuals unrelated to the child who offer their services to act as guardians (referred to as 'volunteer guardians'). In most Member States, the different categories of guardians coexist.
- In a few Member States, guardians are primarily 'volunteer guardians', usually entitled to some form of compensation for their time and the expenses incurred while performing their duties. The amount and conditions of compensation varies between and sometimes within the Member States. Where guardians are primarily volunteers, a specific system of recruitment, placement and supervision of guardians has been developed. In such cases, the responsible guardianship authority or another designated institution or NGO recruits volunteers.

3

Knowledge and skills of guardians



One of the standards set by international and EU law pertaining to guardianship and representation of children is the necessity of expert knowledge and adequate training on a wide range of issues related to welfare and child protection. In addition, guardians must have the necessary expertise to address the particular situation and needs of specific groups of children, such as child victims of trafficking.

Although domestic legislation in many Member States provides for the appointment of competent and qualified guardians, the requirements that are set concerning their professional or educational background are typically very general. In most Member States, national legislation demands general qualifications and sets criteria related to the personality and moral qualities of the guardians. Furthermore, the law usually lists the characteristics and conditions of those who are not qualified to become a guardian.

In cases where guardianship is institutionalised and therefore exercised by civil servants or other employees of designated welfare and/or child protection institutions or specialised NGOs, guardians are in principle social workers, psychologists or legal professionals. When natural persons are assigned and exercise guardianship duties, no particular prerequisites related to their professional or education background usually exist.

Participation in training activities is mandatory for guardians in only a few Member States. Overall, the training of guardians is not organised in a systematic and consistent way, which would allow them to be equipped to address effectively the needs and vulnerabilities of particular groups of children. The duration, frequency and curriculum of trainings vary significantly. Most often, civil society organisations offer such training courses, frequently organised in cooperation with or supported by public institutions. General training for guardians has been

offered most systematically in those Member States where guardianship is assigned to natural persons, given that no particular professional requirements are set for their designation. The availability of specialised or advanced training for guardians, of its focus on the needs and vulnerabilities of particular groups of children, such as child victims of trafficking or unaccompanied children, and more generally of its quality and duration, differs considerably among Member States.

3.1. Qualifications required to become a guardian

In general, the welfare law of EU Member States requires that a guardian should be an 'adequate' or 'suitable' person with the necessary abilities and moral qualities to perform guardianship duties. Specific professional or educational qualification requirements for guardians are not always set. Legislation typically focuses instead on the moral and personal characteristics that potential guardians should fulfil.

In the case of institutional guardianship, where guardianship is assigned to state actors or designated specialised institutions, their employees (who in practice exercise the guardianship functions) are required to have particular educational and professional qualifications. To be employed, such professionals must be qualified social workers, social pedagogues, psychologists or legal professionals. Very often additional requirements of work experience or training are also required.

However, in most Member States the qualifications of guardians are defined in general terms and in a negative manner, describing who does not qualify as a guardian: natural and legal persons whose interests actually or potentially conflict with the interests of the child are not eligible for guardianship.

The most common prerequisites can be listed as follows:⁷⁸

- to be an adult; additional requirements in relation to age may include minimum or maximum age limits, i.e. in Denmark guardians should not be more than 70 years old;
- to have legal capacity;
- to consent;
- not to be precluded fully or partially from exercising parental rights;
- not to be convicted for serious crimes;
- to be physically and psychologically healthy (e.g. in Latvia a psychiatric report is required);
- not to have been declared bankrupt; and
- to be free of conflict of interests (see also [Section 2.4](#)).

Requirements established in national legislation apply in principle to all guardians. However, given that in certain circumstances the appointment of relatives as guardians is considered to be in the best interests of the child, blood or other emotional ties may prevail over other requirements. As an illustration, in Germany, Section 1779(2) BGB provides that when a selection is made between several suitable persons, the presumed wishes of the parents, the personal ties of the child, the relationship by blood or marriage with the child and the religious denomination of the child are to be taken into account. Similarly in Greece, according to Article 1592 of the Civil Code, guardians are preferably: the adult spouse of the minor; the person or legal entity designated by will or by statement made to the Magistrate of Peace or to the public notary by the person who used to exercise parental responsibility; or the person that the court considers more appropriate to be the guardian, preferably among the relatives of the minor.

A few Member States have established more detailed requirements for guardians, with the following three examples showing the different degree of detail

used. In Finland, the Act on the Reception of Asylum Seekers defines the necessary qualifications as follows: although there are no mandatory requirements relating to education or work experience, it is provided that the person should have knowledge about issues concerning immigrants, especially about international protection and human trafficking; should understand the relevant procedures as well as be capable of working with children; and should participate in training organised for guardians by the Finnish Immigration Service, the reception centres, the child welfare organisations or other experts, according to their availability. Finally, it is suggested that it would be helpful for them to familiarise themselves with the national, linguistic, religious and cultural background of the child.⁷⁹

In Denmark, according to a circular letter, potential guardians listed in the State Administration registries need to have a set of qualifications.⁸⁰ In practice, however, due to the lack of qualified individuals along with an increasing demand for guardians, persons who do not fulfil these criteria are also accredited.

In France, ad hoc administrators must have legal knowledge, notably on the law on foreigners (*droit des étrangers*), and must also have a good understanding of the psychology of minors.⁸¹ There is a distinct list of accredited persons for the appointment of ad hoc administrators for non-national children who are unaccompanied to ensure that the appointees have the necessary expertise to perform their duties.⁸² Nevertheless, pre-conditions are set in general terms, which means that the accreditation process lacks in harmonisation.⁸³ As a result, persons who receive accreditation and are registered in the list of accredited persons, for ad hoc administrators do not always have the desired competencies.⁸⁴

3.2. Vetting procedures

To make sure that a potential guardian fulfils the necessary criteria and, in particular, that there is no conflict of interest between him or her and the child, Member States have set up vetting procedures. These usually include checks of criminal records and, in several Member States, the submission of physical and psychological health reports certifying emotional stability of the appointed persons.

78 Czech Republic, Civil Code; Germany, BGB, Section 1779(2); Estonia, Family Law Act; Greece, Civil Code, Art. 1595; Finland, Act on the Reception of Asylum Seekers, Section 40; France, Civil Code, Art. 395 (Guardianship), and Code of criminal procedure, Art. R.53-1 and R.53-2 (ad hoc administrators); Croatia, Family Act, Art. 174 and 175; Hungary, Act IV of 1952 on Marriage, Family and Guardianship, Art. 9; Ireland (2009), Children Acts Advisory Board, Giving a voice to children's wishes, feelings and interests: Guidance on the role, criteria for appointment, qualifications in and training of guardians ad litem appointed for children in proceedings under the Child Care Act 1991 (Dublin, CAAB, 2009), [36] at p. 6; Italy, Civil Code, Art. 348; Latvia, The Civil Law, Sections 234, 235 (1), 236, 240, 252-299, 222-244, and Law on Orphan's Courts, Section 29 (2); Luxembourg, Civil Code, Art. 441; Netherlands, Ministry of Justice (2011), Executive Order Youth Care Act, Art. 1h; Poland, Family and Guardianship Code, Art. 148 (custodian) and Art. 178 (2) (guardian); Sweden, The Children and Parents Code 1949:381; Slovenia, The Law on marriage and family relations; Slovakia, Act No. 36/2005 Coll. on Family, Art. 61, Section 2.

79 Finland, Bill of the Government on the Act on the Reception of Asylum Seekers and amendments of certain Acts connected to it 266/2010.

80 Denmark, Circular letter No. 11494 of 24 October 1996, Section 3.

81 France, Ministry of Justice (2005), Circular No. CIV/01/05.

82 Favre-Lanfray, G. and Al-Kadiry, I. (2009), p. 54; Chamboncel-Saligue, G. (2008), p. 15.

83 Chamboncel-Saligue, G. (2008), pp. 14-16.

84 Favre-Lanfray G. and Al-Kadiry, I. (2009), p. 54.

Submitting other types of records is less frequently required. In Sweden, however, not only do the National Police and the social services (*socialtjänsten*) request an extract from the criminal records, but the Enforcement Authority (*Kronofogden*) also checks the applicant for the custodianship.⁸⁵ The assessment of whether a designated custodian (*godman*) is suitable for the mission is done by the chief guardian (*överförmyndare*) in the municipality where the child lives. In this assessment, special attention is paid to the specific vulnerable situation of the child. The district court assesses whether the conditions to assign a custodian (*godman*) are met. In Germany, private guardianship associations have to ensure that the staff providing guardianship are not in a relationship of dependency with the institution where the child is placed. Furthermore, the staff has to prove by a certificate of criminal record that they have not been convicted for offences and violations related to the sexual self-determination, physical integrity or personal freedom of others.⁸⁶

There are also concerns about the sustainability of vetting procedures and the frequency of checks, as they usually take place after initial appointment or accreditation. FRA could not find evidence that such checks are periodically or regularly conducted. This also relates to employees of institutions or designated NGOs assigned guardianship duties, especially where the assignment of cases takes place internally, without the involvement of judicial authorities. While in some Member States (for example, Ireland) professional accreditation procedures for social workers, psychologists or other professionals who may exercise guardianship are very well developed, this is not the case in all Member States.

3.3. Training

All persons, professionals or volunteers involved in the care and treatment of children must have the required expertise, in accordance to international and European standards. This requirement should also apply to persons exercising guardianship duties. They must have the necessary attitude, skills and knowledge to perform their duties in an effective manner. Furthermore, particular expertise should be required for those working with children who have been victims of trafficking or of other forms of exploitation and abuse.

Although the importance and necessity of training is stressed in general acknowledgments contained in national policy and guidelines or other documents on

child protection and victim support, in practice it is not offered in a systematic way or on a regular basis.

This also concerns induction training. In many cases, professional guardians employed by guardianship authorities are assumed to have the necessary professional qualifications and work experience. Often no particular training on guardianship is offered to them before they start working as a guardian, although employees very often receive training related to their profession and employment occupation. Professional guardians are more likely to receive induction training by the organisation or institution they are affiliated to.

As shown in [Table 4](#), induction training for guardians is only offered systematically in about one third of the Member States. It is, in addition, not always mandatory. In Finland, for instance, the training of guardians appointed for unaccompanied children is not obligatory, and a representative may undertake duties immediately upon appointment, by a decision of the District Court.

Sometimes, despite existing legal obligations, no training is organised in practice. For example, in Slovenia the International Protection Act, which governs the appointment of a legal representative (*zakoniti zastopnik*) – not a guardian – to unaccompanied children who have applied for asylum, explicitly stipulates that legal representatives must undertake obligatory training.⁸⁷ However, between 2010, when this obligation was included in the law, and September 2013, when FRA conducted its research, no such training had taken place in Slovenia.

[Table 4](#) provides an overview of those Member States where induction training was found to be conducted somewhat systematically, although not always, for all categories of guardians. The table also indicates whether such training is compulsory or not.

Even where induction training is compulsory for guardians, there may be exceptions when relatives are appointed. For example, although in Lithuania training is obligatory for all prospective guardians, relatives of the child are excluded from this obligation.⁸⁸

Responsibility for training guardians is normally not specifically assigned to a particular authority. In Member States where this issue is covered by legislation, the responsibility is often given to the guardianship authority or institution (public service or designated NGO). In Ireland, the Health Service Executive (HSE) has to provide training to guardians and Nidos in the Netherlands. Similarly, in Sweden the Chief

⁸⁵ Sweden, [The Enforcement Authority \(Kronofogden\)](#).

⁸⁶ Germany, SGB VIII, Section 72a. See for example the notice of the Regional Youth Welfare Office Bavaria ([Bekanntmachung des Zentrum Bayern Familie und Soziales - Bayerisches Landesjugendamt – vom 01.03.2010 \(Az II/BLJA/1-6000-1/1\)](#)), Section 4.4.

⁸⁷ Slovenia, International Protection Act, Art. 16a (2) and (3).

⁸⁸ Lithuania, Regulations of the organisation of the child's guardianship.

Table 4: EU Member States, where induction training is generally provided, seven EU Member States

EU Member State	Compulsory induction training	Organised by
BE	Yes	Guardianship Authority (<i>Service des tutelles</i>)
DK	Yes	State Administration (<i>Statsforvaltningen</i>) Red Cross
FI	No	Finnish immigration Service (<i>Migrationsverket</i>)
LT	Yes	Municipal Child Rights Protection Unit or its social partners
LV	Yes	Local government
NL	Yes	Nidos
SE	No	Social Welfare Service at municipal level (<i>Socialnämnden</i>)

Note: The relevant national legislation is listed in the Annex.

Source: FRA, 2013

Guardian is responsible for organising training courses for appointed guardians. In Finland, it is the Finnish Immigration Service who is responsible for the training of guardians appointed for unaccompanied children, while in Denmark this responsibility is assigned to the Red Cross, as the authority designated to provide guardianship to unaccompanied children.

In Germany, the law provides that private associations may exercise guardianship for children. To obtain a permission by the Youth Welfare Office according to Section 54 (1) of the *Sozialgesetzbuch* (SGB VIII), private associations need to have the capacity and the resources to provide training and support to recruited guardians. General training for voluntary guardians is offered by some professional associations⁸⁹ and consists of general information about guardianship.⁹⁰ Youth Welfare Offices also organise training courses for volunteer guardians.⁹¹ However, given that Youth Welfare Offices are regional institutions, there can be

great disparities between the regions: training courses, when available, may vary significantly in length, content and frequency.

Likewise, in some regions in Italy, municipal authorities responsible for the guardianship of children organise training courses for recruited volunteers, as is the case in Venice. However, such training courses are not available in all regions. When available, training is a prerequisite for receiving accreditation as a volunteer guardian and for being registered in the respective lists of the municipality.

Legislation only exceptionally regulates the length and the content of training courses for guardians. This is, for example, the case in Latvia, where the Law on the Protection of the Rights of the Child stipulates that within the scope of its budget, a local government must ensure a one-off training of guardians. The training modules for such courses must be approved by the Minister for Welfare (*labklājības ministrs*).⁹² The training programme is 60 academic hours and includes legislation (10 hours), communication in family (30 hours), child development (10 hours) and child care (10 hours). The training is provided to persons who already have acquired the status of a guardian.⁹³ However, there is no provision in the legal acts that this training programme is mandatory before appointment and it is not always available after appointment takes place.

Training self-employed professional guardians also poses challenges, as they are not associated with an

89 Such as by [Child Protection Association Bochum \(Kinderschutzbund Bochum\)](#); by the [German Institute for Youth Human Services and Family Law \(Deutsches Institut für Jugendhilfe und Familienrecht, DIJuF\)](#); by [BUMF](#); by [Social Pedagogical Research Centre Hamburg \(Sozialpädagogisches Forschungszentrum Hamburg\)](#).

90 For example the [Diakonie Wuppertal](#) (a regional welfare organisation of Germany protestant churches) runs a project called "Do it" which recruits, trains and supports voluntary guardians for unaccompanied minor refugees: [Diakonie Wuppertal – Migrationsdienste Projekt Do it!](#).

91 [Regional Youth Welfare Office Sachsen \(Landesjugendamt Sachsen\)](#), p. 56ff; [Regional Youth Welfare Office Bavaria \(Landesjugendamt Bayern\)](#), specialised on [Amtsvormünder](#); [Regional Youth Welfare Office Westfalen Landkreis Westfalen-Lippe \(Landesjugendamt Westfalen Landkreis Westfalen-Lippe\)](#); [Regional Youth Welfare Office Thüringen \(Landesjugendamt Thüringen\)](#); [Youth Welfare Office München \(2013\) – Guardianships/ Trusteeship \(Stadtjugendamt München – Vormundschaften/ Pflegschaften\)](#).

92 Latvia, Protection of the Rights of the Child Law, Section 35.

93 Latvia, Ministry of Welfare (*Labklājības ministrija*) (2005), Guardian training programme (*Aizbildņu apmācības programma*), Order of the minister No. 1-9.1/14, adopted on 26 April 2005.

institution or entity that can deliver such training. To overcome this difficulty in Belgium, professional guardians have created an association, to share experience and organise training. Nevertheless, the association encounters difficulties in securing the necessary funds to finance training activities.

Typically, no systematic specialised training on identification, protection and assistance to child victims of trafficking is provided to guardians. When such courses are available, they are usually organised by NGOs working with victims of trafficking. Issues of child trafficking are more likely to be addressed in training courses on unaccompanied children in general. Training material and courses are often developed on the topic of trafficking in general, without a particular focus on the role of guardians.

Authorities in principle consider the expertise and training of persons exercising guardianship duties particularly important for ensuring the protection of child victims of trafficking. In cases of victims of trafficking, institutional guardianship by state authorities or designated NGOs is preferred. Those guardians are considered more adequate than volunteer guardians, who very often lack professional qualifications and specialised training. In Denmark, for example, in cases of identified victims of trafficking, the representative should be a professional with special qualifications and expertise.⁹⁴ Furthermore, it is envisaged that in cases of suspected victims, the appointed representative should also be a qualified professional, to ensure that it will not be necessary to change representative at a later stage.⁹⁵ In other Member States certain responsibilities related to support and representation of victims of trafficking are delegated to specialised NGOs. In Poland, for instance, the La Strada Foundation and the PoMOC Association run the National Consulting and Intervention Centre for Polish and Foreign Victims of Human Trafficking. These two organisations are also responsible for organising training and offer support, when needed, to all professionals working with victims, including those exercising guardianship duties. Guardianship duties are also assigned to their employees.

94 Denmark, Act No. L 504 of 6 June 2007; Bill No. L 197 of 28 March 2007, Section 3.1.2.; Bill No. L 37 of 28 October 2010, Section 3.5; Guidance for personal representatives, Tasks and function in relation to unaccompanied minors who applied for asylum (*Vejledning for repræsentanter, Opgaver og funktion i forhold til uledsagede mindreårige asylansøgere*), drafted by the Ministry of Refugee, Immigration and Integration Affairs, the Directorate of Civil Affairs (*Civilretsdirektoratet*) and Red Cross in Denmark with contribution from the Danish Refugee Council, June 2003, Section 3.

95 Denmark, Bill No. 197 of 28 March 2007.

3.4. Supervision and support

In a majority of Member States, the competent guardianship authority is responsible for offering supervision, support and training to all individual guardians, including when relatives are appointed. In Germany, for instance, guardians are entitled to support from the Youth Welfare Office and the family courts while performing guardianship duties. Similarly, in Bulgaria, the Social Assistance Department must cooperate with appointed guardians when these are individual persons, and provide advice and guidance to them when needed, including training on issues related to the well-being and development of the child. In Hungary, guardians are under the supervision of the Guardianship Authority,⁹⁶ which provides professional assistance and support to them through a regional network of social services/offices.

Although in principle guardians are entitled to support by the guardianship authority, in most Member States no particular service has been developed within the respective authority aiming to provide them with systematic support.

Persons exercising guardianship duties for unaccompanied children often encounter difficulties in getting free access to legal assistance or translation services. To respond to these needs, in Denmark, for example, guardians can contact the State Administration or the Red Cross (responsible for cases of unaccompanied children), which can assist them with relevant legal issues, but there is no specific legal counselling service for guardians. More information on the access of guardians to legal advice and legal aid is provided in [Section 5.5](#) on legal representation.

On many occasions guardians need more specialised support and guidance when working with children who are victims of exploitation and abuse, including victims of trafficking. Nevertheless, guardians, particularly those that are not affiliated with a guardianship authority or institution, lack systematic access to such guidance and support.

Nidos, in the Netherlands, has developed an internal support system to provide specialised support to guardians working with child victims of trafficking. This system includes specialised training on child victims of trafficking of a number of guardians who act as focal points vis-a-vis other guardians when dealing with those children.

96 Hungary, Act XXXI of 1997 on the Protection of Children and Guardianship Administration, Art. 85 (4).

Key findings

- Although the majority of Member States' domestic legislation provides for the appointment of competent and qualified guardians, typically the requirements regarding their professional or educational background are very general. Moreover, such requirements differ considerably between and within Member States.
- Very often, national law outlines requirements of moral quality and personality of the potential guardian. Furthermore, most Member States, define the qualifications of guardians generally and in a negative manner (such as describing who does not qualify as a guardian). No education or training requirements exist for the relatives assigned with guardianship duties.
- In all Member States, vetting procedures are in place to ensure that the potential guardian fulfils all criteria required by law and, in particular, that there is no conflict of interest. Vetting procedures usually involve criminal record checks, although in some Member States they also include physical and psychological health reports. Moreover, the majority of Member States does not regulate the frequency of reviews of all criteria required and whether or not they are fulfilled.
- In most Member States, induction or refresher training is not mandatory, and legislation only exceptionally regulates the length and the content of training courses for guardians. Overall, the training of guardians is not organised systematically and consistently, which would allow them to be equipped to address effectively the needs and vulnerabilities of particular groups of children. Moreover, the training providers as well as the content of the training courses vary significantly between and within Member States.
- Specialised or advanced training offered to guardians, focusing on the needs and vulnerabilities of particular groups of children, such as child victims of trafficking or unaccompanied children, differ considerably among Member States. Typically, guardians do not receive any systematic specialised training on the identification and protection of and assistance for child victims of trafficking.
- Concerning vetting procedures for volunteer guardians, educational and training requirements are often lacking or not applied systematically.
- Many EU Member States do not provide professional supervision and support to guardians. Although in principle guardians are entitled to support by the guardianship authority, most Member States have not developed any particular service within the respective authority aiming to provide guardians with systematic support.



4

Appointment procedures



In principle the competent judicial authorities and courts are responsible for appointing guardians. However, when guardianship is assigned to an institution, it is the institution that must appoint the person who will act as guardian to the child, an appointment that takes place internally. This is often the case when a guardian or legal representative is appointed under asylum or migration law for unaccompanied children originating from third countries.

In case of institutional guardianship, the appointed institution may delay assigning an individual guardian to the specific child. For example, the Spanish Ombudsman (*Defensor del Pueblo*) noted that unaccompanied children entering the protection system often remain indefinitely under the supervision of public protection entities without having been assigned an individual guardian.⁹⁷

The court, when appointing a guardian, might act on a request from an individual or a competent authority, or on its own initiative. More broadly, any individual or authority can trigger an appointment procedure for a guardian, by reporting a case of a child in need of care either to the welfare or child care institutions, or directly to the competent judicial authorities. This applies to all children considered to be in need of guardianship, whether or not they are nationals.

The responsible judicial authorities must assess each particular case and decide if conditions requiring appointment of a guardian apply. Appointment procedures also include parental assessment, for the court to decide if the parents or the legal guardian of the child

(where they are known) are able to represent the best interests of the child. Judicial authorities may request the assistance of child protection, welfare or other competent authorities in this respect.

In Germany, for instance, if conditions for appointing a guardian are met, the family court orders a guardianship for the child under Section 1773(1) BGB. Section 1779(2) BGB entitles the family court to choose a suitable person after hearing the youth welfare office, which has to suggest a candidate (Section 53(1) SGB VIII and II.1). The family court appoints the guardian to hold office faithfully and conscientiously (Section 1789 BGB) and issues a certificate of appointment (Section 1791 BGB). In urgent cases, the court may appoint a guardian without hearing the youth welfare office under the reservation of dismissal (Section 1790 BGB). If no suitable person can be found, the local youth welfare office can be appointed as guardian (Section 1791b BGB, Section 87c(3) and (4) SGB VIII). The youth welfare office initially contacts the family court in most cases.

In cases of unaccompanied children, it is frequently the police, migration or asylum authorities that report the situation either to the judicial authorities, requesting the appointment of a guardian, or to the responsible care facilities (e.g. reception centres or residential care centres). In Sweden, for example, according to Article 3 of the Act on Legal Guardian for Unaccompanied Children, the application for a guardian (*godman*) is made by the Migration Board (*Migrationsverket*) and the Social Welfare Committee (*socialnämnden*) in the municipality where the child resides. In Finland, the migration and asylum authorities are responsible for appointing a representative to unaccompanied children. The representative has the same rights and duties as the guardian appointed under welfare law for national children.

⁹⁷ Spain, Spanish Ombudsman (*Defensor del Pueblo*) (2011). The General conclusions and recommendations of the report available in [English](#). See also Save the Children (2012), p. 96.

Unlike in Finland, in other Member States representatives appointed under provisions of migration and asylum law often have a narrower mandate. Their duties are primarily related or limited to representing the child in particular proceedings. However, children may also be entitled to a guardian and to protection under welfare law. In France, for example, to assist a child in asylum and other administrative proceedings, the law provides for the appointment of an ad hoc administrator in certain procedures for unaccompanied foreign minors (*mineurs étrangers isolés*) present in waiting zones at borders and when seeking asylum once on the national territory.⁹⁸ The concrete tasks of the ad hoc administrator are determined upon his/her appointment. The prosecutor is responsible for this appointment, after being contacted by the administration (usually by the Prefecture or the *Office français de protection des réfugiés et apatrides*, OFPRA, which is the national asylum office).

4.1. Referral mechanism for child victims of human trafficking

In some Member States, such as Bulgaria and Romania, there is a national referral mechanism specialised on child victims of trafficking. In other Member States it is common practice to at least have special arrangements and referral procedures for trafficked children.

In cases of trafficking, it is most often the police or the migration authorities who identify the victims and report their case either to the court, the child protection authorities or the victims support service.

It is not rare that NGOs become involved in dealing with cases of child victims of trafficking. In Poland, for instance, La Strada has been designated by the state to assist them. All cases of suspected or identified child victims of trafficking in Romania have to be signalled to the General Direction for Social Assistance and Child Protection (GDSACP).⁹⁹ In the Netherlands, the Nidos Foundation is responsible for guardianship services of unaccompanied children, including victims of trafficking. Nidos has signed a cooperation agreement with the police and the migration and border authorities to facilitate the adequate protection of all victims or suspected victims of trafficking, which includes the appointment of a guardian. Based on this agreement, as soon as the respective authorities receive a child, Nidos employees conduct an interview with the child to determine

whether he/she may be a victim of trafficking entitled to assistance and access to specialised services. When required, in cases of identified or presumed victims of trafficking, Nidos files a request for temporary guardianship at the juvenile court.¹⁰⁰

In other Member States, referrals are channelled through a specialised governmental contact point. In Estonia since 2013, when the Police or Border Guard suspect that an unaccompanied child is a victim of trafficking, they should refer the child to the National Board of Social Services, which has the authority to identify the child as a victim and whose role is to support the child in accordance to his/her individual needs.

In the Czech Republic, in all cases concerning children in a vulnerable situation, which includes cases of child victims of trafficking, the police has to inform the Authority for the Social and Legal Protection of Children or the child's guardian.¹⁰¹ In the case of unaccompanied children, employees of this authority have a legal duty to fulfil the function of guardian until it is officially assigned by a court or the child is transferred to another legal representative or an individual responsible for the care of the child. To facilitate immediate appointment of guardians, all offices of the Authority of the Social and Legal Protection of Children have a telephone hotline which is active outside working hours. These emergency employees are available to go to meet and provide support to the child as quickly as possible. Courts also respond in a similar emergency mode and can immediately approve a recommendation from the Authority of the Social and Legal Protection of Children to assign a guardian.

4.2. Time of appointment and length of procedures

Prompt appointment of a guardian is a key safeguard of the child's best interests and his/her protection. National legal provisions usually state that the appointment of a guardian must take place promptly, without undue delay, etc. However, no specific deadline is normally set.

In the Czech Republic for instance, national law states that the appointment of a guardian must take place immediately, without, however, setting a timeframe for the appointment procedures. Similarly, in Sweden the Act on Legal Guardian for Unaccompanied Children emphasises that the appointment of a guardian (*godman*) is an urgent matter and provides that the guardian (*godman*) should be appointed "as soon as

98 France, Code of entry and stay of foreigners and asylum, Art. L.221-5 and L-751-5.

99 Poland, the National Consulting and Intervention Centre for the Victims of Trafficking's [website](#); Romania, Decision 49/2011 of the Government.

100 Kromhout, M.H.C. and Liefwaard (2010).

101 Czech Republic, Ministry of the Interior (*Ministerstvo vnitra České republiky*) (2011).



possible". In Portugal, although national legislation stipulates that in proceedings related to protection measures for children the clearing procedure which involves collection of data for assessing the case should not last more than four months,¹⁰² there is no deadline for the appointment of a guardian.

In contrast, Bulgarian national law provides clear deadlines. When a child is under care and is accommodated in an institution, it is the duty of its director to request the appointment of a guardian within seven days from the day when the accommodation started.¹⁰³ The mayor who receives this request immediately conducts an inquiry and checks the grounds for guardianship. The mayor is obliged to appoint a guardianship council (*настоятельный съвет*), consisting of a guardian (*настоятник*), a provisional guardian (*заместник-настоятник*) and two advisers (*съветници*), within 30 days. This time limit starts the day the mayor receives a copy of the court decision on the deprivation of parental rights or learns that the parent is deceased.¹⁰⁴ In the Netherlands, the first contact between Nidos and the unaccompanied minor has to take place within five days after the arrival of the child at the application centre.¹⁰⁵ Nidos and the Immigration Service have concluded a working agreement to this effect. The period between the request for guardianship and the granting of guardianship may not be longer than two months.

In France the initial phase of protection, evaluation and orientation (*mise à l'abri/évaluation/orientation*) has to be carried out within the first five days following the identification of the child (Article L.223-2 of the Code of social action and families). Subsequently, the prosecutor may order a temporary placement (Article 375-5 of the Civil Code), and the guardian appointment procedures will be triggered if required.

In spite of legal provisions requiring an immediate or relatively short time of appointment of guardians, in practice the actual time of appointment of a guardian can last from a few days to several months, and sometimes takes more than a year.

Delays are partly due to insufficient human resources and to the difficulties faced by the child protection services to effectively respond to an increasing number of children in need of guardianship. However, this is only one of the reasons, as delays may also occur in reporting the child in need to the competent authorities or in initiating appointment procedures, including as a result of long court proceedings. Moreover, structural difficulties

may exist. In Greece the law envisages that guardianship duties be assigned to a social service which has not yet been established. In France, the unequal share in the reception of unaccompanied children across the country puts pressure on a specific few departments, the city of Paris being particularly affected.

Variations in the appointment process and in the length of appointment procedures exist, even within Member States. Such differences are more evident in federal states where responsibility for guardianship lies at the regional or local level.

In Austria, for example, significant differences in the appointment procedures of guardians exist among the various district courts. In Mödling, for instance, the verification procedures take place within one week, whereas in Steyr and Salzburg they take between one and two months, and in Linz up to three months.¹⁰⁶ It appears that while some judges investigate the case in detail by studying the reports of the child and youth welfare office (*Kinder- und Jugendhilfeträger*) and hear the child, other judges decide on the basis of written documentation only. It has also been reported that procedures for unaccompanied children may only be finalised after the child has already turned 18,¹⁰⁷ and is therefore no longer entitled to benefit from child protection and guardianship.

Similarly in Germany, although Section 42 (3) SGB VIII requires that in cases of unaccompanied minors a guardian be appointed without delay, the timeframe for the appointment of a guardian can vary substantially. Although no statistical data on the duration of lawsuits concerning the appointment of a guardian are available, they may last for several weeks.

Moreover, in cases of unaccompanied children, delays in the appointment of the guardian may derive from age disputes. This can occur when it is necessary to complete age assessment procedures before a guardian is appointed. To overcome this delay, in Denmark the designated NGO (Red Cross) appoints an observer (*bisidder*).¹⁰⁸

4.3. Temporary arrangements

In every Member State, national legislation provides the possibility to request or apply preliminary or temporary measures in cases where the child is at risk and immediate action is needed. Preliminary measures are very often applied by the authorities in cases of child victims of trafficking. Such measures usually include the

¹⁰² Portugal, Law 147/99.

¹⁰³ Bulgaria, Family Code, Art. 153 (3), second sentence.

¹⁰⁴ *Ibid.*, Art. 155 (1).

¹⁰⁵ Netherlands, Ministry of Justice (2011), Executive Order Youth Care Act, Art. 44.

¹⁰⁶ Fronek, H. (2010), p. 137.

¹⁰⁷ *Ibid.*, p. 137.

¹⁰⁸ Denmark, Bill No. L 37 of 28 October 2010, Section 3.5

appointment of a temporary guardian, in addition to the placement of the child in a care facility.

Taking such temporary measures may be established as a duty of the responsible authorities. For example in Austria, if the best interests of the child are endangered, the child and youth welfare office (*Kinder- und Jugendhilfeträger*) has the duty to take effective measures so as to obtain a decision by the court within eight days.

Three different situations can be distinguished, as illustrated in Table 4. In the first group of Member States, guardianship can be temporarily assigned to the director (or other representative) of the care facility in which the child is placed. This is the case in Italy, for example.¹⁰⁹ In the second group of Member States, temporary guardianship is assigned to the entity which normally exercises guardianship tasks, i.e. the child protection agency. In Germany, for instance, if no suitable person can be found, the local youth welfare office can be appointed as guardian (Section 1791b BGB). Similarly, in the Czech Republic the Authority of the Social and Legal Protection of Children automatically fulfils the function of guardian until this position is assigned officially by a court. The court can immediately approve a recommendation from the Authority of the Social and Legal Protection of Children in assigning a guardian. Finally, in the third group of Member States, temporary guardianship is assigned to a natural person who acts on behalf of the guardianship appointing authority, when this is not the same entity that normally exercises guardianship tasks.

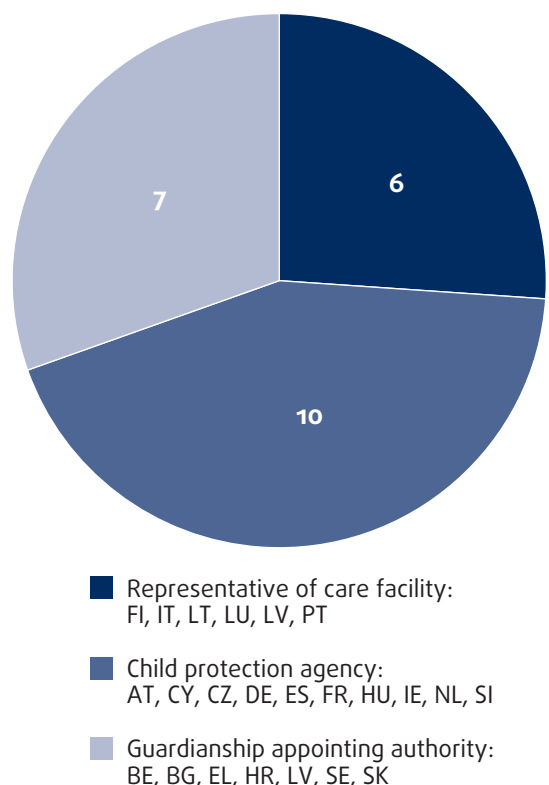
The duration of temporary guardianship is most of the time not stipulated by law. The rights and duties of temporary guardians can be more restricted compared to the rights and duties of other guardians, whilst their tasks are often decided upon appointment by the competent authority (see also Chapter 5 on the tasks of guardians).

For emergency cases, national legislation normally provides for an accelerated procedure to assign a temporary guardianship. In Germany, for instance, when legal representation is needed, the family court can appoint a guardian as an interim measure.¹¹⁰

Urgent measures are sometimes specifically envisaged for child victims of trafficking. In Greece, for example, the responsible prosecutor may order all appropriate measures to protect children victims of trafficking and must contact the court within 30 days to appoint a guardian (Articles 1532, 1534 and 1592 of the Civil Code).

¹⁰⁹ Italy, Law 184/1983, Art. 3 (2).
¹¹⁰ Germany, FamFG, Section 49ff.

Figure 5: Temporary guardianship arrangements, 23 EU Member States



Notes: Information for Finland and Lithuania only relates to non-national children. In Finnish reception facilities, the Finnish Migration Board can exercise temporary guardianship for unaccompanied children. In Lithuania, the Refugee Reception Centre is assigned guardianship and legal representation duties for unaccompanied children. No precise information was obtained on temporary provisions for DK, EE, MT, PL and UK. The relevant national legislation is listed in the Annex.

Source: FRA, 2013

4.4 Accountability and oversight mechanisms

Effective supervision and monitoring of guardians is essential to ensure the quality of guardianship systems, safeguard the best interests of children under care and protect them from violations of their fundamental rights. In most Member States there is no systematic and effective monitoring of guardians, and effective complaint mechanisms accessible to children are not available. Inspections are often conducted only as a result of reported complaints.

Table 5 provides an overview of the authorities in charge of monitoring and oversight of guardians in the 28 EU Member States. In all Member States guardianship authorities have developed an internal system of

supervision and monitoring of guardians, while external monitoring is exercised by courts and judicial authorities. Very often courts only act within the scope of their obligation to review a case within a specific timeline provided in national law. As a result, the external monitoring of guardianship systems is weak.

Most Member States lack a system of external monitoring by independent authorities other than the courts, although there are some positive exceptions to this. In the Netherlands, the Inspection on Youth Care (*Inspectie Jeugdzorg*) is an independent body responsible for monitoring guardianship institutions. Similarly in Ireland, the Health Information and Quality Authority (HIQA) is responsible, among its functions under Section 8 (1) c of the Health Act 2007, for monitoring the quality of service provided by the Child and Family Agency to protect children and to promote their welfare. HIQA has drawn up national standards for the protection and welfare of children, and conducts audits to monitor compliance with those standards.¹¹¹

Another way to monitor guardianship activities is to appoint a supervisory council made up of family members of the child. Four Member States (France, Greece, Luxemburg and Romania) have adopted this solution. This approach is suited to children whose parents are in the country and are known to the authorities. It is less instrumental in the case of unaccompanied children and rarely used, although alternative solutions are possible, as shown in Greece. There, in cases of unaccompanied children where no relatives reside in the country, supervisory councils consist of civil servants from welfare services, or the role of the councils is assigned to the Magistrate of the Peace (Article 1635 of the Civil Code).

The most common ways of monitoring guardianship services are reporting and record-keeping obligations imposed on guardians. In most Member States guardians have to submit reports once or twice a year, or upon request, to the monitoring authority, i.e. the court or the guardianship authority. This authority in turn must keep a case-file where essential information on the child is recorded and the guardian's acts are documented.

In some Member States the court is entrusted with more effective and systematic monitoring. For example, in the Czech Republic and in Italy the court has to approve all important decisions affecting the child taken by the guardian. In Croatia, the guardianship authority has the power to restrict the guardian's authority and tasks. Article 177 (2) of the Croatian Family Act provides that

a social welfare centre may issue a decision to restrict the guardian's authorities if that is in the child's best interests, or it may decide that certain duties concerning the child will be performed by a centre's official or another person qualified for that kind of task. Moreover, the guardian has to obtain the approval of the social welfare centre that appointed him or her prior to decisions and actions that are important for the child's life (Article 185 of the Family Act).

In addition, some EU Member States provide for inspections and visits to care facilities where the child is placed by the responsible authority. The frequency of inspections and reviews varies in practice since it is not always regulated in law. In Lithuania, regulations set this frequency. Social workers from child protection units should carry out frequent inspections. The initial visit is organised no later than one month after temporary guardianship has been granted and no later than three months after permanent guardianship is established. Other visits are organised according to the needs of the child, but occur no less than four times a year in the case of temporary guardianship. In the case of permanent guardianship, a child is visited no less than twice during the first year and no less than once in subsequent years. During these visits, a social worker talks to the child about his/her living conditions and relationship with the guardian and assesses whether or not the guardian fulfils his or her role and duties.¹¹²

Another common deficiency of the monitoring systems in place is the lack of effective complaint mechanisms. In the majority of Member States there are no particular mechanisms or provisions for lodging complaints against guardians. Where they do exist, individual complaint mechanisms are not sufficiently developed and often not accessible to children. Children are expected to lodge complaints against their guardians either with the guardianship authority, the court or the office of ombudsperson for children or offices of child commissioners, where such institutions exist. Children are not systematically informed about their right to lodge complaints and complaint procedures are not necessarily child-friendly. In Croatia, for instance, according to Article 204 of the Family Act, children may file a complaint if they are not satisfied with their guardian. Appeals and complaints are decided upon by the Social Welfare Centre, or by the Ministry of Social Policy and Youth, in cases where the Social Welfare Centre performs the duty of a guardian. However, the question remains of whether children are systematically and adequately informed of this possibility and receive adequate support. According to the Ministry of Social Policy and

¹¹¹ Health Information and Quality Authority (2012), *National standards for the protection and welfare of children*, Dublin, HIQA, [68].

¹¹² Lithuania, Regulations of the organisation of the child's guardianship.

Table 5: Bodies entrusted with oversight and monitoring of guardians, 28 EU Member States

EU Member State	Responsible authority	
	External	Internal
AT	District Court	Child and Youth Welfare Offices (<i>Kinder- und Jugendwohlfahrtsträger</i>)
BE	Civil Magistrate's Court	Guardianship Authority (<i>Service des tutelles</i>)
BG	The State Agency for Child Protection (specialised authority under the Council of Ministers)	Mayor
CY	Minister of Labour and Social Insurances	Head of the Department for Family and Children under which the Social Welfare Office operates
CZ	Court The Public Defender (<i>Veřejný ochránce Práce</i>)	Department of the Social and Legal Protection of Children.
DE	Family court	Youth Welfare Office (<i>Landesjugendamt</i>)
DK	Court	State Administration (<i>Statsforvaltningen</i>) operating at municipal level Red Cross
EE	Court	Municipality
EL	Court	N/A
ES	The Public Prosecutor's Office (<i>Ministerio Fiscal</i>)	Youth Welfare Authority of the autonomous community
FI	N/A	Reception centers operating under Finnish Migration Service (for unaccompanied children) Social Work Units of municipalities
FR	Court (the magistrate that mandated the guardian)	N/A
HR	Ministry of Social Policy and Youth (<i>Ministarstvo socijalne politike i mladih</i>)	Special council operating within Social Welfare Center
HU	The Judicial Services centre of the Ministry of Justice	The Guardianship Authority Social Welfare and Guardianship-Authority (<i>Szociális és Gyámhivatal</i>) The General Directorate of Social Affairs and Child Protection (<i>Szociális és Gyermekvédelmi Főigazgatóság</i>)
IE	Health Information Quality Authority (HIQA)	N/A
IT	Juvenile Court (Guardian Judge)	N/A
LT	Court	Municipal Child's rights protection Unit
LU	Judge	Ministry of Family and Integration
LV	Orphan's court (<i>Bāriņtiesu</i>) State Inspectorate For Protection Of Children's Rights	N/A
MT	Juvenile Court Children and Young Persons Advisory Board	N/A

Table 5: (continued)

EU Member State	Responsible authority	
	External	Internal
NL	Juvenile Court Youth Care Inspectorate	N/A
PL	The guardianship court Family court	N/A
PT	Family and Children's Court	N/A
RO	Court	The GDSACP
SE	County Board (<i>Länssstyrelsen</i>) supervises the Chief Guardian (<i>överförmyndarnämnden</i>)	Chief Guardian
SI	The Ministry of Labour, Family, Social Affairs and Equal Opportunities	Social work centre
SK	Court	Office of Labour, Social Affairs and Family (<i>Úradov Práce, Sociálnych Vecí A Rodiny</i>)
UK*	N/A	N/A

Notes: * In the United Kingdom there is no uniform approach within the four nations; guardianship when in place is exercised by local authority's social workers. For more information on existing arrangement in the United Kingdom see [Section 2.3](#).

The relevant national legislation is listed in the [Annex](#).

Source: FRA, 2013

Youth, no case of a complaint by any child victim of trafficking has been recorded.¹¹³

Furthermore, very often complaints can be communicated to the guardianship authority and are processed internally without safeguarding the child's anonymity. For example, in cases of institutional guardianship where guardianship is exercised by one of the employees of the institution, the child can issue a complaint to the director of the same institution. Such practice raises questions of conflicts of interest.

Accessible individual complaint mechanisms appear to only exist in a few Member States. In the Netherlands, for example, Nidos and the Youth Welfare Service are obliged by law to establish a complaint mechanism. These organisations have to establish a complaints commission made up of at least three independent persons who are not employed by the organisation itself.¹¹⁴ To ensure accessibility of its complaints procedure, Nidos provides all children with an introductory folder in their own language where this complaints procedure is explained.

¹¹³ Croatia, Ministry of Social Policy and Youth (*Ministarstvo socijalne politike i mladih*) (2013). Written communication in preparation of this report of 30 October 2013.

¹¹⁴ Netherlands, Youth Care Act, Art. 68.2.

Key findings

- In principle, the competent judicial authorities and courts appoint a guardian. However, in many cases a court decision or virtue of law assigns guardianship to an institution. It is then the task of this institution to assign a person – usually one of its employees or a volunteer – as guardian to a specific child. In that case, the assignment of the natural person exercising the guardianship role takes place internally and often informally. Guardianship is assigned to an institution more often in the case with unaccompanied children.
- In many EU Member States, national law does not provide a specific timeline for the appointment. When national law addresses this, the timeframes differ significantly.
- Nevertheless, despite legal provisions requiring the immediate appointment or a relatively short timeframe for appointing guardians, in practice the actual time of appointment of a guardian can last from a few days to several months, while sometimes it can take more than a year. Delays in the appointment procedures of guardians may take place for various reasons, such as lack of human resources, insufficient identification and referral mechanism, long court proceedings or structural issues.

- Variations in the appointment process and in the length of appointment procedures exist even within Member States. Such differences are more evident in decentralised states where responsibility for guardianship lies at the regional or local level.
- For emergency cases, national legislation normally provides for an accelerated procedure to assign temporary guardianship. However, the law does not provide for the duration of temporary guardianship and, in practice, this varies significantly between Member States.
- Only a few Member States have set up a referral mechanism for child victims of trafficking that ensures the timely appointment of guardians and protection of victims. However, even when lacking a comprehensive referral mechanism, Member States have some special arrangements in place for child victims of trafficking.
- In all Member States, guardianship authorities have developed an internal system of supervision and monitoring of guardians, while judicial or other legal authorities, such as public prosecution services, exercise external monitoring.
- Existing monitoring systems are often not clearly structured and inefficient. Lack of clarity on the tasks and responsibilities of the actors involved makes monitoring more challenging.
- In the majority of Member States, external monitoring by independent authorities other than the court is lacking, although positive examples exist.
- In most Member States, no particular mechanisms or provisions for lodging complaints against guardians are in place. Moreover, most Member States do not have child-friendly complaint mechanisms accessible to children.



5

Tasks of a guardian

The role of a guardian is to ensure the care, protection and overall well-being of the child, as well as the promotion of the child's best interests. In practice, however, there are significant variations in the areas of care in which guardians are involved. Their concrete tasks and duties also vary.

The duties and tasks of guardians are very often defined in a general manner in legislation. This approach reflects to a large extent the belief that a sufficient flexibility is necessary and that guardian's tasks should be based on the particular situation and needs of each individual child. Moreover, it is not practicable to stipulate in the law a rigid list of functions and tasks of the guardian.

In general terms, the most common tasks of guardians encompass ensuring that the child receives care, accommodation, education and healthcare, as well as managing the child's finances and the child's legal representation. Guardians of unaccompanied children are to some extent also involved in decisions on long-term solutions for the child.

In practice, however, the differences in the guardianship regimes between Member States leads to a situation where the concrete tasks and duties of guardians depend to a certain extent on the legal basis of their appointment. For example, guardians of unaccompanied children appointed under migration or asylum law play a role in advising, supporting and representing the child in asylum and other related administrative procedures. In other cases, a guardian – or other representative – is appointed to ensure representation of the child during court proceedings in which the child is party, victim or witness.

In fact, in some Member States, the guardian's – or legal representative's – tasks are determined by the court or the appointing authority and can be limited

in scope. Furthermore, in these cases, guardianship is sometimes limited in duration until the tasks assigned are accomplished.

The mandate of temporary guardians, where they exist, is usually narrower, and the appointment of limited duration. In some Member States, if a child is granted asylum or a permit to stay in the country, the guardianship arrangement often changes and a normal guardian is appointed.

5.1. National provisions defining a guardian's tasks

In the majority of Member States, as previously stated, a guardian's tasks are not precisely defined by law. In principle, guardians have to represent the child in legal transactions or other proceedings, when required in national law, to administrate the child's finances and to ensure adequate care and promote the child's well-being. Provisions laying down parental rights and duties may be used to determine the content of the guardian's mandate, including, for example, his or her concrete rights and duties when representing the child's best interests or ensuring the well-being of the child.

In at least four EU Member States (Bulgaria, Germany, Latvia,¹¹⁵ and the Netherlands), relevant provisions define the role and duties of a guardian to correspond with parental rights and duties. The appointed guardian, however, is not necessarily obliged to cover the material needs of the child and he or she is not responsible for the child's upbringing. For example, in the Netherlands,

¹¹⁵ Latvia, The Civil Law, Sections 252–259, and some other specific tasks in Sections 260–315.

the guardian has the same tasks and duties as a natural parent (Article 1:303 of the Civil Code). Parents have the duty and the right to take care and bring up the child.¹¹⁶ The guardian, however, only has to ensure that the child is cared for and educated, but he or she is not directly entrusted with the upbringing of the child.¹¹⁷ The fact that a guardian should not have direct responsibility for the upbringing and care of a child is also highlighted in other Member States. In Finland, for example, the guardian has to ensure that the child receives adequate care, but it is not the representative's or guardian's duty to manage the immediate daily care or upbringing of the child or to otherwise look after the child.¹¹⁸

However, whenever the child is placed together with the individual guardian, for instance when relatives or foster parents are appointed, the guardian is only exceptionally not responsible for the upbringing of the child.

In five Member States (Croatia, Italy, Poland, Portugal and Spain), a guardian's authority to make decisions on behalf of the child is somewhat limited compared to the authority of the parents. Guardians have to seek and obtain the approval of the court or other guardianship authority (in Croatia the Social Welfare Centre) for all important decisions affecting the life of the child.¹¹⁹ In Latvia, too, despite the fact that the civil code states that guardians have to assume the role of the parents, guardians must request directions from an Orphan's court concerning important decisions in the life of the child.

In very few Member States, the tasks of guardians are defined more precisely by law, with a descriptive list of task and duties. One illustrative example is Lithuania, where according to the Civil Code,¹²⁰ guardians are obliged to:

- ensure the child's physical and mental safety;
- take care of the child's health and schooling; educate the child;
- decide upon issues related to the child's interests in cooperation with interested central and local government institutions;
- not create obstacles to the child being in contact with his or her biological parents provided this is not detrimental to the child's interests;
- maintain contact with the child's parents; inform the child's parents and close relatives, if they so request,

about the child's development, health, studies and other important issues;

- organise the child's leisure activities, taking into account the child's age, development level and inclinations;
- prepare the child for independent life and work in the family, society and the state.

Concerning unaccompanied children, the general mandate of guardians as defined in civil or welfare law is often operationalised through provisions of migration and asylum law listing specific rights for this particular group of children as well as precise duties and obligations of their representatives. In Denmark, for example, the tasks of 'custody holders' (*forældremyndighedsindehaver*) are defined in general terms, while very specific tasks are given to representatives appointed to unaccompanied children in the "Guidance for personal representatives; tasks and function in relation to unaccompanied minors, who applied for asylum" developed by the ministry in charge of asylum and migration.¹²¹

In Member States where no clear and precise guidelines define a guardian's duties, considerable differences can be identified in the practice of individual guardians. The lack of clarity on what a guardian's duties are may cause confusion to children and adults responsible for their care.¹²² To overcome this in Austria, a working group in which representatives of the Child and Youth Welfare Office (*Kinder- und Jugendhilfeträger*) – the responsible guardianship authority – and other relevant actors participated developed a descriptive list with concrete tasks and duties of guardians.¹²³ However, this list of duties can only be used as guidance for those exercising guardianship duties, since it is not legally binding.

5.2. Well-being of the child

As described above, guardianship encompasses the duty to ensure the adequate care of the child and to promote the child's well-being. Although often it is not the role of the guardian to assume personal responsibility for the material needs of the child or for the child's upbringing and daily care, guardians have the responsibility to guarantee that the child receives

116 Netherlands, Civil Code, Art. 1:247.

117 Netherlands, Civil Code, Art. 1:336.

118 Finland, Act on the Reception of Asylum Seekers, Section 41.

119 In Croatia approval must be given by the Social Welfare Centre, being the responsible guardianship authority.

120 Lithuania, Civil Code, Art. 3.271.

121 FRA (2010a); Guidance for personal representatives, Tasks and function in relation to unaccompanied minors who applied for asylum (*Vejledning for repræsentanter, Opgaver og funktion i forhold til uledsagede mindreårige asylansøgere*), drafted by the Ministry of Refugee, Immigration and Integration Affairs, the Directorate of Civil Affairs (*Civilretsdirektoratet*) and Red Cross in Denmark with contribution from the Danish Refugee Council, June 2003, Sections 3 and 3.1.

122 Finland, Parsons, A., The Ombudsman for Minorities (2010), pp. 47–48.

123 Working group unaccompanied minor refugees (*Arbeitsgruppe unbegleitete minderjährige Flüchtlinge*, UMF) (2013).

necessary care by those in charge, usually a care facility or foster parents. The guardian has to ensure that such care meets the child's needs and promotes his/her overall well-being and physical, emotional and mental development.

In this regard, the most common duties of a guardian relate to the care, housing, education and health of the child. In practice, however, the way guardians perform their duties varies significantly. While some guardians systematically accompany the child to all meetings and appointments with care providers or other authorities, i.e. health services or migration authorities, other guardians do not consider this necessary. This reflects the great disparity in the actual time allocated to each child and the amount and frequency of personal contact between the child and the guardian. This is sometimes linked to the number of children a guardian is assigned and the supervision and support that is available to guardians, including access to legal advice.

In the case of unaccompanied children, some Member States make a clear distinction between the role of the guardian and of the care provider. In Austria, guardians can assign certain tasks and responsibilities related to guardianship to third parties. Typically, accommodation facilities are given the duty to care for the child, although the final responsibility remains with the guardian. In Finland, the reception facilities assign a guardian to the child. In other Member States, the representative of the residential care facility where the child is placed is simultaneously the guardian and the responsible authority for the care of the child. The role of direct caregivers is difficult to reconcile with the guardian's responsibility to oversee that the child is provided with the necessary care (see also [Section 2.4](#)). Across Member States, the role of caregivers and social workers is often not clearly defined and distinguished from the role and responsibilities of the guardian. This may result in diminished child protection.

5.3. Need assessment and care plans

Representing and safeguarding the best interests of the child is one of the key functions of a guardian that is normally clearly set by national law. The guardian's involvement in the child's needs assessment is important for safeguarding the child's best interests.

When a child is considered to be at risk or is taken under care, child protection authorities typically conduct a needs assessment to determine the situation of the child and to identify the action that needs to be taken. The results of this assessment are reflected in a care plan for the child. This plan is developed by the

competent authorities and should be subject to revisions according to the needs of the child.

Preparing the needs assessment and the care plan is, in principle, a duty of the welfare or child protection authorities. As a rule, a needs assessment for a child at risk is undertaken by social workers, usually at an early stage, following initial contact with the child. For example, in Denmark and Sweden, as the municipal authorities are responsible for the care of the child, they are also responsible for conducting the assessment.

Only a few Member States require that the needs assessment and consequent drawing up of a care plan be conducted by a multidisciplinary team, with the participation of all actors involved in the care of the child. There is no evidence that guardians are systematically involved. Depending on the Member State and on the specific situation of the child, the guardian may or may not be part of this process. It is more likely that guardians are involved in the needs assessment in cases of institutional guardianship, where employees of a child protection authority or designated NGOs exercise guardianship duties, as is the case in Ireland and the Netherlands. The guardian is also usually involved in Denmark and in Sweden, where child protection and guardianship responsibilities lie with municipal authorities.

The care plan has to be drawn up on the basis of what is in the best interests of the child. Factors to be taken into consideration when defining the best interests are manifold. In Austria, for example, Section 138 ABGB enumerates some of the criteria relevant for the assessment of the child's best interests. These comprise immaterial needs (such as promoting the child's talents, abilities, inclinations and development potential; safeguarding the child's rights, claims and interests; considering the child's opinion); material needs (especially food, health-care and housing, as well as a diligent education of the child); and negative impacts on the child's mind (prevention of danger; protection from assaults or violence; protection of bodily and mental integrity; prevention of conflicts of loyalties). Similarly, in Romania, Law No. 272/2004 states that in determining the best interests of the child, at least the following are to be taken into consideration:

- the physical, psychological, educational and health-related, security and stability and family belonging needs;
- the child's opinion, according to age and degree of maturity;
- the child's history, considering, in particular, situations of abuse, neglect, exploitation or any other form of violence against children, as well as potential risk situations that may arise in the future;
- the ability of parents or persons to raise and care for the child to meet his/her concrete needs;

- maintaining personal relationships with people with whom the child has developed attachment relationships.

In cases of identified child victims of trafficking, child protection authorities or specialised NGOs are usually involved in their care and protection. For them it is more likely that the guardian is actively involved in the needs assessment. For example, in Denmark the Red Cross is assigned the responsibility, in cases of non-national identified child victims of trafficking, to develop an action plan which includes the protection measures required based on the needs of the individual child in question. This action plan is presented to the Danish Immigration Service.¹²²

5.4. Durable solutions for unaccompanied children

In the context of migration and as far as unaccompanied children are concerned, one of the key questions that authorities need to address is the identification of a long-term or durable solution for the child. Often, a decision needs to be taken as to whether the child should stay in the host country or whether efforts should be made to return the child to his or her home country or to reunite him or her with his or her family. Such decisions are usually taken by the migration authorities. If the child has sought international protection, the asylum decision will play an important role, at least inasmuch as children granted international protection would typically be supported to integrate in the host country.

The best interests of the child play a key role in determining a durable solution. In most Member States, no standardised procedure to determine the most appropriate durable solution based on the best interests of the child has been set up. Furthermore, legislation does not clearly define the tasks and duties of the guardian concerning the identification of a durable solution, including family reunification, return or integration into the host society. At the same time, the general provisions stating that the role of guardians encompasses promoting the best interests of the child clearly extend to determining a durable solution for unaccompanied children.

In its Article 10, the Return Directive (2008/115/EC) includes a duty for Member States to ensure that “assistance by appropriate bodies [...] be granted, with due

124 Danish Centre against Human Trafficking (2012), p. 25.

consideration being given to the best interests of the child” before issuing a return decision of an unaccompanied child. Leaving aside the role of the guardian in appealing a return decision of an unaccompanied child, little trace can be found in national legislation that specifically mentions guardians in this context. In Belgium, guardians are required to make a proposal for a durable solution for a child who has not applied for asylum.¹²⁵ In Cyprus, the director of the social welfare office must express his/her opinion to the immigration officer regarding a potential return of an unaccompanied minor to his/her country of origin or to a third country for the aim of family reunification.¹²⁶ It should, however, be noted that a number of EU Member States do not allow for the return of unaccompanied third-country national children.¹²⁷ Guardians therefore have a more evident role in the process of voluntary return of children. In principle, in cases of voluntary repatriation involving a child, the guardian has to consent, and is also responsible for preparing the child for being repatriated. In the majority of Member States, there is no unified system or procedure: the guardian’s involvement and the degree of this involvement varies depending on the individual guardian. The most common situation in which the guardian has a concrete role to play is in family tracing and voluntary return programmes when implemented or supported by international organisations experienced in this field, such as the International Organization for Migration (IOM) or the Red Cross.

In relation to child victims of trafficking, the risk of re-victimisation and re-trafficking of the child has to be assessed, particularly in the view of a prospective repatriation or voluntary return. The guardian can play a key role in this regard. However, there is no evidence that this happens in practice.

5.5. Legal representation

One of the main tasks of a guardian included in national legislation is the legal representation of the child. The guardian has to assist the child in all legal actions for which the child lacks legal capacity. Guardians complement the child’s limited legal capacity in all civil, administrative or judicial proceedings. The rights and duties of guardians in such proceedings are in principle clearly defined in the relevant legislation. For example, asylum and migration law usually clearly describes the duties of the guardian or legal representative and typically also

125 Belgium, Guardianship Act of 24 December 2002 and Circular Letter of 15 September 2005.

126 Cyprus, Combating of Trafficking and Exploitation of Human Beings and the Protection of Victims Law of 2007, Section 39 (1).

127 FRA (2010b), Ch. 6.

provides for the right of the child to legal assistance.¹²⁸ In many Member States, a child who has reached a certain age or has married is capable of concluding certain legal acts. For example, in some Member States children above a certain age are allowed to submit an asylum application by themselves. In Germany for instance, migrants from the age of 16 onwards are legally capable of performing acts under the Asylum Procedure and the Residence Acts, including submitting an asylum claim.¹²⁹ While in practice guardians are also appointed for these children, this only occurs after the child lodges an asylum application. This limits the advice and guidance that the child may get during the process leading up to lodging the application. To clarify the situation, legal amendments are being drafted to raise the age of legal capacity to 18, which makes the appointment of a guardian mandatory.

The interaction of the guardian or legal representative with the lawyer of the child is usually not clearly defined. Whenever the child participates in administrative or other judicial proceedings, the guardian's duty to promote the best interests of the child and guarantee the child's participation requires that the guardian ensures that the child has access to legal assistance. The guardian should ensure that a lawyer with adequate expertise is appointed, if not already done *ex officio*. In certain cases the guardian may have to authorise the lawyer to act on behalf of the child.

The procedure of appointing a lawyer and the entitlements of the child to free legal aid might not be the same in administrative, civil and criminal procedures. In some Member States, such as Luxembourg, the child (as any other person entitled to free legal aid) has the possibility to choose his/her lawyer among the list of lawyers that are registered in the Legal Aid Service. In principle, the guardian should inform the child about his/her rights to legal assistance and support the child in choosing a lawyer when such a possibility exists.

In Poland, according to the Code of Civil Procedure, the child has the right to choose a particular lawyer; the court, considering the options available, and in agreement with the selected lawyer, appoints him/her as the lawyer for the particular case. Since the Polish Code of Criminal Procedure does not contain provisions on the procedure used to appoint a lawyer, the provisions described above can be applied by analogy in criminal proceedings. This implies that, to a certain extent, the child victim of trafficking or his/her legal representative (e.g. a guardian) are allowed to choose their lawyer.

¹²⁸ For more information on legal representation of unaccompanied children and legal aid see also ECRE (2014).
¹²⁹ Germany, AsylVfG, Section 12 and AufenthG, Section 80.

A guardian's authority to instruct a lawyer is not always regulated in law, particularly if the child has the legal capacity to act in a particular procedure. In practice, the situation in Member States varies significantly. In Bulgaria for instance, when the child is above 14 years of age, the lawyer's client is the child and not the legal representative, although he/she has to validate the wishes of the child.¹³⁰ The lawyer discusses the case with the child directly (and not with the legal representative), taking into account the child's ability to understand. No concrete evidence was identified of implementation practice. By contrast, in Cyprus,¹³¹ decisions are taken by the guardian (social welfare officer) in consultation with both the lawyer and the child. Similarly in the Netherlands, the child, the guardian and the lawyer assigned by the Legal Aid Board work together to complete the child's asylum request. The lawyer advises the child and the guardian, but the guardian retains the authority to take decisions in the course of the procedure. In other Member States – as for example in Latvia – the guardian clearly directs the actions of the lawyer and makes all the final decisions (for example to appeal a decision). In some Member States, such as Belgium, where there is a disagreement between the guardian, the child and the child's lawyer, it is up to the court to resolve the conflict.

A final aspect where the situation varies among Member States concerns the right of the guardian to legal advice, to be able to effectively perform his/her duties and make decisions in the best interests of the child. In principle, when the child is entitled to free legal aid, the guardian will benefit from legal counselling and advice as well. However, it appears that in only a few Member States do appointed guardians have a right to legal counselling, regardless of the involvement of the child in particular proceedings. For example, in Bulgaria the legal aid law provides that guardians with low income can have independent access to free legal advice.¹³²

In Romania as well, guardians benefit from free legal assistance. It is worth noting that such legal assistance is mandatory in the cases of human trafficking.¹³¹

In general terms, guardians affiliated with a particular institution or a designated NGO are more likely to have access to legal advice. This is the situation for example in Croatia and the Netherlands, where employees

¹³⁰ Bulgaria, the Persons and Family Act, Article 4 and Family Code, Art. 129 (1).

¹³¹ Cyprus, the Legal Aid Law of 2002.

¹³² On the basis of the common grounds of Article 22 (1) of the Legal Aid Law of 2002.

¹³³ Romania, Law 678/2001 on the prevention and combating of trafficking in persons.

exercising guardianship duties have access to legal advice offered in-house by employed lawyers or legal advisors working respectively for Nidos and for the Social Welfare Service.

5.6. Legal representation of child victims of trafficking in criminal proceedings and legal aid

In many Member States, there are special provisions in national law regulating the treatment and the rights of child victims in criminal proceedings, which also apply to child victims of trafficking in human beings, irrespective of the child's nationality.¹³⁴ As a rule, appointed guardians exercise legal representation duties in various proceedings, including criminal proceedings.

National law provides for the appointment of a special representative, other than the parent or appointed guardian, in cases where there is a conflict of interests between the child and his/her parent/guardian.

In addition to the guardian, who represents the child in the same way that parents would, child victims are usually entitled to specialised legal assistance in court proceedings. A lawyer is usually appointed for this purpose. Nevertheless, appointing a lawyer free of charge to child victims is not always mandatory and may be subject to a means test.¹³⁵

Unless provided *ex officio*, when the child victim is entitled to free legal aid, the appointment of a lawyer must be requested by the guardian. Under Greek law for example, a guardian has the duty to appoint a lawyer to represent the child in court and/or in other legal proceedings, although the law does not describe the procedure to be followed. In Denmark, the court, upon the request of the guardian and/or the legal representative, must assign a lawyer (*bistandsadvokat*) to children who are victims of certain types of crimes, including trafficking in human beings.¹³⁶

When a lawyer is appointed to represent the child in the proceedings, the law does not exclude the presence of the guardian during the criminal investigations and/or proceedings, given the fact that he/she is a key guarantor of the best interests of the child.

In Spain, the guardian (civil or administrative) has no legal duty to be present in court, unless the judge decides so,

based on the content of the proceeding and the best interests of the child. Only the *procurador*¹³⁷, appointed by the court to all persons involved in criminal proceedings, and the child's lawyer have to be present. The *procurador* should represent the rights and interests of the parties in the courts through a power of attorney granted for this purpose, and ensures that communications between the courts and the parties are duly authenticated.

In most Member States, the guardian also has to instruct the lawyer. In Ireland, for example, a child under the age of 18 is not competent to instruct his/her lawyer. This must be done on behalf of the child by a guardian or other person with legal responsibility for the child. In Latvia, children must be represented by a guardian in all legal transactions and proceedings.¹³⁸ If a lawyer has been appointed, the guardian directs the actions of the latter and takes the final decisions. On the other hand, in some Member States, as for example in Bulgaria, the client of the lawyer is the child and not his/her parent or guardian. The lawyer must discuss the case with the child in accordance with his/her ability to understand and not with his/her legal representative¹³⁹. The lawyer signs the necessary documents (claims, written observations, appeals, etc.) instead of and on behalf of the child.

One important challenge identified is the appointment of lawyers who have specialised knowledge of the trafficking of human beings and of working with child victims. The Netherlands is one of the few Member States where the Legal Aid Board has drawn up a list of specialised lawyers, assigning them to child victims of trafficking who are placed within the protected reception system. There is a specific list of solicitors who have declared their ability for this kind of support and who are specialised in this area of work.¹⁴⁰ The lawyer advises the child and the guardian, but the guardian retains the authority to take decisions during the procedure. In some Member States steps are taken to improve the quality of legal representation for children. In Croatia, for example, the Croatian Bar Association (*Hrvatska odvjetnička komora*) keeps a list of lawyers who represent children in criminal proceedings, according to the Article 54 (4) of the Juvenile Courts Act. It began to educate its members who will be appointed as attorneys to children in different proceedings in 2012, but the training is not systematic as yet.¹⁴¹

¹³⁴ For more information on treatment of child victims in judicial proceedings see also FRA (2015a).

¹³⁵ *Ibid.*

¹³⁶ Denmark, Criminal Code.

¹³⁷ Spain, Act 13/2009 of 3 November; they are competent to act in all districts.

¹³⁸ Latvia, The Civil Law, Section 261 (1) and Section 264.

¹³⁹ Bulgaria, Ethical Code of the Attorney, Art. 13 (1).

¹⁴⁰ Kromhout, M.H.C. and Liefwaard (2010).

¹⁴¹ Education started in 2012, with one-day seminars on the European Convention on the Exercise of Children's Rights, in regional centres in Zagreb, Osijek, Rijeka and Split, and on the child's right to be heard in proceedings, organised by the Children Ombudsperson, the UNICEF office for Croatia and the Croatian Bar Association, see a children's publication on this topic.

FRA, within the scope of its work on child-friendly justice, conducted interviews with professionals working with child victims and or parties in civil and criminal proceedings, in 10 EU Member States. The FRA report notes that some EU Member States make free legal aid available only to those who are financially eligible. In civil cases, respondents from all countries report a lack of legal representation for children.¹⁴² Finally, the FRA report on *Victims of crime in the EU: the extent and the nature of support for victims* provides information on victim support services in 28 EU Member States, including on services targeting child victims.¹⁴³

Key findings

- A guardian's mandate can be either broad, covering all aspects related to guardianship, or be delimited on appointment by the competent authority. In this case, the duties assigned and the duration of the appointment depend on the particular situation of the child, often his or her migration and/or residence status, or the particular legal procedures regarding the child.
- Legislation often defines the guardians' duties and tasks generally. Only in a few EU Member States does national law provide a list of concrete tasks. The most common tasks that Member States assign to guardians encompass ensuring that the child receives care, accommodation, education and healthcare, as well as managing the child's finances and his or her legal representation (i.e. complementing the limited legal capacity of a child).
- Guardians have to ensure that the competent authorities provide the child with adequate care and protection. The way that these tasks are carried out varies.
- Guardians of unaccompanied children are also involved to some extent in decisions on durable solutions for the child, but they do not determine the decisions taken by the competent authorities.
- The duties to ensure the child's well-being and to represent the child's best interests are very often dissociated and different persons or institutions carry them out.
- One of the main tasks of a guardian included in national legislation is the legal representation of the child. Guardians complement the child's limited legal capacity in all civil, administrative or judicial proceedings. The rights and duties of guardians in such proceedings are in principle clearly defined in the respective legislation.
- In certain legal proceedings, a professional lawyer needs to represent the child. National legislation, however, does not always stipulate any clear rules concerning the interaction between the guardian, acting as legal representative of the child, and the child's lawyer. The guardian should be fully involved and ensure that the competent authorities appoint a lawyer or another qualified professional for the child, in accordance with national law. In certain cases, the guardian may need to authorise the lawyer to act on behalf of the child, especially in court proceedings.
- Appointing a lawyer to a child victim of human trafficking is not always mandatory for the proceedings and, in some cases, free legal assistance is provided only subject to a means test.
- In most Member States, there are a limited number of lawyers with specialised knowledge on child victims and in particular on victims of trafficking in human beings available, and they may not always be available to deal with particular cases.

¹⁴² For more information on treatment of child victims in judicial proceedings see also FRA (2015a).

¹⁴³ FRA (2015b).

Conclusions

International and EU legislation provide for the protection of child victims of trafficking and for assistance and support to victims. The vulnerability of children to victimisation and re-trafficking is stressed in the EU Anti-trafficking Strategy, which has set the protection of child victims of trafficking as one of its actions (Priority A, Action 3).

Child victims of trafficking fall under the scope of existing guardianship systems in the EU Member States. Although it is in accordance with the UN Convention on the Rights of the Child that all children are entitled to protection without discrimination under the legal system of the Member State, the residence status of the child often determines the type of guardianship arrangements applied as well as the support to be provided to the child.

There are great disparities between the types of guardianship provided to children in the Member States, and sometimes within Member States. This affects unaccompanied children in particular, and presumed victims of trafficking in human beings. Differences concern the appointment procedures and timeline, as well as the profile, qualifications and tasks of the appointed guardians.

There are gaps in national guardianship systems caused, for example, by lengthy appointment procedures, lack of systematic training of guardians, lack of necessary support for the children and the guardians including in accessing legal advice. This can result in inadequate protection of children deprived of parental care, including of those identified as victims of trafficking in human beings or presumed victims.

Despite existing provisions in national and international law, guardianship systems often fail to provide adequate support and protection and treat foreign and national children equally. In many Member States, migration and asylum law provisions prevail over welfare and child protection law and the child's residence status impacts on the protection he/she receives and his/her guardianship arrangements.

To cater for the needs of the most vulnerable groups of children, such as victims of trafficking in human beings, and to prevent child trafficking, it is necessary to harmonise and strengthen guardianship system in EU Member States. An integrated approach to child protection and child rights that puts children in the centre as rights holders is essential for the effective protection of children from all forms of violence and exploitation, including trafficking in human beings.

To support Member States in addressing the challenges identified, FRA, in cooperation with the European Commission, developed a handbook that contributes to the protection of child victims and to the prevention of child trafficking. This handbook, *Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking*, published in June 2014, intends to assist Member States in their efforts to strengthen guardianship systems, providing comprehensive guidance which may be useful to both policy makers and practitioners. This guidance focuses on how to strengthen guardianship systems for all children in need, while addressing at the same time specific concerns relating to the needs of child victims of trafficking. The handbook stresses that while an integrated approach on child protection is needed, the necessity of expert knowledge and skills are essential, but need to be placed within the context of the overall child protection system in place.

In line with the approach of the EU Anti-Trafficking Strategy that “comprehensive child-sensitive protection systems that ensure interagency and multidisciplinary coordination are key in catering to diverse needs of diverse groups of children, including victims of trafficking”, the handbook places guardianship systems within the broader framework of national child protection systems and points to the importance of guardianship systems both in the prevention of all forms of abuse, neglect and exploitation and in the protection of child victims.

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Annex

Key national legislation on guardianship and/or legal representation of children deprived of parental care

EU Member State	Legislation	Text	See in particular
AT	Federal Constitutional Law (<i>Bundes-Verfassungsgesetz</i> , B-VG), Federal Law Gazette No. 1/1930 (<i>Bundesgesetzblatt</i> , BGBl, Nr. 1/1930)	de en	Art. 12 (1) Z 1
	General Civil Code (<i>Allgemeines Bürgerliches Gesetzbuch</i> , ABGB), Justice Law Collection No. 946/1811 (<i>Justizgesetzsammlung</i> , JGS, Nr. 946/1811)	de	
BE	Guardianship Act of 24 December 2002, Title XIII, Chapter VI “Unaccompanied minor aliens” of the Programme Law of 24 December 2002 (<i>Loi sur la tutelle du 24 décembre 2002, Titre XIII, Chapitre VI « Mineurs étrangers non accompagnés », de la loi-programme du 24 décembre 2002</i>), entered into force on 29 January 2004	fr nl	Art. 20
	Royal Decree of 22 December 2003 to implement Title XIII, Chapter VI “Unaccompanied minor aliens” of the Programme Law of 24 December 2002 (<i>Arrêté royal du 22 décembre 2003 portant exécution du Titre XIII, Chapitre VI « Tutelle des mineurs étrangers non accompagnés », de la loi-programme du 24 décembre 2002</i>), entered into force on 1 May 2004	fr nl	
	Circular Letter of 15 September 2005 on the stay of unaccompanied minor aliens (<i>Circulaire du 15 septembre 2005 relative au séjour des mineurs étrangers non accompagnés</i>), entered into force on 7 October 2005	fr nl	
	Circular Letter of 2 August 2007 on European unaccompanied minors in a vulnerable condition (<i>Circulaire du 2 août 2007 relative aux mineurs européens non accompagnés en situation de vulnérabilité</i>), entered into force on 17 September 2007	fr nl	
BG	Family Code (<i>Семеен кодекс</i>), entered into force on 23 June 2009	bg en	Art. 129 (1), 153-155, 170-173
	Persons and Family Act (<i>Закон за лицата и семейството</i>), entered into force on 10 September 1949	bg	Art. 3, 4
	Child Protection Act (<i>Закон за закрила на детето</i>), entered into force on 13 June 2000	bg en	Art. 15 (7), <i>in fine</i>
	Implementing Regulation on the Child Protection Act (<i>Правилник за прилагане на Закон за закрила на детето</i>)	bg en	Art. 59, 61
	Legal Aid Act (<i>Закон за правната помощ</i>), entered into force on 1 January 2006	bg en	Art. 22 (1)
	Aliens Act (<i>Закон за чужденците в Р България</i>), entered into force on 23 December 1998	bg en	
	Refugees Act (<i>Закон за убежището и бежанците</i>), entered into force on 1 December 2002	bg en	
	Combating Trafficking in Human Beings Act (<i>Закон за борба с трафика на хора</i>), entered into force on 20 May 2003	bg en	Art. 24
Ethical Code of the Attorney (<i>Етичен Кодекс на адвоката</i>), entered into force on 22 July 2005	bg en	Art. 13 (1)	

CY	Children's Law (Cap 352) of 1956, (<i>Ο Περί Παίδων Νόμος, (Κεφ. 352)</i>)	en	
	Parents and Children Relations Law of 1990 (216/1990) (<i>Ο Περί Σχέσεων Γονέων και Τέκνων Νόμος</i>)	el en	
	The Legal Aid Law of 2002 (165(I)/2002) (<i>Ο Περί Νομικής Αρωγής Νόμος</i>)	el	Art. 22 (1)
	Combating of Trafficking and Exploitation of Human Beings and the Protection of Victims Law of 2007 (L.87(I)/2007) (<i>Ο περί της καταπολέμησης της εμπορίας και της εκμετάλλευσης προσώπων και της προστασίας των θυμάτων νόμος</i>)	el en	Sections 36(3), 37(3), 39(1)
CZ	Civil Code (No. 89/2012 Coll.) (<i>Občanský zákoník</i>), 1 January 2014	cs	
	Code of Civil Procedure (No. 99/1963 Coll.) (<i>Občanský soudní řád</i>), 1 April 1964	cs	
	Code of Administrative Procedure (No. 500/2004 Coll.) (<i>správní řád</i>), 24 June 2004	cs en	
	Family Act (No. 94/1963 Coll.) (<i>Zákon o rodině</i>), 1 April 1964	cs en	
	Act on the Social and Legal Protection of Children (No. 359/1999 Coll.) (<i>Zákon o sociálně-právní ochraně dětí</i>), 1 April 2000	cs en	Art. 17 (54)
	Act on the Residence of Foreign Nationals on the territory of the Czech Republic (No. 326/1999 Coll.) (<i>Zákon o pobytu cizinců na území České republiky</i>), 1 January 2000	cs en	
	Asylum Act (No. 325/1999 Coll.) (<i>Zákon o azylu</i>), 1 January 2000	cs en	
	Act on Special Judicial Proceedings (No. 292/2013 Coll.) (<i>Zákon o zvláštních řízeních soudních</i>), 1 January 2014	cs	
	Act on the Public Defender of Rights (No. 349/1999 Coll.) (<i>Zákon o veřejném ochránci práv</i>), 8 December 1999	cs en	
DE	Civil Code (<i>Bürgerliches Gesetzbuch, BGB</i>)	de en	Book IV. 2 and 3
	Social Code (<i>Sozialgesetzbuch, SGB</i>)	de	Book VIII (Sections 42(3), 53(1) and (3), 72a, 87c(3) and (4)) and Book II. 1
	Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (<i>Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit Familienverfahrensgesetz, FamFG</i>)	de en	Section 151, No. 4, Section 49
	Residence Act (<i>Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz, AufenthG</i>)	de en	Section 80
	Asylum Procedure Act (<i>Asylverfahrensgesetz, AsylVfG</i>)	de en	Section 12
	Act on Senior Judicial Officers (<i>Rechtspflegergesetz, RpfVG</i>)	de en	Section 14(1), No. 10



	Criminal Code, Consolidated act No. 1028 of 22 August 2013 (<i>Straffeloven, lovbekendtgørelse nr. 1028 af 22. august 2013</i>)	da	
	Act on Social Service, Consolidated act No. 1093 of 5 September 2013 with amendments (<i>Serviceloven, lovbekendtgørelse nr. 1093 af 5. september 2013 med senere ændringer</i>)	da en	Section 57
	Act on Parental Responsibility, Consolidated act No. 1073 of 20 November 2012 (<i>Forældreansvarsloven, lovbekendtgørelse nr. 1073 af 20. november 2012</i>)	da en	Section 28
	Act on Guardianship, Consolidated act No. 1015 of 20 August 2007 with amendments (<i>Værgemålsloven, lovbekendtgørelse nr. 1015 af 20. august 2007 med senere ændringer</i>)	da	
	Administrative Order No. 1075 of 11 December 2003 on the processing of cases on guardianship and guardians and on permanent guardians and their payment (<i>Bekendtgørelse om behandling af værgemåls- og værgesager samt om faste værger og værgens vederlag m.v.</i>)	da	Section 11
	Circular letter No. 11494 of 24 October 1996 on approving permanent guardians (<i>Cirkulæreskrivelse nr. 11494 af 24. oktober 1996 om antagelse af faste værger</i>)	da	Section 3
DK	Aliens Act, Consolidated act No. 863 of 25 June 2013 (<i>Udlændingeloven, lovbekendtgørelse nr. 863 af 25. juni 2013</i>)	da	Section 56a (1)
	Bill No. L 23 of 2 October 2002 on amending the Aliens Act and the Act on Integration (Processing cases concerning unaccompanied minor asylum seekers) (<i>Lovforslag nr. L 23 af 2. oktober 2002 om lov om ændring af udlændingeloven og integrationsloven (Behandlingen af sager vedrørende uledsagede mindreårige asylansøgere)</i>)	da	Section 3.4.4
	Bill No. L 197 of 28 March 2007 on amending the Aliens Act and the Act on the Formation and Dissolution of Marriage (<i>Lovforslag nr. L 197 af 28. marts 2007 om ændring af udlændingeloven og lov om ægteskabs indgåelse og opløsning</i>)	da	Section 3.1.2
	Act No. L 504 of 6 June 2007 on amending the Aliens Act and the Act on the Formation and Dissolution of Marriage (<i>Ændringslov nr. L 504 af 6. juni 2007 om ændring af udlændingeloven og lov om ægteskabs indgåelse og opløsning</i>)	da	
	Bill No. L 37 of 28 October 2010 on amending the Aliens Act and the Act on Integration (<i>Lovforslag nr. L 37 af 28. oktober 2010 om ændring af udlændingeloven og integrationsloven</i>)	da	Sections 2.2.2, 3.5
	Act No. 1543 of 21 December 2010 on amending the Aliens Act and the Act on Integration (<i>Ændringslov nr. 1543 af 21. december 2010 om ændring af udlændingeloven og integrationsloven</i>)	da	
EE	Family Law Act (<i>Perekonnaseadus, PKS</i>), RT I 2009, 60, 395	et en	Art. 175, 176
	Social Welfare Act (<i>Sotsiaalhoolekande seadus, SHS</i>), RT I 1995, 21, 323	et en	
	Act on Granting International Protection to Aliens (<i>Välismaalasele rahvusvahelise kaitse andmise seadus, VRKS</i>), RT I 2006, 2, 3	et en	Art. 6.1 (4)

EL	Civil Code	en	Art. 24, Art. 1505-1654
	Code of Civil Procedure (<i>Κώδικας Πολιτικής Δικονομίας</i>), 16 September 1968	el	Art. 681 C
	Law 2447/1996, "Adoption as a code of the draft law on adoption, guardianship, and foster care of minors, judicial assistance, judicial trusteeship of alien property and relating provisions" (<i>Κύρωση ως Κώδικα του Σχεδίου Νόμου «Υιοθεσία, επιτροπεία, δικαστική επιμέλεια ξένων υποθέσεων και συναφείς ουσιαστικές, δικονομικές και μεταβατικές διατάξεις</i>), 30 December 1996	el	Art. 49-53
	Law 3727/2008, "Ratification and implementation of the Council's of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse [...]" (<i>Κύρωση και εφαρμογή της Σύμβασης του Συμβουλίου της Ευρώπης για την προστασία των παιδιών κατά της γενετήσιας εκμετάλλευσης και κακοποίησης [...]</i>), 18 December 2008	el	Art. 35
	Law 3386/2005, "Codification of legislation on the entry, residence and social integration of third country nationals in Greek territory"	en	Art. 47 (z)
	Presidential Decree 113/2013 (transposing Asylum Procedures Directive 2005/85/EC), (<i>Προεδρικό Διάταγμα 113/2013, Καθιέρωση ενιαίας διαδικασίας αναγνώρισης σε αλλοδαπούς και ανιθαγενείς του καθεστώτος του πρόσφυγα ή δικαιούχου επικουρικής προστασίας σε συμμόρφωση προς την Οδηγία 2005/85/EK</i>), 14 June 2013	el en	
	Presidential Decree 220/2007 (transposing Reception Conditions Directive 2003/9/EC), (<i>Προεδρικό Διάταγμα 220/2007, Προσαρμογή της Ελληνικής Νομοθεσίας προς τις διατάξεις της Οδηγίας 2003/9 EK, σχετικά με τις ελάχιστες απαιτήσεις για την υποδοχή των αιτούντων άσυλο</i>), 13 November 2007	en	Art. 19
Law 3961/2011 "on the amendment of Law 3126/2003 on the criminal liability of Ministers and other provisions" (<i>Τροποποίηση του Ν. 3126/2003 για την ποινική ευθύνη των υπουργών και άλλες διατάξεις</i>), 29 April 2011	el	Art. 8 (1)	
ES	Civil Code (<i>Código Civil</i>), BOE No. 206, 25 July 1889	es en	Art. 172-174, 222-228
	Organic Act 1/1996 of 15 January on the Legal Protection of Minors, modifying the Civil Code and the Code of Civil Procedure (<i>Ley Orgánica 1/1996, de 15 de enero, de protección jurídica del menor, de modificación del Código Civil y de la Ley de Enjuiciamiento Civil</i>), BOE No. 15, 17 January 1996	es	
	Act 13/2009 of 3 November on the reform of the procedural legislation for the purpose of the implementation of the new Judicial Office (<i>Ley 13/2009, de 3 de noviembre, de reforma de la legislación procesal para la implantación de la nueva Oficina judicial</i>)	es	
	Circular 8/2011 of the General Public Prosecutor's Office on criteria for the unity of the specialised intervention of the Public Prosecutor's Office regarding the protection of minors (<i>Circular 8/2011 sobre criterios para la unidad de actuación especializada del Ministerio Fiscal en materia de protección de menores</i>)	es	
	Ministries of Justice, Home Affairs, Employment, Social Security, Health, Social Services, Equality, Public Prosecutor, and General Council of the Judiciary (<i>Ministerios de Justicia, Interior, Empleo, Seguridad Social, Salud, Servicios Sociales, Igualdad, Fiscalía General del Estado y Consejo General del Poder Judicial</i>) (2011), Framework protocol for protection of victims of human trafficking (<i>Protocolo Marco de protección de las víctimas de trata de seres humanos</i>)	es en	

FI	Child Welfare Act (<i>Lastensuojelulaki</i>) 417/2007	fi en	
	Guardianship Services Act (<i>Laki holhoustoimesta</i>) 442/1999	fi en	Sections 50, 56–58
	Act on the Integration of Immigrants and Reception of Asylum Seekers (<i>Laki maahanmuuttajien kotouttamisesta ja turvapaikanhakijoiden vastaanotosta</i>) 493/1999	fi en	Section 26(1)
	Act on the Promotion of Integration (<i>Laki kotoutumisen edistämisestä</i>), 1386/2010	fi en	Sections 56(1), 58
	Act on the Reception of Asylum Seekers (<i>Laki kansainvälistä suojelua hakevan vastaanotosta</i>) 746/2011	fi	Sections 33, 39–42
	Bill of the Government on the Act on the Reception of Asylum Seekers and amendments of certain Acts connected to it (<i>Hallituksen esitys Eduskunnalle laeiksi kansainvälistä suojelua hakevan vastaanotosta ja eräiden siihen liittyvien lakien muuttamisesta</i>) 266/2010	fi	
	Decree on Fees and Compensations for the Representatives of Unaccompanied Children (<i>Valtioneuvoston asetus ilman huoltajaa olevan lapsen edustajalle maksettavasta palkkiosta ja kulukorvauksesta</i>) 15/2012	fi	
FR	Civil Code (<i>Code civil</i>)	fr en	Art. 375-5, 389-3, 395, 399, 411, 510, 511
	Code of criminal procedure (<i>Code de procédure pénale</i>)	fr	Art. R.53-1, R.53-2
	Code of Social Action and Families (<i>Code de l'action sociale et des familles</i>)	fr	Art. L.223-2, L.226-2-1
	Code of Entry and Stay of Foreigners and of Asylum (<i>Code de l'entrée et du séjour des étrangers et du droit d'asile</i> , CESEDA)	fr	Art. L.221-5, L-751-5
	Ministry of Justice (2005), Circular No. CIV/01/05 issued in application of decree No.°2003-841 of 2 September 2003 (<i>Circulaire n° CIV/01/05 prise en application du décret n° 2003-841 du 2 septembre 2003 relatif aux modalités de désignation et d'indemnisation des administrateurs ad hoc institués par l'article 17 de la loi n° 2002-305 du 4 mars 2002 relative à l'autorité parentale</i>)	fr	
HR	Family Act (<i>Obiteljski zakon</i>), Official Gazette (<i>Narodne novine</i>) Nos. 116/03, 17/04, 136/04, 107/07, 57/11 and 61/11	hr en	Art. 149–158, 167 (1), 187
	Protocol for the identification, protection and assistance to victims of trafficking in human beings, consolidated text (<i>Protokol za identifikaciju, pomoć i zaštitu žrtava trgovanja ljudima, pročišćeni tekst</i>)	hr	
	Protocol on the procedure during the voluntary return of victims of trafficking	hr	

HU	Act IV of 1952 on Marriage, Family and Guardianship (1952. évi IV. törvény a házasságról, a családról és a gyámságról)	hu	Art. 9, 98 (1)
	Act XXXI of 1997 on the Protection of Children and Guardianship Administration (1997. Évi XXXI. törvény a gyermekek védelméről és a gyámügyi igazgatásról)	hu	Art. 85 (4)
	Act CXCII of 2012 on the Taking Over of Certain Specialised Social and Child Protection Service Providers (2012. Évi CXCII. törvény egyes szakosított szociális és gyermekvédelmi szakellátási intézmények állami átvételéről és egyes törvények módosításáról)	hu	Art. 85
	Government Decree No. 331 of 2006 (XII.23.) on Tasks of Child Protection and Guardianship and Organization of the Guardianship Authority and its Scope (331/2006. (XII. 23.) Korm. rendelet a gyermekvédelmi és gyámügyi feladat- és hatáskörök ellátásáról, valamint a gyámhatóság szervezetéről és illetékességéről)	hu	
	Government Decree No. 316 of 2012 (XI.13.) on General Directorate of Social Affairs and Child Protection (316/2012. (XI. 13.) Korm. rendelet a Szociális és Gyermekvédelmi Főigazgatóságról)	hu	
	Government Decree No. 114 of 2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (114/2007. (V. 24.) Korm. rendelet a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról szóló 2007. évi II. törvény végrehajtásáról)	hu	
	Act LXXX of 2007 on Asylum (2007. évi LXXX. törvény a menedéjogról)	hu en	
IE	Child Care Act 1991	en	Section 3(2)(a)
	Health Act 2007	en	Section 8(1)
	Refugee Act 1996 (Asylum Procedures), Regulations 2011 (SI No. 52 of 2011)	en	
IT	Civil Code (<i>Codice civile</i>)	it	Art. 348, 371
	Presidential decree No. 616 of 24 July 1977	it	Art. 25 (1)
	Law No. 184/1983 of 4 May 1983, Right of a minor to family (<i>Diritto del minore ad una famiglia</i>)	it	Art. 2, 3 (2)
	Law Decree No. 286 of 25 July 1998, Consolidated text of provisions governing immigration and the status of foreigners	it	Art. 18
	Law No. 228 of 11 August 2003, Measures against human trafficking (<i>Misure contro la tratta di persone</i>)	it	Art. 13
LT	Civil Code (<i>Civilinis kodeksas</i>), No. VIII-1864, 18 July 2000	lt en	Art. 3.267, 3.271
	Law on Benefits for children (<i>Išmokų vaikams įstatymas</i>), No. I-621, 3 November 1994	lt en	
	Regulations of the organisation of the child's guardianship (<i>Vaiko globos organizavimo nuostatai</i>), No. 405, 28 August 2003	lt	
	Ministry of the Interior and Ministry of Social Security and Labour (2005), Order on the approval of the rules of providing accommodation to unaccompanied underage asylum-seekers at the Refugee Reception Centre (<i>LR Vidaus reikalų ministro ir LR Socialinės apsaugos ir darbo ministro įsakymas Dėl nelydimų nepilnamečių prieglobsčio prašytojų apgyvendinimo pabėgėlių priėmimo centre taisyklių patvirtinimo</i>), No. 1V-31/ A1-28, 2 February 2005	lt	



LU	Civil Code (<i>Code civil</i>)	fr	Art. 382–441
	Act of 29 August 2008 on Free movement of persons and immigration (<i>libre circulation des personnes et immigration</i>)	fr	
	Act of 25 June 2013 on Immigration and International Protection (coordinated text) (<i>Libre circulation des personnes – Immigration – Protection internationale</i>)	fr	
	Act of 9 April 2014 on Strengthening the rights of victims of trafficking in human beings (<i>renforçant le droit des victimes de la traite des êtres humains</i>)	fr	Art. 3
	Act of 8 September 1998 on the relations between the State and organisations working in the social, family and therapeutic fields (<i>relations entre l’Etat et les organismes œuvrant dans les domaines social, familial et thérapeutique</i>)	fr	
LV	The Civil Law (<i>Civillikums</i>), Official Journal, 20 February 1937, No. 41	lv en	Sections 234–315
	Protection of the Rights of the Child Law (<i>Bērnu tiesību aizsardzības likums</i>), Official Journal, 8 July 1998, No. 199/200	lv en	Section 35
	Law on Orphan’s Courts (<i>Bāriņtiesu likums</i>), Official Journal, 7 July 2006, No. 107	lv en	Section 5, Sections 25–31
	Cabinet Regulation No. 1037, adopted on 19 December 2006, “Regulations for the Operation of an Orphan’s Court” (<i>Bāriņtiesas darbības noteikumi</i>), Official Journal, 29 December 2006, No. 207	lv en	
	Cabinet Regulation No. 291, adopted on 3 June 2003, “Requirements for Social Service Providers” (<i>Prasības sociālo pakalpojumu sniedzējiem</i>), Official Journal, 6 June 2006, No. 85	lv en	Art. 10
	Immigration Law (<i>Imigrācijas likums</i>), Official Journal, 20 November 2002, No. 169	lv en	
	Asylum Law (<i>Patvēruma likums</i>), Official Journal, 30 June 2009, No. 100	lv en	Section 6
MT	Cabinet Regulation No. 707, adopted on 16 April 2003, “Procedures by which Alien Minors Enter and Reside in the Republic of Latvia Unaccompanied by Parents or Guardians” (<i>Kārtība, kādā Latvijas Republikā ieceļo un uzturas nepilngadīgi ārzemnieki bez vecāku vai aizbildņu pavadības</i>), Official Journal, 19 December 2003, No. 180	lv en	Art. 16
	Civil Code, Chapter 16 of the Laws of Malta, 11 February 1870 and subsequent amendments	en	Title V (Courts)
	Children and Young Persons (Care Orders) Act, Chapter 285 of the Laws of Malta, 8 August 1980 and subsequent amendments	en	
NL	Refugees Act, Chapter 420 of the Laws of Malta, 1 October 2001 and subsequent amendments	en	
	Civil Code, Book 1 (<i>Burgerlijk Wetboek, Boek 1</i>)	nl en	Art. 1:241, 1:247, 1:253f, 1:303, 1:336
	Youth Care Act (<i>Wet op de jeugdzorg</i>)	nl	Art. 47, 68.2
	Ministry of Justice (<i>Ministerie van Justitie</i>) (2011), Executive Order Youth Care Act (<i>Uitvoeringsbesluit Wet op de Jeugdzorg</i>)		Art. 1h, 44
Ministry of Justice (2005), Decision on the acceptance of the legal body in Civil Code Book 1 (<i>Besluit aanvaarding rechtspersoon Burgerlijk Wetboek Boek 1</i>), No. 5328240/04/DJJ	nl		

PL	Code of Administrative Procedure (<i>Kodeks postępowania administracyjnego, Dz.U. 1960 nr 30 poz. 168</i>), 14 June 1960	pl	Art. 570
	Code of Civil Procedure (<i>Kodeks postępowania cywilnego, Dz.U. 1964 nr 43 poz. 296</i>), 1 December 1964	pl	
	Family and Guardianship Code (<i>Kodeks rodzinny i opiekuńczy, Dz.U. 1964 nr 9 poz. 59</i>), 25 February 1964	pl	Art. 145, 148, 178 (2)
	Law on Family Support and the System of Substitute Care (<i>Ustawa o wspieraniu rodziny i systemie pieczy zastępczej, Dz.U. 2011 nr 149 poz. 887</i>), 9 June 2011	pl	
	Law on Granting Protection to Foreigners within the Territory of the Republic of Poland (<i>Ustawa o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej, Dz.U. 2003 nr 128 poz. 1176</i>), 13 June 2003	pl en	
PT	Law 147/99 for Promoting and Protecting Children and Young People at Risk (<i>Lei n.º 147/99 de Promoção e Protecção de Crianças e Jovens em Perigo</i>), Government Gazette, 1 st Series-A No. 204, 1 September 1999 (<i>Diário da República, 1ª Série-A, N.º 204 de 1 de setembro de 1999</i>)	pt	Art. 49-51, 97
	Law 23/2007 on the entry, permanence, exit and removal of foreigners into and out of national territory (Aliens Act) (<i>Lei n.º 23/2007 Aprova o regime jurídico de entrada, permanência, saída e afastamento de estrangeiros do território nacional</i>), Government Gazette, 1 st Series, No. 127, 4 July 2007 (<i>Diário da República, 1ª Série, N.º 127 de 4 de Julho de 2007</i>)	pt en	Art. 114 (4)
	Law 27/2008 (<i>Lei n.º 27/2008</i>) (Asylum Act), Government Gazette, 1 st Series No. 124, 30 June 2008 (<i>Diário da República, 1ª Série, N.º 124 de 30 de junho de 2008</i>)	pt en	
RO	Law 287/2009 on the Civil Code (<i>Legea 287/2009 privind Codul Civil</i>)	ro	Art. 151 (1)
	Law 272/2004 on the protection and promotion of children's rights (<i>Legea 272/2004 privind protecția și promovarea drepturilor copilului</i>) including amendments by Law 257/2013 on the modification and completion of Law 272/2004	ro en	Art. 64 (3)
	Governmental Decision 1434/2004 on the attributions and organisation and functioning regulations of the General Direction for Social Assistance and Child Protection (<i>Hotărârea Guvernului 1434/2004 privind atribuțiile și Regulamentul-cadru de organizare și funcționare a Direcției generale de asistență socială și protecția copilului</i>)	ro	Art. 2-3
	Governmental Ordinance 194/2002 on the legal status of foreigners in Romania (<i>Ordonanța de Guvern 194/2002 privind regimul strainilor in Romania</i>)	ro en	Art. 131
	Law 122/2006 on asylum in Romania (<i>Legea 122/2006 privind azilul in Romania</i>)	ro en	
	Law 678/2001 on the prevention and combating of trafficking in persons (<i>Legea 678/2001 privind prevenirea și combaterea traficului de persoane</i>)	ro	
	Decision 49/2011 of the Government for the approval of the Framework methodology on the use of a multidisciplinary team and network for the prevention and intervention in situations of violence against children and domestic violence [...] (<i>Hotărâre de Guvern 49/2011 pentru aprobarea Metodologiei-cadru privind prevenirea și intervenția în echipă multidisciplinară și în rețea în situațiile de violență asupra copilului și de violență în familie [...]</i>)	ro	



SE	The Children and Parents Code 1949:381 (<i>Föräldrabalk, SFS 1949:381</i>), Stockholm: Justitiedepartementet	se	
	The Act on Legal Guardian for Unaccompanied Children 2005:429 (<i>lag om god man för ensamkommande barn, SFS 2005:429</i>)	se	Art. 3
SI	The Law on marriage and family relations (<i>Zakon o zakonski zvezi in družinskih razmerjih, ZZZDR</i>), 4 June 1976, and subsequent modifications (Official Gazette No. 15/1976, 4 June 1976, and subsequent modifications)	sl en	Art. 178–202
	Aliens act (<i>Zakon o tujcih, ZTuj-2</i>), 15 June 2011 (Official Gazette No. 50/2011, 27 June 2011)	sl en	
	International protection act (<i>Zakon o mednarodni zaščiti, ZMZ</i>), 21 November 2007, and subsequent modifications (Official Gazette No. 111/2007, 5 December 2007, and subsequent modifications)	sl en	Art. 16a (2), (3)
SK	Act No. 99/1963 Coll., Code of Civil Procedure (<i>Predpis č. 99/1963 Zb., Občiansky súdny poriadok</i>), 1 April 1964	sk	Art. 181
	Act No. 36/2005 Coll. on Family (<i>Predpis č. 36/2005 Z. z., Zákon o rodine a o zmene a doplnení niektorých zákonov</i>), 11 April 2005	sk	Art. 58, 60, 61
	Act No. 305/2005 Coll. on Social and Legal protection of Children and Social Custody (<i>Predpis č. 305/2005 Z. z., Zákon o sociálnoprávnej ochrane detí a o sociálnej kuratele a o zmene a doplnení niektorých zákonov</i>), 1 September 2005	sk	Art. 29, Section 1–4
UK	Children Act 1989	en	Sections 20, 22 (3), 31, 33 (3)
	Children Act 2004	en	Section 11
	Children (Scotland) Act 1995	en	Section 25
	Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015	en	
	Consolidated Immigration Rules (as at August 2013)	en	Part 11, 352

Notes: Texts of the legislation in languages other than the original one are often unofficial translation and do not always contain the latest amendments of the law.

All hyperlinks were accessed on 5 March 2015.

This is a list with key legal instruments and not an exhaustive list of relevant national legislation.

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HELPING TO MAKE FUNDAMENTAL RIGHTS A REALITY FOR EVERYONE IN THE EUROPEAN UNION

Guardians are a key element of a protection system for children who are temporarily or permanently deprived of their family environment and cannot have their interests represented by their parents. There are great disparities between the types of guardianship provided to children in and within European Union (EU) Member States. To support Member States in addressing the challenges identified, FRA, in cooperation with the European Commission, developed a handbook, published in 2014, aiming to contribute to the protection of child victims and to the prevention of child trafficking.

This report explores the key features of guardianship systems put in place to cater for the needs of all children in need of protection, including child victims and those at risk of becoming victims of trafficking in human beings or of other forms of exploitation. The research covers four specific areas, namely the type of guardianship systems in place, the profile of appointed guardians, the appointment procedures, and the tasks of the guardians. It looks at how existing systems respond to the particular needs and vulnerabilities of presumed or identified child victims, or children at risk of trafficking and exploitation, such as unaccompanied children. This comparative report helps to understand better the strengths and weaknesses of national guardianship systems and may also assist decision makers to take measures to promote the effective protection of all children.

