



The Legal Situation of the Child in the European Union at the Stage of Qualification, Reception, and Procedure during the Granting of International Protection

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Abstract. Foreigners seeking international protection in the European Union constitute a broad group encompassing a diverse range of individuals with varied reasons for migrating. Their objective is not solely the pursuit but rather the attainment and reception of international protection within the European Union. Individual characteristics serve as the primary and fundamental distinguishing factor behind the reasons for migration, enabling the categorisation of foreigners seeking international protection within the European Union. The categories include persons with disabilities, older adults, pregnant women, single parents raising minor children, victims of human trafficking, individuals suffering from serious illnesses, those with mental disorders, torture survivors, rape survivors, and people who have endured other serious forms of psychological, physical, or sexual violence. Although mere examples, these categories have significant legal importance, as EU legal norms consider specific factual circumstances. EU law adjusts legal status during the stages of reception, qualification, and procedure to the factual situation justified by legally defined individual characteristics of the foreigner. However, the law does not explicitly mention the aforementioned categories of foreigners seeking international protection, which are prioritised and treated with exceptional attention to detail and legal significance in legal norms and literature. These categories include children and unaccompanied children. This study analyses the legal situation of children and unaccompanied children at each legally defined stage of seeking and granting international protection in the European Union, namely, reception, qualification, and procedure. In each stage, the legal situation of children and unaccompanied children differs from the classical or standard legal situation of foreigners belonging to other specially treated categories of foreigners or foreigners who do not belong to such categories. This study analyses this difference and the legal foundations taking into

account the special situation of children and unaccompanied children. Based on the findings, we offer observations and recommendations.

Keywords: children, asylum, refugee, subsidiary protection, international protection, European Union

1. Introduction

The European Union (EU) adopts normative and legislative actions concerning policies on border checks, asylum, and immigration as part of the legal norms of the Area of Freedom, Security and Justice (AFSJ). In accordance with Article 4(2)(j) of the Treaty on the Functioning of the European Union (TFEU), the AFSJ constitutes shared competences between the EU and its Member States. From the perspective of EU primary law, this holds significant legal importance, as in this case, regulations must comply not only with the standards arising from the principle of conferral and the principle of proportionality but also with those arising from the principle of subsidiarity. These principles are defined in Article 5 of the Treaty on European Union.¹

In accordance with Article 78(1) of the TFEU, the EU should develop a common policy on asylum, subsidiary protection, and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. Importantly, this policy must be in accordance with the Geneva Convention of 28 July 1951² and the Protocol of 31 January 1967 relating to the status of refugees³ and other relevant treaties.⁴ However, according to Article 78(2) of the TFEU, for the purposes of article 78(1), the EU should adopt measures for a common European asylum system comprising: a uniform status of asylum for nationals of third countries, valid throughout the EU; a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, would be in need of international protection; a common system of temporary protection for displaced persons in the event of a massive inflow; common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;

1 EUR-Lex (2012), 13–390. For example, ‘Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.’

2 Convention Relating to the Status of Refugees Geneva, 1951, p. 137.

3 Protocol Relating to the Status of Refugees New York, 1967, p. 267.

4 An example is the Convention for the Protection of Human Rights and Fundamental Freedoms.

criteria and mechanisms for determining which EU Member State is responsible for considering an application for asylum or subsidiary protection; standards concerning the conditions for the reception of applicants for asylum or subsidiary protection; and partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

Based on the aforementioned primary legal provisions contained in EU law, a so-called “triad of directives” concerning the broad process of granting international protection in the EU has been adopted. The literature emphasises that these directives mainly determine the legal situation of foreigners seeking international protection in the EU, including children and unaccompanied children. First, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 lays down standards for the reception of applicants for international protection (Reception Directive).⁵ The purpose of this rule, according to its Article 1, is to lay down standards for the reception of applicants for international protection in Member States.⁶ Second, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 concerns 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 (Qualification Directive).⁷ The aim of this rule, based on its Article 1, is to lay down 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.⁸ Third, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 concerns common procedures for granting and withdrawing international protection (Procedural Directive).⁹ According to Article 1 of this directive, the aim is to establish common procedures for granting and withdrawing international protection pursuant to the Qualification Directive.¹⁰ From these three directives, one can interpret the three stages experienced by a foreigner seeking international protection in the EU, including children and unaccompanied children. These stages are: reception, qualification, and procedure. In each stage, the so-called triad of directives contains special legal provisions taking into account the particular situation of children and unaccompanied children.

5 EUR-Lex, 2013a, pp. 96–116.

6 Peek and Tsourdi, 2016a, pp. 1382–1478, 2016b, pp. 1381–1477; Barry, 2021, pp. 223–242.

7 EUR-Lex, 2011, pp. 9–26.

8 Aldea, 2018, pp. 141–148; Eaton, 2012, pp. 765–792; Tsourdi, 2015, pp. 240–271.

9 EUR-Lex, 2013, pp. 60–95.

10 Vedsted-Hansen, 2016, pp. 1285–1381; Widdershoven, 2019, pp. 5–34; Costello and Hancox, 2016, pp. 375–445; Spalding, 2014, pp. 483–487.

At this point, we should note that in 2020 the European Commission submitted new legislative proposals in the field of issues regulated by the above directives.¹¹ However, by the time of writing, these proposals had not yet been adopted or entered into force, and thus had not become hard EU law. For this reason, this study does not consider them further.

2. Qualification Stage

The Qualification Directive contains a series of material legal provisions that concern not only the qualification criteria themselves (separately for refugees and persons eligible for subsidiary protection) but also relate to the assessment of facts and circumstances, refugee status, subsidiary protection status, the content of international protection, and administrative cooperation. As indicated in recital 13 of the Qualification Directive,

The approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movement of applicants for international protection between Member States, where such movement is purely caused by differences in legal frameworks.

The essence of the qualification stage is to determine whether a foreigner seeking international protection in the EU meets the legal conditions enabling the granting of international protection to that foreigner. In accordance with Article 2(a) of the Qualification Directive, ‘international protection means refugee status and subsidiary protection status as defined in points (e) and (g)’.

Therefore, first, in accordance with Article 2(e) of the Qualification Directive, ‘refugee status means the recognition by a Member State of a third-country national or a stateless person as a refugee’. Additionally, complementing this is the definition contained in Article 2(d) of the Qualification Directive, according to which

refugee means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.

11 New Pact on Migration and Asylum.

In Article 12 of the Qualification Directive, reasons for exclusion from the possibility of obtaining refugee status are specified.

Second, according to Article 2(g) of the Qualification Directive, ‘subsidiary protection status means the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection’. In this case, complementing this definition is the concept of ‘person eligible for subsidiary protection’. According to Article 2(f) of the Qualification Directive, a

person eligible for subsidiary protection means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

In Article 17(1) and (2) of the Qualification Directive, the grounds for exclusion from the possibility of receiving subsidiary protection are specified.

This means that, initially, the eligibility of a foreigner seeking international protection in the EU for refugee status is checked first.¹² If found to be ineligible, the eligibility of a foreigner seeking international protection in the EU for subsidiary protection status is checked.¹³ If the person is again found to be ineligible, a decision refusing to grant international protection is issued. The assessment at hand constitutes a single process, as the foreigner in this context submits a single application (the application for international protection).

The Qualification Directive contains legal provisions taking into account the particular situation of children and unaccompanied children. First, it is appropriate to mention the provisions of the Qualification Directive, which are more general in nature and concern the definitions of children and unaccompanied children, and second, constitute a directive to EU legislators to ensure the best interests of the child. Therefore, according to Article 2(k) of the Qualification Directive, ‘minor means a third-country national or stateless person below the age of 18 years’, and, according to Article 2(l) of the Qualification Directive,

unaccompanied minor means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such a person;

12 Hathaway, 1991, pp. 113–131; Goodwin-Gill, 2013, pp. 651–666.

13 Battjes, 2014, pp. 541–561; Piotrowicz and Eck, 2004, pp. 107–138.

it includes a minor who is left unaccompanied after he or she has entered the territory of the Member States.

The Qualification Directive, in this context, uses the term ‘minor’, which, considering the content of the presented definitions, semantically corresponds fully to the term ‘child’ understood according to linguistic rules but in a narrow sense. This is because in other parts of the Qualification Directive, the term ‘child’ or ‘children’ is used, and sometimes an appropriate annotation is made regarding the minority of these children. An argument in favour of using such terminology is that the word ‘children’ may be understood too broadly and could include adult children, thereby encompassing descendants in the first line without age limitations. Most likely for this reason, EU legislators decided to use the term ‘minor’ to emphasise that it refers exclusively to under-age children. An example here is the content of Article 2(j)(2) of the Qualification Directive, according to which

family members means, in so far as the family already existed in the country of origin, the following members of the family of the beneficiary of international protection who are present in the same Member State in relation to the application for international protection: the minor children of the couples referred to in the first indent or of the beneficiary of international protection, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law.

However, concerning the aforementioned directive from EU legislators to ensure the best interests of the child, it is necessary to refer to recitals 18 and 19 of the Qualification Directive. According to recital 18 of the Qualification Directive,

The ‘best interests of the child’ should be a primary consideration of Member States when implementing this Directive, in line with the 1989 United Nations Convention on the Rights of the Child. In assessing the best interests of the child, Member States should in particular take due account of the principle of family unity, the minor’s well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity.

Additionally, according to recital 19 of the same directive, ‘It is necessary to broaden the notion of family members, taking into account the different particular circumstances of dependency and the special attention to be paid to the best interests of the child.’

The Qualification Directive also contains detailed provisions altering the procedural rules concerning children and unaccompanied children or safeguarding their best interests while considering their specific situation. A prime example of such regulation is Article 31 of the Qualification Directive, which is entirely dedicated to unaccompanied children. According to this, first,

as soon as possible after the granting of international protection Member States shall take the necessary measures to ensure the representation of unaccompanied minors by a legal guardian or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or court order.

Second, 'Member States shall ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments.' Third, 'Member States shall ensure that unaccompanied minors are placed either: (a) with adult relatives; or (b) with a foster family; or (c) in centres specialised in accommodation for minors; or (d) in other accommodation suitable for minors.' In addition, 'In this context, the views of the child shall be taken into account in accordance with his or her age and degree of maturity.' Fourth,

As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

Fifth,

If an unaccompanied minor is granted international protection and the tracing of his or her family members has not already started, Member States shall start tracing them as soon as possible after the granting of international protection, whilst protecting the minor's best interests. If the tracing has already started, Member States shall continue the tracing process where appropriate. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis.

Sixth, ‘Those working with unaccompanied minors shall have had and continue to receive appropriate training concerning their needs.’ It seems that this is a solid legal basis, particularly attentive to the situation of unaccompanied children, who require such exceptional care and assistance. It is exceptionally rare for an unaccompanied child to seek international protection in a Member State.¹⁴ The EU legislation aptly devotes considerable attention to this scenario by dedicating an entire separate article, Article 31 of the Qualification Directive, to unaccompanied children. In summary, the aim of this legal norm is to swiftly designate a person or entity to take care of the unaccompanied child. In this context, the EU legislation requires efforts to restore care primarily to parents and, if this is not possible, to other family members. Institutional care should be utilised only when no other option is available. Importantly, throughout the process of seeking care for the unaccompanied child, their best interests should be taken into account, as evidenced by directives not to separate siblings or to minimise changes in their place of residence. Another example of a legal norm concerning children is Article 9 of the Qualification Directive, which defines acts of persecution and provides examples of their forms, including acts of a gender- or child-specific nature.¹⁵ This holds significant legal importance, as it provides a clear legal basis to qualify crimes targeting children as acts of persecution, which in turn is a crucial milestone in the process of qualifying for refugee status. Another example is Article 20 of the Qualification Directive, which opens an important legal chapter of the Qualification Directive concerning the scope of international protection. Essentially, it defines the rights of a foreigner granted international protection in the receiving country. In this context, Article 20 of the Qualification Directive stipulates that

When implementing this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

It also states that ‘The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors.’ This provides evidence that the EU legislation pays special attention not only to introducing regulations changing the rules for granting international protection to children and unaccompanied children but generally to securing the best interests of the child. However, importantly, this provision unequivocally

14 Natania, 2018, pp. 1–14; Hadzibulic, 2020, pp. 49–54; Chak, 2018, pp. 7–28.

15 Bhabha and Schmidt, 2008, pp. 126–138; Brumar, 2009, pp. 250–258.

shifts the responsibility for implementing this demand to the EU Member States. This seems appropriate, as it occurs within the framework of an EU directive. Undoubtedly, the EU Member States remain responsible for the correct, effective, and thoughtful implementation of EU directives to achieve their objectives.¹⁶ In the context of the discussed issue, Article 27 of the Qualification Directive is also significant. On the one hand, it states that ‘Member States shall grant full access to the education system to all minors granted international protection, under the same conditions as nationals.’ On the other hand, it stipulates that ‘Member States shall allow adults granted international protection access to the general education system, further training or retraining, under the same conditions as third-country nationals legally resident.’ This example clearly demonstrates that EU legislators, by considering the particular situation of children and unaccompanied children, decided to introduce a legal provision guaranteeing them broader access to education. It is noteworthy that in the first case, the wording ‘under the same conditions as nationals’ is used as a model, while in the second case, it is ‘under the same conditions as third-country nationals legally resident’.

The discussion in this section leads to a clear conclusion that, within the qualification stage, foreigners seeking international protection in the EU who are children or unaccompanied children can benefit from dedicated legal norms aimed at protecting their best interests. In other words, these legal norms take into account their exceptional situation and specific needs.

3. Reception Stage

The Reception Directive contains a set of legal provisions concerning the conditions for receiving foreigners seeking international protection in the EU. It is important to note that these provisions apply to foreigners who have requested such protection and have not yet received a decision on their application. In other words, the Reception Directive applies to foreigners who have arrived in an EU Member State and covers them until they receive refugee status, subsidiary protection status, or a negative decision. The reception phase involves all legal provisions governing the conditions for accommodating foreigners seeking international protection in the EU. Essentially, these legal norms carry an administrative nature, dictating the foreigner’s (applicant for international protection) place of residence, eligibility for specific material benefits, and access to employment and education. More simply, the criteria for the reception stage significantly impact the quality of life for foreigners residing in EU Member States. Additionally, according to recital 12 of the Reception Directive, ‘the harmonisation of conditions for the reception of applicants should help to limit

16 Versluis, 2004.

the secondary movements of applicants influenced by the variety of conditions for their reception'. This appears to be another important aspect of the Reception Directive, albeit less so than ensuring dignified reception conditions for foreigners seeking international protection in the EU.

The Reception Directive, like the Qualification Directive, includes legal provisions focused on the particular situation of children and unaccompanied children. In terms of general legal norms, the Reception Directive also contains definitions of the notions of 'minor' and 'unaccompanied minor'. Regardless of the call for proper legislation,¹⁷ EU legislators decided to adopt definitions identical to those in the Qualification Directive. While it is commendable that these definitions are the same, this move could be unnecessary. In this regard, a simple reference to the relevant provisions of the Qualification Directive would have sufficed. Referring to definitions adopted in another EU rule arises from the specificity of EU legislation, wherein each secondary rule generally contains its own conceptual framework operating within that rule. By implicitly adopting the practice common in national law, where once a term is defined in one rule, there is no need to repeat it, arguments could ensue in EU law that if EU legislators wanted a term to be understood in the same way as in another secondary rule, they should have explicitly decided so, as indicated by EU legislative practice. Such arguments could lead to numerous and serious interpretational discrepancies. Therefore, including a reference to the definitions adopted in the Qualification Directive could be evaluated positively. Furthermore, it is worth referring to recitals 9 and 22 of the Reception Directive. According to recital 9 of the Reception Directive,

In applying this Directive, Member States should seek to ensure full compliance with the principles of the best interests of the child and of family unity, in accordance with the Charter of Fundamental Rights of the European Union, the 1989 United Nations Convention on the Rights of the Child, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, respectively.

According to recital 22 of the Reception Directive,

When deciding on housing arrangements, Member States should take due account of the best interests of the child, as well as of the particular circumstances of any applicant who is dependent on family members or other close relatives such as unmarried minor siblings already present in the Member State.

17 Zaleśny, 2009, pp. 11–47; Bułajewski, 2015, pp. 31–42; Drozdowski, 2021, pp. 40–46.

These provisions are similar to recitals 18 and 19 of the Qualification Directive. The goal appears to be identical, as in both cases the primary aim is to ensure compliance with the principle of the child's best interests.

The Reception Directive also includes detailed provisions concerning children and unaccompanied children. A prime example of such specific regulations addressing the situation of children and unaccompanied children is Article 21 of the Reception Directive, which opens an essential chapter of this legal act concerning persons in need of special care.¹⁸ According to this provision,

Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive.

The mechanism of this legal norm is very similar to the mechanism of Article 20 of the Qualification Directive. Here too, there is a shift of responsibility (consistent with the nature of EU directives) for the implementation of this directive. Additionally, key examples of legal norms dedicated to children and unaccompanied children are Articles 23 and 24 of the Reception Directive. The first of these provisions concerns minors, while the second concerns unaccompanied minors. According to Article 23 of the Reception Directive, first,

The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors. Member States shall ensure a standard of living adequate for the minor's physical, mental, spiritual, moral and social development.

Second,

In assessing the best interests of the child, Member States shall in particular take due account of the following factors: (a) family reunification possibilities; (b) the minor's well-being and social development, taking into particular consideration the minor's background; (c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking; (d) the views of the minor in accordance with his or her age and maturity.

¹⁸ Morawa, 2003, pp. 139–155.

Third, 'Member States shall ensure that minors have access to leisure activities, including play and recreational activities appropriate to their age within the premises and accommodation centers referred to in Article 18(1)(a) and (b) and to open-air activities.' Fourth,

Member States shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counseling is provided when needed.

Fifth, 'Member States shall ensure that minor children of applicants or applicants who are minors are lodged with their parents, their unmarried minor siblings or with the adult responsible for them whether by law or by the practice of the Member State concerned, provided it is in the best interests of the minors concerned.' Conversely, according to Article 24 of the Reception Directive, first,

Member States shall as soon as possible take measures to ensure that a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive. The unaccompanied minor shall be informed immediately of the appointment of the representative. The representative shall perform his or her duties in accordance with the principle of the best interests of the child, as prescribed in Article 23(2), and shall have the necessary expertise to that end. In order to ensure the minor's well-being and social development referred to in Article 23(2)(b), the person acting as representative shall be changed only when necessary. Organizations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives. Regular assessments shall be made by the appropriate authorities, including as regards the availability of the necessary means for representing the unaccompanied minor.

Second,

Unaccompanied minors who make an application for international protection shall, from the moment they are admitted to the territory until the moment when they are obliged to leave the Member State in which the application for international protection was made or is being examined, be placed: (a) with adult relatives; (b) with a foster family; (c) in accommodation centers with special provisions for minors; (d) in other accommodation

suitable for minors. Member States may place unaccompanied minors aged 16 or over in accommodation centers for adult applicants, if it is in their best interests, as prescribed in Article 23(2). As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

Third,

Member States shall start tracing the members of the unaccompanied minor's family, where necessary with the assistance of international or other relevant organizations, as soon as possible after an application for international protection is made, whilst protecting his or her best interests. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis, so as to avoid jeopardizing their safety.

Fourth,

Those working with unaccompanied minors shall have had and shall continue to receive appropriate training concerning their needs, and shall be bound by the confidentiality rules provided for in national law, in relation to any information they obtain in the course of their work.

Additionally, complementary to Articles 23 and 24 of the Reception Directive, Article 11(2) and (3) of the Reception Directive concerns the detention of vulnerable persons and of applicants with special reception needs. According to the cited provisions,

Minors shall be detained only as a measure of last resort and after it has been established that other less coercive alternative measures cannot be applied effectively. Such detention shall be for the shortest period of time, and all efforts shall be made to release the detained minors and place them in accommodation suitable for minors. The minor's best interests, as prescribed in Article 23(2), shall be a primary consideration for Member States. Where minors are detained, they shall have the possibility to engage in leisure activities, including play and recreational activities appropriate to their age.

Additionally,

Unaccompanied minors shall be detained only in exceptional circumstances. All efforts shall be made to release the detained unaccompanied minor as soon as possible. Unaccompanied minors shall never be detained in prison accommodation. As far as possible, unaccompanied minors shall be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age. Where unaccompanied minors are detained, Member States shall ensure that they are accommodated separately from adults.

It is easy to observe that Articles 23, 24, and 11 of the Reception Directive complement each other, operating to protect and implement the best interests of the child.¹⁹ These regulations serve as a guarantee for children, including unaccompanied ones, that, on the one hand, their rights will be respected, and, on the other hand, their particular situation will be taken into account, and appropriate legal privileges will apply. These legal privileges aim, as far as possible, to counteract threats associated with harm to the best interests of the child by adjusting legal realities within the framework of EU law, which directly influences how the law operates in EU Member States. For instance, without Article 23 of the Reception Directive, theoretically, actions taken to safeguard the interests of the child could overlook whether the child is a victim of human trafficking.²⁰ Without Article 24 of the Reception Directive, theoretically, it would be possible not to immediately inform an unaccompanied child about the appointment of a representative for them, or to appoint a representative whose interests conflict or may conflict with those of the unaccompanied minor. Similarly, without Article 11 of the Reception Directive, theoretically, it would be possible to detain an unaccompanied child in prison. These are just some examples, but they illustrate how the aforementioned legal privileges work and what their differences relative to the standard provisions of the Reception Directive are.

These observations lead to the conclusion that EU legislators, within the reception phase, introduced legal provisions aimed at considering the special situation and needs of children, including unaccompanied children. The level and style of these legal norms, in principle, refer to and remain in line with the relevant standards contained in the Qualification Directive.

19 For the best child interest principle, see: Judgment of the Court of Justice of EU (Tenth Chamber) of 11 March 2021, *M. A. v État belge* (ECLI:EU:C:2021:197); Judgment of the Court of Justice of EU (Grand Chamber) of 10 May 2017, *H.C. Chavez-Vilchez and Others v Raad van bestuur van de Sociale verzekeringsbank and Others* (ECLI:EU:C:2017:354).

20 Fong and Cardoso, 2010, pp. 311–316.

4. Procedural Stage

The procedural stage involves formal regulations that facilitate the application of the substantive legal principles laid out in the Qualification Directive. The relationship between the elements of this stage and those of the qualification stage can be illustrated as the traditional connection between substantive and procedural laws governing the same subject matter (e.g. civil matters). Thus, it can be compared to the relationship between the civil code and civil procedure code. The Procedural Directive, comprising formal regulations, sets out procedures for granting international protection in the EU and specifies the rights and duties of the parties engaged in such proceedings. Additionally, in the context of the procedural stage, the EU legislation aims to implement the concept of a unified procedure, as clearly emphasised in recital 11 of the Procedural Directive. Also important in this context is recital 12 of the Procedural Directive, which indicates that the main objective of this norm is expressly indicated, as follows: ‘The main objective of this Directive is to further develop the standards for procedures in Member States for granting and withdrawing international protection with a view to establishing a common asylum procedure in the Union.’ An argument in favour of introducing a unified asylum procedure²¹ throughout the entire EU is indicated by recital 13 of the Procedural Directive. It emphasises that

The approximation of rules on the procedures for granting and withdrawing international protection should help to limit the secondary movements of applicants for international protection between Member States, where such movements would be caused by differences in legal frameworks, and to create equivalent conditions for the application of Directive 2011/95/EU in Member States.

This is exactly the same argument presented by the EU legislation in the context of the qualification stage (recital 13 of the Qualification Directive) and the reception stage (recital 12 of the Reception Directive).

The Procedural Directive, just like the Qualification Directive and the Reception Directive, contains legal provisions addressing – and sensitive to – the specific situation and needs of children and unaccompanied children. In terms of general regulations, it is worth emphasising, first, that the Procedural Directive also includes a definition of a minor and an unaccompanied minor. The definition of a minor is identical to that in the Qualification Directive and the Reception Directive. However, the definition of an unaccompanied minor refers to the provisions of the relevant article of the Qualification Directive (‘unaccompanied minor means an unaccompanied minor as defined in Article

21 Bojenko-Izdebska, 2016, pp. 43–56; Schittenhelm, 2019, pp. 229–244.

2(l) of Directive 2011/95/EU'). On the side-lines and in the context of earlier considerations related to the duplication of identical definitions, as seen in this case, EU legislators opted to use the mechanism of referral. This could have been applied successfully in other instances of defining not only an unaccompanied minor but also a minor. Another example of general legal norm is found in recital 33 of the Procedural Directive, according to which

The best interests of the child should be a primary consideration of Member States when applying this Directive, in accordance with the Charter of Fundamental Rights of the European Union (the Charter) and the 1989 United Nations Convention on the Rights of the Child. In assessing the best interest of the child, Member States should in particular take due account of the minor's well-being and social development, including his or her background.

This is undoubtedly a reason similar to recitals 9 and 22 of the Reception Directive and recitals 18 and 19 of the Qualification Directive. The primary goal of these recitals is to instruct the best possible protection of the child's best interests and the fullest implementation of the principle of the child's best interests.

The procedural directive also contains specific provisions taking into account the particular situation of children and unaccompanied children. A prime example of such legal norm is Article 7(3) of the Procedural Directive, which pertains to applications made on behalf of dependants or minors. According to this provision,

Member States shall ensure that a minor has the right to make an application for international protection either on his or her own behalf, if he or she has the legal capacity to act in procedures according to the law of the Member State concerned, or through his or her parents or other adult family members, or an adult responsible for him or her, whether by law or by the practice of the Member State concerned, or through a representative.

This rule strongly emphasises that a child or unaccompanied child is not an object but a subject of the procedure for granting international protection in the EU, and, in some cases, this subject should be able to submit an application for such protection on their own behalf. The criterion here is generally the child's capacity to perform legal acts.²² It is not specified here whether this capacity refers to full or limited legal capacity. It seems that EU legislators, respecting the diversity of EU Member States, intended to leave this decision up to them, as

22 Varney, 2017, pp. 493–519; Bhailís, 2018, pp. 45–49.

clearly emphasised in Article 7(5) of the Procedural Directive. According to this provision,

Member States may determine in national legislation: (a) the cases in which a minor can make an application on his or her own behalf; (b) the cases in which the application of an unaccompanied minor has to be lodged by a representative as provided for in Article 25(1)(a); (c) the cases in which the lodging of an application for international protection is deemed to constitute also the lodging of an application for international protection for any unmarried minor.

Article 7(4) of the Procedural Directive is also noteworthy; it states,

Member States shall ensure that the appropriate bodies referred to in Article 10 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals have the right to lodge an application for international protection on behalf of an unaccompanied minor if, on the basis of an individual assessment of his or her personal situation, those bodies are of the opinion that the minor may have protection needs pursuant to Directive 2011/95/EU.

This provision reflects special concern for unaccompanied children who cannot rely on adult mentoring. If an unaccompanied child, for some reason, does not submit an application for international protection, the appropriate authorities have the right to do so on behalf of the unaccompanied child.²³ This seems to be the meaning of Article 7(4) of the Procedural Directive. However, a flagship example of a rule relating exclusively to unaccompanied minors as a more vulnerable category is Article 25 of the Procedural Directive. According to this provision, first and foremost

With respect to all procedures provided for in this Directive and without prejudice to the provisions of Articles 14 to 17, Member States shall: (a) take measures as soon as possible to ensure that a representative represents and assists the unaccompanied minor to enable him or her to benefit from the rights and comply with the obligations provided for in this Directive. The unaccompanied minor shall be informed immediately of the appointment of a representative. The representative shall perform his or her duties in accordance with the principle of the best interests of the child and shall have the necessary expertise to that end. The person acting

23 Vannelli, 2022; Warren and York, 2014.

as representative shall be changed only when necessary. Organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives. The representative may also be the representative referred to in Directive 2013/33/EU; (b) ensure that the representative is given the opportunity to inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, how to prepare himself or herself for the personal interview. Member States shall ensure that a representative and/or a legal adviser or other counsellor admitted or permitted as such under national law are present at that interview and have an opportunity to ask questions or make comments, within the framework set by the person who conducts the interview.

Furthermore, ‘Member States may require the presence of the unaccompanied minor at the personal interview, even if the representative is present.’ Second, ‘Member States may refrain from appointing a representative where the unaccompanied minor will in all likelihood reach the age of 18 before a decision at first instance is taken.’ Third,

Member States shall ensure that: (a) if an unaccompanied minor has a personal interview on his or her application for international protection as referred to in Articles 14 to 17 and 34, that interview is conducted by a person who has the necessary knowledge of the special needs of minors; (b) an official with the necessary knowledge of the special needs of minors prepares the decision by the determining authority on the application of an unaccompanied minor.

Fourth, ‘Unaccompanied minors and their representatives shall be provided, free of charge, with legal and procedural information as referred to in Article 19 also in the procedures for the withdrawal of international protection provided for in Chapter IV.’ Fifth,

Member States may use medical examinations to determine the age of unaccompanied minors within the framework of the examination of an application for international protection where, following general statements or other relevant indications, Member States have doubts concerning the applicant’s age. If, thereafter, Member States are still in doubt concerning the applicant’s age, they shall assume that the applicant is a minor. Any medical examination shall be performed with full respect for the individual’s dignity, shall be the least invasive examination and shall be carried out by qualified medical professionals allowing, to the extent possible, for a reliable

result. Where medical examinations are used, Member States shall ensure that: (a) unaccompanied minors are informed prior to the examination of their application for international protection, and in a language that they understand or are reasonably supposed to understand, of the possibility that their age may be determined by medical examination. This shall include information on the method of examination and the possible consequences of the result of the medical examination for the examination of the application for international protection, as well as the consequences of refusal on the part of the unaccompanied minor to undergo the medical examination; (b) unaccompanied minors and/or their representatives consent to a medical examination being carried out to determine the age of the minors concerned; and (c) the decision to reject an application for international protection by an unaccompanied minor who refused to undergo a medical examination shall not be based solely on that refusal.

Additionally, 'The fact that an unaccompanied minor has refused to undergo a medical examination shall not prevent the determining authority from taking a decision on the application for international protection.' Sixth,

The best interests of the child shall be a primary consideration for Member States when implementing this Directive. Where Member States, in the course of the asylum procedure, identify a person as an unaccompanied minor, they may: (a) apply or continue to apply Article 31(8) only if: (i) the applicant comes from a country which satisfies the criteria to be considered a safe country of origin within the meaning of this Directive; or (ii) the applicant has introduced a subsequent application for international protection that is not inadmissible in accordance with Article 40(5); or (iii) the applicant may for serious reasons be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law; (b) apply or continue to apply Article 43, in accordance with Articles 8 to 11 of Directive 2013/33/EU, only if: (i) the applicant comes from a country which satisfies the criteria to be considered a safe country of origin within the meaning of this Directive; or (ii) the applicant has introduced a subsequent application; or (iii) the applicant may for serious reasons be considered a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security or public order under national law; or (iv) there are reasonable grounds to consider that a country which is not a Member State is a safe third country for the applicant, pursuant to Article 38; or (v) the applicant has misled the authorities by presenting false

documents; or (vi) in bad faith, the applicant has destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality.

Moreover,

Member States may apply points (v) and (vi) only in individual cases where there are serious grounds for considering that the applicant is attempting to conceal relevant elements which would likely lead to a negative decision and provided that the applicant has been given full opportunity, taking into account the special procedural needs of unaccompanied minors, to show good cause for the actions referred to in points (v) and (vi), including by consulting with his or her representative

and

(c) consider the application to be inadmissible in accordance with Article 33(2)(c) if a country which is not a Member State is considered as a safe third country for the applicant pursuant to Article 38, provided that to do so is in the minor's best interests; (d) apply the procedure referred to in Article 20(3) where the minor's representative has legal qualifications in accordance with national law

and 'Without prejudice to Article 41, in applying Article 46(6) to unaccompanied minors, Member States shall provide at least the guarantees provided for in Article 46(7) in all cases.'

The scope of the rule contained in the entire Article 25 of the Procedural Directive is extremely broad and affects all provisions of the Procedural Directive. In this case, EU legislators chose to adapt the procedural rules for granting international protection in the EU, taking into account the particular situation of unaccompanied children.²⁴ Article 25 of the Procedural Directive is the provision within the norm wherein the concern for the best implementation and protection of the best interests of unaccompanied children is directly evident. Although all of this is contained within a single editorial unit of the Procedural Directive, it results in adjusting, on the one hand, by softening the rules, conditions, and requirements, and, on the other hand, by strengthening procedural guarantees for the entire procedure regarding international protection where the applicant is an unaccompanied child.²⁵ At this point, it is important to note the discrepancy regarding the lack of a similar regulation concerning children. Unaccompanied

24 Abbing, 2011, pp. 11–25; Mets, 2021, pp. 625–637.

25 Kalverboer *et al.*, 2011, pp. 2–18.

children constitute a particularly vulnerable category compared to children in general, but this does not mean that leaving standard procedural rules for children in principle will be deemed appropriate. Unfortunately, legal provisions, such as Article 15(3)(e) of the Qualification Directive, which stipulates the requirement for interviewing children in a manner that takes their needs into account, bring little change. The existence of such a legal gap and leaving this issue to the discretion of the Member States of the EU must be viewed negatively. A clear and specific legal norm dedicated to children is needed, modelled after Article 25 of the Procedural Directive, which is dedicated to unaccompanied children.

The procedural stage has been designed by EU legislators in such a way that unaccompanied children can seemingly expect a relatively thorough consideration of their best interests. Unfortunately, the same cannot be said for the situation of children who rely only on fragmented regulations (e.g. regarding interviews) and provisions of the directive's recitals. The latter may serve as a basis for legal interpretation in favour of children. First, however, it is not something that would necessarily occur; second, even if it were to happen, it would require time, meaning that, at least in some cases, the best interests of children might not have been adequately taken into account. It would be appropriate to introduce clear legal norms dedicated to children in the procedural stage to strengthen their position.

5. Conclusions

This section discusses some conclusions stemming from our findings in the previous section.

The Qualification Directive, Reception Directive, and Procedural Directive are clearly interconnected secondary EU rules. Their connection is mainly because each addresses the granting of international protection in the EU from a different perspective. Each of the three EU directives pertains to a different stage, but the stages do not follow one another sequentially. The beginning of each stage is marked by the submission of an application by an eligible person, and it concludes with a decision issued by the EU Member State. This means that the provisions of the Qualification Directive, Reception Directive, and Procedural Directive operate concurrently and intertwine with each other. Because of this and the fact that they are three separate rules, their provisions sometimes appear to be very similar. Sometimes, this similarity is due to the need to repeat the same subject matter (to ensure legal completeness); at other times, this resemblance is illusory and actually indicates that the so-called triad of directives forms a complementary organism.

The Qualification, Reception, and Procedural Directives each contain provisions focused on the particular situation of children and unaccompanied

children. However, there is a difference in the quality of these legal norms, with the Procedural Directive notably falling short owing to its lack of detailed legal provisions for children, similar to those for unaccompanied children. Nevertheless, from the perspective of safeguarding the best interests of children, and perhaps more broadly, a better solution would be to replace these three rules with a single legislative instrument containing sections relating to the qualification, reception, and procedural stages. This would eliminate unnecessary repetition of regulations on the same subject matter and facilitate intelligibility. Such a legal instrument should include a separate chapter dedicated to children and a separate chapter dedicated to unaccompanied children. These chapters should encompass all special legal norms dedicated to and taking into account the particular situation of children and unaccompanied children, including provisions for the qualification, reception, and procedural stages. The form of such a single legal instrument should be an EU directive, considering that immigration and refugee law is not within the exclusive competence of the EU but falls under shared competence. The principle of subsidiarity also applies here. This is not a definitive argument precluding the possibility of issuing an EU regulation, but at this stage of EU integration, taking into account the sensitivity of the matter and EU Member States' sovereignty, the Member States deserve to retain appropriate decision-making powers. Only when it becomes evident that EU Member States are unable to achieve a common goal would it be possible to attempt to justify the issuance of an EU regulation in terms of the principles of attribution, subsidiarity, and proportionality. However, the attempt alone does not guarantee a successful justification. Nevertheless, it seems that this moment has not yet arrived, and EU Member States should continue to carry out their tasks regarding the processing of applications.

In conclusion, it can be suggested that in the proposed legal instrument, the establishment of an ombudsman for children's rights in migration and refugee affairs could be considered. However, first, it would be necessary to establish an office for the ombudsman for children's rights in the EU.

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