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THE DISAPPEARANCE OF UNACCOMPANIED MIGRANT CHILDREN IN EUROPE

The cases of Italy and Ireland

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Abstract

The interest of a further research on the topic of missing unaccompanied migrant children has been raised by the Europol's announcement of losing the traces of at least 10.000 since 2015. After presenting the extent to which the phenomenon has been addressed by governing and non governing actors, the research topic examined is whether the prevention of these disappearances has been taken into consideration in the 2016 Proposals for the reform of the Common European Asylum System and, particularly, in the proposed Reception Directive and EURODAC Regulation. For their evaluation it has been followed a comparative analysis with national legal frameworks of countries that have faced the problem and adapted their legislations on its prevention. Italy and Ireland have been chosen as the cases in order to examine the prevention of the phenomenon both in the context of a frontline and a destination country. From their comparison came out the regulations that could fill the still existing gaps, if transplanted on the EU level. The gaps show that the phenomenon has been perceived as an obstacle for the effective control of the migration flows in the broader context of the discourse about the securitisation of the EU borders.

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List of Abbreviations

UAM	Unaccompanied Minor
EU	European Union
Europol	European Union's law enforcement agency
MS	Member State
UK	United Kingdom
NGO	Non Governmental Organisation
SUMMIT	Safeguarding Unaccompanied Migrant Minors from going Missing by Identifying Best Practices and Training Actors on Interagency Cooperation
SIS	Schengen Information System
CEAS	Common European Asylum System
CoE	Council of Europe
UN CRC	United Nations Committee on the Rights of the Child
UNCRC	United Nations Convention on the Rights of the Child
UNGA	United Nations General Assembly
UN	United Nations
UNICEF	United Nations Children's Fund
UNHCR	United Nations High Commissioner for Refugees
CRRF	Comprehensive Refugee Response Framework
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
TEU	Treaty on the European Union
TFEU	Treaty on the functioning of the European Union
TCN	Third Country National
ECRE	European Council on Refugees and Exiles
BIA	Best Interests Assessment
VIS	Visa Information Systems
EES	Entry/Exit Systems
ETIAS	European Travel Information and Authorisation System
UN	United Nations

SPRAR	System for the Protection of Asylum Seekers and Refugees
CAS	temporary structures
CPR	pre-removal detention centres
IRPP	Irish Refugee Protection Programme
FRHAP	Family Humanitarian Admission Programme
TUSLA	Child and Family Agency - TUSLA
SWTSCSA	Social Workers Team for Separated Children Seeking Asylum
HSE	Health Service Executive
GNIB	Garda National Immigration Bureau

Chapter I

1. Introduction

1.1.1 Background

The Arab Spring and the Syrian conflict resulted to unprecedented numbers of migrants and refugees arriving in Europe. Among them 90.000 unaccompanied minors (hereinafter UAMs) applied for asylum in the European Union (hereinafter EU) in 2015¹ and around 63.300 in 2016². UAMs is the most vulnerable group of migrants because of their age, their traumatic experiences during the war, the fact that they travel without their parents or someone who cares about them and because most of them have fallen victims of traffickers during their journey. However, their hardship does not end with their arrival in the “land of rights”. The pressure that the large influxes triggered in the frontline countries of Europe brought many difficulties on the management of the situation. The result was thousands of migrants to be stranded in the hotspots of the Greek islands and south Italy. Inappropriate housing conditions especially in the winter season, significant delays in the asylum, family reunification and relocation procedures, trafficking, sexual exploitation and racist violence is a representative sample of the reality that migrants still face. The European Asylum acquis proved to be inadequate. Finally, EU was unprepared for an emergency situation.

1.1.2 Description of the phenomenon

On January 2016 the *Observer* reported that according to the European Union’s law enforcement agency - Europol (hereinafter Europol) at least 10.000 UAMs have gone missing after arriving in the EU.³ Moreover, Brian Donald, the Europol’s chief of staff, claimed that these children disappeared after the registration with state authorities.⁴ Around half of them have disappeared in Italy while about 1.000 in Sweden.⁵ In the United Kingdom (hereinafter UK) it has been noticed that the number of the UAMs disappearing after their arrival has been doubled in 2015.⁶ In Germany and Hungary

¹ *Reuters* (2016)

² *Refugees Deeply* (2017)

³ *The Guardian* (2016)

⁴ *Ibidem*

⁵ *Ibidem*

⁶ *Ibidem*

criminals have been arrested after evidence of exploiting migrants.⁷ Brian Donald expressed his concerns about the existence of a pan - European “criminal infrastructure”, which taking advantage of the difficulties of the large influxes’ management, targets UAMs as an easy target for trafficking.⁸

The best scenario for them is to disappear because of their desire to be reunited with their families in another EU Member State (hereinafter MS).⁹ The long delays in the family reunification procedures force them to choose the irregular and dangerous way.¹⁰ Moreover, in many of the transit countries, authorities do not register them encouraging them in this way to move unsafely to the northern destinations.¹¹ Research studies have shown that UAMs leave reception centers because they can not cover their basic needs and because of the bad treatment they endure by the staff and their guardians.¹² The so called “protective custody” facilities in Greece, which in reality are detention facilities, led many UAMs living in the streets¹³ and resorting to prostitution¹⁴ and slavery¹⁵ in order to survive. Many of them came in EU aiming to find a job and to send back money to their families.¹⁶ This makes them can not wait the long delays of the asylum procedures and they make it for North European countries or they end up in the hands of traffickers.¹⁷ Concerns have been raised by experts that many smugglers who transferred them now they bring them in touch with traffickers in order to gain more money.¹⁸ This is mostly because UAMs trust the smugglers after bringing them in Europe and they do not trust authorities and guardians.¹⁹ In countries-destinations, like Sweden and UK, it has been noticed that UAMs close to the age of 18 go missing more

⁷ Ibidem

⁸ Ibidem

⁹ Ibidem

¹⁰ *Open Democracy* (2016)

¹¹ *BBC News* (2016)

¹² *Open Democracy* (2016)

¹³ *The National* (2016)

¹⁴ RT Documentary (2018)

¹⁵ *Medium* (2016)

¹⁶ *Open Democracy* (2016), See also Centre for Migration Studies, ‘*In search of Protection of Unaccompanied Minors in Italy*’ (2018)

¹⁷ *Open Democracy* (2016)

¹⁸ *BBC News* (2016)

¹⁹ Ibidem

frequently than younger UAMs.²⁰ They are afraid of deportation since after turning 18 they will not be benefitted by the favorable regulations for UAMs.²¹

This is how the press described the phenomenon and the underlying reasons of the 10.000 missing UAMs. In the next subchapter crucial for a better understanding of the phenomenon, its reasons and the gaps of the system, would be to cite the observations of practitioners who work with UAMs.

1.2 Practitioners' Observations

In order to have a comprehensive view of the phenomenon of the missing UAMs and its roots, it has been chosen to examine material of studies and outcomes of conferences in which civil society organisations from all around Europe contributed to. This collective actions were enabled under the European Non Governmental Organisations' (hereinafter NGOs) network for missing and exploited children, named "Missing Children Europe".

"Missing Children Europe" experts confirm the reasons of UAMs' disappearance, as they have been presented above. In particular, the delays of asylum and family reunification procedures that are discouraging for UAMs, the fear of deportation to their country of origin or of being sent back to their first country of arrival and the inappropriate housing conditions are some of reasons why UAMs choose to disappear.²² On the other hand, many times UAMs disappear involuntarily, being forced or abducted by traffickers.²³ Important misgivings within the European legislation, identified by practitioners who work with children, is the lack of reporting, the lack of follow up and the lack of data in missing UAMs' cases.²⁴

In 2014, the project "Safeguarding Unaccompanied Migrant Minors from going Missing by Identifying Best Practices and Training Actors on Interagency Cooperation" (hereinafter SUMMIT) was launched in order to gather information on how the

²⁰ *Open Democracy* (2016)

²¹ *Ibidem*

²² Missing Children Europe, 'The issue'

²³ *Ibidem*

²⁴ *Ibidem*

phenomenon of the disappearance of UAMs is tackled in some EU MS.²⁵ It has been noticed that missing UAMs are not treated as children at risk because they are considered as runaways with a plan and their disappearance is not connected with abduction or trafficking.²⁶ This entails that most cases are reported late or are not reported at all to the police.²⁷ The study highlighted the importance of the role of the guardian and the need of being trained for identifying early the signs of the risk of UAMs going missing.²⁸ It has also underlined the need of implementing a risk assessment within 24 hours after the arrival.²⁹ Finally, most of the times, the disappearance of the UAMs has transnational character and the cross-border and interagency cooperation is an essential element both for the prevention of and response to the problem.³⁰

In 2017, after the announcement of the 10.000 missing UAMs by Europol, the “Lost in Migration” conference has been organised to discuss the child protection challenges that led to the disappearance of these children and to give operational and policy recommendations to decision makers in order to adopt a comprehensive approach for a better prevention and response.³¹ The reasons behind this phenomenon include poor reception conditions, lack of child-friendly information, delays on the procedures for protection, fear of deportation to their country of origin or being transferred to the first country of their arrival, lack of training of the guardians, lack of coordination on national and cross border level, absence of systematic risk assessment, delays on responding to the disappearance cases, while police investigates only the UAMs whose application has been rejected, and desire to be reunited with their families in other EU MS.³² Drawing on the reasons, the recommendations of the conference included a better reception through child friendly registration and identification procedures and better

²⁵ Missing Children Europe, SUMMIT REPORT (2016)

²⁶ Ibidem, p 85

²⁷ Ibidem, p 22

²⁸ Ibidem, pp 43-44

²⁹ Ibidem, pp 50-55

³⁰ Ibidem, pp 62-69

³¹ Missing Children Europe, Lost in Migration I Conference-Conclusions (2017)

³² Ibidem, pp 9-12

accommodation in small scale reception centres or in foster families.³³ The need for more efficient procedures and international cooperation has been addressed.³⁴ This could be implemented by conducting systematically best interest assessments and all the procedures to be explained in a child friendly manner.³⁵ Moreover, the guardians should be well trained and their appointment should be made upon the arrival of the UAM.³⁶ The right of the child to be heard should be respected in all the procedures and durable solutions shall be found.³⁷ When they move to another country, it has to be ensured that it will be made in a safe and regular manner and in line with their best interests.³⁸ The cooperation between the professionals involved in the situation of a missing UAM has to be formalised.³⁹ Furthermore, the cross - border cooperation on responding to disappearances has to be strengthened through the establishment of a network of guardianship institutions and the broader use of the 116000 European hotline.⁴⁰ It has been also enhanced that the personal and biometric data taken from UAMs should be used for their protection and not for managing secondary movements or for their return.⁴¹

In the next subchapter it will be examined whether the mobilisation of the Civil Society had any impact and in what extent the phenomenon of the disappearance of UAMs has been addressed by the decision-makers.

1.3 Decision-makers

1.3.1 EU Level

Back to 2010, and therefore before the media report these high numbers of missing UAMs, the European Commission has adopted the “Action Plan on Unaccompanied Minors (2010 - 2014)” where the disappearance of UAMs has been characterised as an issue of major concern. It seems that the link between trafficking and the phenomenon

³³ Ibidem, p 50

³⁴ Ibidem, pp 50-52

³⁵ Ibidem, pp 50-52

³⁶ Ibidem, p 52

³⁷ Ibidem, pp 52-53

³⁸ Ibidem, p 54

³⁹ Ibidem, p 55

⁴⁰ Ibidem, pp 56-57

⁴¹ Ibidem, p 57

of the disappearance of the UAMs was already observed.⁴² Well known were also some of the reasons underlying, such as UAMs' attempts to reunite with their families on their own and the poor reception conditions that made them to escape.⁴³ The European Commission invited the MS to use the missing persons alerts of the Schengen Information System (hereinafter SIS) and to introduce a monitoring mechanism in order to better implement the guardianship system.⁴⁴

In 2015, the European Commission adopted the EU Agenda on Migration. The EU's duty to protect consisted one of the four levels of action for a better management of the migration. In this context, European Commission announced that a comprehensive strategy to deal with missing and unaccompanied children regardless their migration status will be developed following up the "Action Plan on Unaccompanied Minors (2010-2014)".⁴⁵

In April 2016 the European Parliament Committee on Civil Liberties organised a debate to discuss the issue of missing UAMs and in particular how the EU could respond to it.⁴⁶ In November 2016, the European Commission organised the 10th EU Forum on the rights of the child on the protection of children in migration where several stakeholders, such as representatives from EU institutions, international organisations, practitioners from NGOs, and academics, gathered to identify the challenges and to exchange ideas and good practices. Among the issues that were highlighted was that of missing UAMs, enumerating the challenges that function as drivers for the phenomenon.⁴⁷ One important issue admitted that impedes the appropriate and comprehensive response to this phenomenon is the lack of data of children going missing from the reception centres.⁴⁸ The participants provided recommendations for better prevention and response to the disappearance⁴⁹ giving a great focus on the identification and registration stage, as it has been discussed on a separate parallel

⁴² European Commission Communication COM(2010)213 final, p 9

⁴³ Ibidem

⁴⁴ Ibidem, p.10

⁴⁵ European Commission Communication COM(2015)240 final, p 12

⁴⁶ European Parliament (2016), See also FRA, *Background note on ways to prevent unaccompanied migrant children from going missing* (2016)

⁴⁷ 10th European Forum on the rights of the child, General Background Paper (2016), p 9

⁴⁸ Ibidem, p 10

⁴⁹ 10th European Forum on the rights of the child, Factsheet, (2016), p 3

session.⁵⁰

In 2017, the European Commission adopted the strategy that promised with the EU Agenda on Migration, the Communication on the “protection of children in migration”. This document included more details on the recommendations of the European Commission on the issue of missing UAMs. Particularly, it is enhanced that missing migrant children should be treated like missing national children and wherever there will be found within the EU territory they should be referred to the child protection authorities.⁵¹ All the actors involved in the protection of the migrant children, such as guardian, the staff of the reception facilities and the police, should cooperate under protocols and procedures that ensure the systematic reporting and response to the missing UAMs cases.⁵² Missing children hotlines, national child alert mechanisms, systematic reporting of the disappearances in the SIS by the police and cooperation with Europol and Interpol are important to be utilised.⁵³ The European Commission also mentioned that in the context of the 2016 Proposals for reforms in the areas of the Common European Asylum System (hereinafter CEAS) and the SIS, information whether the missing child is an UAM and/or victim of trafficking would be added and an automated fingerprint identification will be used in SIS alert system while the lowering of the children’s age from 14 to 6 in taking biometric data will contribute to a more effective tracing of these children.⁵⁴

1.3.2 Regional Level

In 2016 the Council of Europe (hereinafter CoE) addressed the issue of missing UAMs in its Report “Harmonising the protection of unaccompanied minors in Europe”. In particular, the Rapporteur attributed the phenomenon to the shortcomings of the national legislations.⁵⁵ More specifically, he stated that despite the existence of a complete International legal and policy framework, its standards are not reflected in the

⁵⁰ 10th European Forum on the rights of the child, Background Document - Parallel Sessions, (2016), pp 2-3

⁵¹ European Commission Communication COM(2017)211 final, p 12

⁵² Ibidem, p 7

⁵³ Ibidem

⁵⁴ Ibidem

⁵⁵ CoE, ‘Harmonising the protection of unaccompanied minors in Europe’, Report (2016), p 2

national legal framework.⁵⁶ The phenomenon of missing UAMs was characterised as a “new challenge” and was also linked with the efforts of total or partial closure of the EU external borders with the EU-Turkey deal.⁵⁷ It has been highlighted that around the half of UAMs go missing within 48 hours after their arrival.⁵⁸

With its Resolution, the Parliamentary Assembly calls its MS to improve their international cooperation with countries of origin and transit countries utilising the national police and SIS databases and involving Europol and Frontex, to harmonise the guardianship and legal representative system giving a common definition and uphold the right to family reunion.⁵⁹ On national and regional level urges for adequate registration, accommodation, health care, child-friendly information and trained interpretation, non intrusive age assessment methods, early appointment of guardians who are well trained and will be in charge of a small number of UAMs, early access to education, implementation of the best interests assessment for finding durable solutions and compliance with the principle of non refoulement.⁶⁰ Last but not least, the Parliamentary Assembly expressed its concerns in regards with the absence of a legal definition of “missing children” which affects the investigations, the waiting times and the levels of alarm.⁶¹

1.3.3 International Level

In 2012 the United Nations Committee on the Rights of the Child (hereinafter UN CRC) in its report “The rights of all children in the context of International migration”⁶² referred to the problem of missing UAMs which was linked with the right to liberty and alternatives to detention. The UN CRC, due to the fact that many children have been noticed to go missing from the reception centres in various countries, called the MS to

⁵⁶ Ibidem

⁵⁷ Ibidem, pp 3-5

⁵⁸ Ibidem, pp 3,6

⁵⁹ Ibidem pp 3-4, See also CoE, ‘Harmonising the protection of unaccompanied minors in Europe’, Compendium of amendments (Final version) (2016), p 4

⁶⁰ CoE, ‘Harmonising the protection of unaccompanied minors in Europe’, Report (2016), p 4

⁶¹ CoE, ‘Harmonising the protection of unaccompanied minors in Europe’, Compendium of amendments (Final version) (2016), amendments 3,4, p 2

⁶² UN CRC, Report (2012), pp 11,19

adopt concrete guidelines for the reception facilities in accordance with the United Nations Convention on the Rights of the Child (hereinafter UNCRC).

The adoption of the New York Declaration for Refugees and Migrants in September 2016 by the United Nations General Assembly (hereinafter UNGA) called for the development of the Global Compact on Refugees and the Global Compact for safe, orderly and regular migration. In the context of the Global Compact for safe, orderly and regular migration, one of the 6 informal thematic sections of the consultation phase was on “smuggling of migrants, trafficking in persons and contemporary forms of slavery, including appropriate identification, protection and assistance to migrants and trafficking victims”.⁶³ One of its side events was on “enhancing protection of unaccompanied minors along the migration routes” where the phenomenon of missing UAMs has been discussed.⁶⁴ In particular, the period following the Balkan route closure many UAMs have chosen to disappear because of the fear of being sent back as irregular migrants, turning to smugglers’ networks in order to transfer them to their destination.⁶⁵ As a response to this a project has been implemented to improve the identification and protection of UAMs.⁶⁶ The relevant with child protection recommendations in the thematic section called for child and gender-sensitive identification⁶⁷ and information⁶⁸, establishment of national and international referral mechanisms and identification of victims of trafficking⁶⁹, interagency cooperation⁷⁰, strengthening of guardianship system and alternative care⁷¹.

⁶³ Global Compact for migration ‘Smuggling of migrants, trafficking in persons and contemporary forms of slavery, including appropriate identification, protection and assistance to migrants and trafficking victims’, (2017)

⁶⁴ Global Compact for migration ‘Smuggling of migrants, trafficking in persons and contemporary forms of slavery, including appropriate identification, protection and assistance to migrants and trafficking victims’, Side event ‘enhancing protection of unaccompanied minors along the migration routes’,(2017)

⁶⁵ Ibidem

⁶⁶ Ibidem

⁶⁷ Global Compact for migration ‘Smuggling of migrants, trafficking in persons and contemporary forms of slavery, including appropriate identification, protection and assistance to migrants and trafficking victims’, (2017), p 5

⁶⁸ Ibidem, p 7

⁶⁹ Ibidem, p 6

⁷⁰ Ibidem, p 7

⁷¹ Ibidem

1.4 Research Question, Limitations, Methodology and Structure

The introductory part developed above, described in what extent the phenomenon of the disappearance of UAMs has been addressed by the press, the civil society and the decision-makers. Given this material and due to the 2016 proposals by the European Commission for a reform of the CEAS⁷² in the broader context of managing the refugee crisis, the research question that has arisen is whether these concerns about the phenomenon of missing UAMs are reflected on the recent proposals. Specifically, it will be analysed whether the relevant with the prevention of disappearances regulations in the proposed Reception Directive and EURODAC Regulation, have been strengthened or there are still gaps. Despite the fact that the disappearances of UAMs is a topic that can be examined from the view of prevention, response and aftercare, this paper will deal with the regulations relevant to the prevention of this phenomenon. Moreover, due to the limitations of this thesis only two instruments of the CEAS will be analysed, the proposed Reception Directive and the proposed EURODAC Regulation. These two instruments were chosen on the grounds that the majority of UAMs go missing within 48 hours after their arrival,⁷³ and therefore the stage of reception and identification is important to be strengthened⁷⁴.

Despite the fact that it is not a new phenomenon, the large numbers that the disappearance of UAMs has reached since the beginning of the migrant and refugee crisis and its transnational character classify it among the “new challenges”.⁷⁵ Provided this, and in combination with the recent proposals for the reform of CEAS, within which the phenomenon will be examined, the main problem during the initial stage of this research was that only a few academic papers were found. The main sources utilised are legal documents, NGOs reports and information from the official websites of EU, United Nations (hereinafter UN) and other institutions.

⁷² It has been announced with the European Commission Communication “Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe” on 6 April 2016 and with the release of two packages of proposals: the first on 04 May 2016 which included the proposals for a Dublin reform, EURODAC and EASO and the second on 13 July 2016 for the Asylum Procedures, Qualification and Reception.

⁷³ See n 57

⁷⁴ See n 49, See also FRA, *Key migration issues: one year on from initial reporting, Main Findings*

⁷⁵ CoE, ‘Harmonising the protection of unaccompanied minors in Europe’, Report (2016), p 5

At this point, an appropriate method for the evaluation of the recent Proposals of CEAS was to follow a comparative analysis with national legal frameworks of EU MS that have faced the problem and have adapted their relevant legislations taking this phenomenon into account. Since after the initial part of this research, it came up that the reasons the UAMs go missing in a frontline MS are different than those in a destination MS, it was important for a comprehensive view of the phenomenon the examination of the relevant legislation of a frontline and a destination country as case studies. Italy has been chosen as the case study of a frontline MS as the recently adopted Law 47/2017 “Provision on Protection Measures for Unaccompanied Migrant Children” has been proposed by United Nations Children’s Fund (hereinafter UNICEF) as an EU model.⁷⁶ Ireland has been chosen as the case study of a destination MS on the grounds that it is one of the four EU MS that has legal and procedural regulations on missing migrant children.⁷⁷

Based on the analysis of the two CEAS instruments and on the comparison with the relevant regulations of the national legal frameworks of Italy and Ireland, this paper will attempt to find out which of these regulations on national level would contribute to a better prevention of the disappearance of UAMs as a transnational phenomenon, if transplanted on the EU level. At this point, it has to be mentioned that the analysis and the evaluation of the relevant provisions will be only from a legal point of view and factors, such as the political will⁷⁸ or the inadequate funding⁷⁹, that put obstacles on their implementation, will not be taken into consideration. Moreover, the examination of the phenomenon will be geographically limited in the region of Europe⁸⁰ and

⁷⁶ ‘UNICEF hails new Italian law to protect unaccompanied refugee and migrant children as a model for EU’ (2017)

⁷⁷ European Commission ‘Missing children in the European Union: Mapping, Data Collection and Statistics’, (2013), p 16, 47

⁷⁸ I am referring to the anti migration policy that the newly elected Italian government follows, See *The New York Times* (2018), See also *Huffington Post* (2018), and to the much smaller number of refugees that Ireland relocated from Greece in comparison to that promised and none from Italy, See *The Irish Times* (2017)

⁷⁹ *Elena Rozzi* (2017), See also Rai Report, See also *Forced Migration Review*

⁸⁰ *Independent* (2018), See also *CNN* (2018)

particularly with regard to the disappearances that occur after the arrival of UAMs in the land⁸¹ of one of the EU MS.

Closing with this subchapter the introductory part, the structure of the rest of this thesis will be developed in the next four chapters as follows: the second chapter will give an overview of the legal framework of the protection of UAMs on the International, Regional and EU level, the third chapter will analyse the proposed Reception Directive and EURODAC Regulation, the fourth chapter will analyse the relevant regulations of the national legal frameworks of Italy and Ireland and the last chapter will deal with the comparison between them and the findings.

Chapter II

2. Overview of the protection framework

Because of the fact that the phenomenon of the disappearance of UAMs is considered to be a “new challenge”, there are no direct provisions for their protection in the international legislation.⁸² However, the UN, the CoE and the EU provide a complete protection framework for UAMs in general. For a complete overview of the protection framework applied in the category of missing UAMs, three legal regimes shall be examined, this referring to the protection of the children, to the protection of refugees, and the anti-trafficking. However, in this section, only the relevant with the protection of the children and the protection of refugees will be reviewed, as these are the frameworks this thesis will utilise. The relevant legal frameworks cited below, covers the International, regional and EU level and will be developed in this sequence.

2.1 International Level

2.1.1 UN Convention on the Rights of the Child ⁸³

The UNCRC is the main and legally binding instrument for the protection of all children and therefore for the protection of UAMs. It could be characterised as the

⁸¹ There are projects dealing also with the missing migrants in the territorial waters after disembarkations or while crossing the land borders, See IOM’s ‘Missing Migrants Project’, See also the ‘Mediterranean Missing Project’

⁸² CoE, ‘Harmonising the protection of unaccompanied minors in Europe’, Report (2016), p 8

⁸³ UNCRC (1989)

“children’s edition” for the civil, political, economic, social and cultural rights. It covers the principle of non discrimination, the right to life, survival and development, the right to family life, the right of the child to be heard, the right to be protected from violence, abuse and neglect, the right to seek asylum, the right to an adequate standard of living, protection from sexual and other forms of exploitation and protection from inhuman treatment. Furthermore, it adds provisions adapted to the vulnerable nature of the children as the principle of the best interests of the child, the prohibition of separation from their parents and the protection from abduction, sale and trafficking. In the case of missing UAMs the rights violated, at least on a risk level, are the right to life, survival and development, the right to be protected from violence, abuse and neglect, from sexual and other forms of exploitation, from abduction, sale and trafficking. Moreover, for the prevention of their disappearance the principle of non discrimination and the best interests of the child should be upheld and the the right to adequate standard of living and the right to be heard should be respected.

2.1.2 UN Committee on the Rights of the Child

2.1.2.1 General Comment No. 6 ⁸⁴

The UN CRC, the body responsible for monitoring the implementation of the UNCRC issued the General Comment No.6 to address the vulnerability of the UAMs and to close the gaps on their treatment. It is a document interpreting the articles of the UNCRC as they have to be applied to the UAMs.

2.1.2.2 General Comment No. 12 ⁸⁵

The General Comment No.12 was issued in order to support or to impose a legal obligation to the States for a clear provision within their national legislations and a better implementation of the right of the child to be heard. It includes a detailed legal analysis of the two paragraphs of the Art. 12 of the UNCRC and explains its requirements in order to be fully realized in different situations and settings. The situations referred to the missing UAMs are the immigration and asylum proceedings, in emergency situations and situations of violence and in alternative care.

⁸⁴ UN CRC, *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*

⁸⁵ UN CRC, *General comment No. 12 (2009): The right of the child to be heard*

2.1.2.3 General Comment No. 14 ⁸⁶

The General Comment No.14 aims to ensure the application and respect for the child's best interests. The CRC attributes three dimensions to it, as a substantive right, as a fundamental interpretative legal principle and as a rule of procedure. The paragraph 1 of the the Art. 3 is analysed with detail and consists a tool for governments on how to implement in all decisions refer to children the principle of the best interests and how to endorse it during the law making. The principle of the best interests of the child is applied in all the procedures and decisions concern UAMs.

2.1.3 1951 UN Refugee Convention and the 1967 Protocol ⁸⁷

The 1951 UN Refugee Convention is the main instrument for the protection of refugees and defines who is a refugee, their rights and the obligations of the hosting State. Based on this instrument and on the UNCRC, the United Nations High Commissioner for Refugees (hereinafter UNHCR) published guidelines on "Policies and Procedures in dealing with Unaccompanied Minors Seeking Asylum"⁸⁸ (1997), guidelines on "Determining the Best Interests of the Child"⁸⁹ (2008) in which explains how and in which circumstances a best interests assessment should take place including when temporary care decisions should be taken and durable solutions for UAMs should be identified, and a "Framework for the Protection of Children"⁹⁰ (2012) which includes actions on how to mitigate and respond to the protection risks UAMs face.

2.1.4 New York Declaration ⁹¹

On 19 September 2016 and in the light of the large movements of migrants and refugees, the world leaders gathered to give a global response to management of the human mobility. They agreed on a holistic approach to protect refugees and migrants on the basis that they share the same human rights and vulnerabilities. It has been enhanced

⁸⁶ UN CRC, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*

⁸⁷ UNHCR, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*

⁸⁸ UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, (1997)

⁸⁹ UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child*, (2008)

⁹⁰ UNHCR, *A Framework for the Protection of Children*, (2012)

⁹¹ UNGA, *New York Declaration for Refugees and Migrants (19 September 2016)*

that international cooperation especially with the countries of origins should be strengthened and effective responsibility sharing mechanisms should be fostered to reveal the neighbouring and transit countries. Commitments have been made that apply both to refugees and migrants and others separately to each of them. Annex I calls UNHCR to evaluate the comprehensive refugee response framework (hereinafter CRRF) that has developed after consulting with states and relevant stakeholders and adopt the Global Compact on Refugees. Annex II calls for intergovernmental negotiations that will lead to the adoption of the Global Compact for safe, orderly and regular migration.

2.1.4.1 Global Compact on Refugees⁹²

The final draft of the Global Compact on Refugees has been released on 26 June 2018 and will be proposed by the High Commissioner for refugees within the annual report to be presented in the UNGA 2018. The CRRF, which is integral part of this compact, aims to help host countries under pressure, enhance the self-reliance of refugees, find out solutions to access third countries, ensure return in safety and dignity to the countries of origin.

2.1.4.2 Global Compact for Migration⁹³

The Global Compact for safe, orderly and regular migration will be the first intergovernmental agreement for the management of migration and human mobility in a comprehensive approach and will be adopted in an intergovernmental conference on international migration in 2018⁹⁴. The final draft, released on 11 July 2018, enlists a number of objectives including collection of adequate data, accurate and timely information at all stages of migration, fight against smuggling and trafficking clarifying their difference, and proposes actions for their realization. Moreover, it will be the first international instrument that explicitly calls for the UN MS for undertaking international efforts on missing migrants with a particular focus on UAMs⁹⁵. Among the actions should be followed by Governments are to develop procedures and agreements

⁹² UNHCR, *The Global Compact on Refugees*, Final Draft, (26 June 2018)

⁹³ ‘*Global Compact for safe, orderly and regular migration*’, final draft, (11 July 2018)

⁹⁴ *UN News* (2018)

⁹⁵ ‘*Global Compact for safe, orderly and regular migration*’, final draft, (11 July 2018), objective 8, pp 15-16

for tracing missing migrants and to examine whether their migration policies create the risk of migrants going missing⁹⁶.

2.2 Regional Level

2.2.1 The European Convention on the Exercise of Children's Rights⁹⁷

The Europe's regional instrument for the protection of the rights of the children provides procedural measures for them to exercise their rights in accordance with the best interests principle. In the case of UAMs the relevant with the appointment of the representative provisions apply. The European Convention on the Exercise of Children's Rights not only establishes the obligation of the Juvenile Court to appoint a representative but also provides to the UAM the right to apply for his/her appointment. Moreover, within the provision of the right to be heard explicitly provides the right to access to information for the proceedings and for the possible consequences of any decision.

2.2.2 European Court of Human Rights case law

Whereas the regional framework does not provide an instrument specific for the protection of migrants or refugees, the provisions of the European Convention of Human Rights (hereinafter ECHR) are applied to them and therefore to the UAMs, as the case law of the European Court of Human Rights (hereinafter ECtHR). In particular, in the case *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*⁹⁸, the ECtHR condemned the Government of Belgium for the detention of a 5 year old UAM in a centre for adults. In *Rahimi v. Greece*⁹⁹, the ECtHR found that Greece violated the principle of the best interests of the child when detained an Afghan UAM entered irregularly the borders in a detention centre for adults in Lesbos. Moreover, Greece has been denounced in the case *Affaire Housein v. Greece*¹⁰⁰ for detaining an UAM for two months in place for adults and without effective administrative review.

⁹⁶ Ibidem

⁹⁷ CoE, *European Convention on the Exercise of Children's Rights*, (1996)

⁹⁸ ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, (2006)

⁹⁹ ECtHR, *Rahimi c. Grèce*, (2011)

¹⁰⁰ ECtHR, *Affaire Housein v. Greece*, (2013)

2.2.3 Resolution No. 2146 on “Harmonising the protection of unaccompanied minors in Europe” (2016)

The need for CoE MS to harmonise their national legislations for UAMs has been readdressed¹⁰¹ in the Resolution No. 2146 due to the unprecedentedly high numbers of UAMs arrived in 2015 and 2016. The Parliamentary Assembly provides recommendations to CoE MS for better protection of UAMs and for prevention of their disappearances. Furthermore, it has been the first time to call for an adoption of a legal definition on “missing children”¹⁰² due to the “large numbers of children are going missing at different stages of their journey, especially directly after arrival at reception centres”¹⁰³.

2.3 EU level

2.3.1 Primary EU Legislation

2.3.1.1 The Treaty on the EU¹⁰⁴

The Treaty on the EU (hereinafter TEU), one of the two constitutional instruments of the EU, provides in Art 3(5): “In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter”

2.3.1.2 EU Charter of Fundamental Rights¹⁰⁵

The EU instrument guaranteeing to EU citizens and residents personal, civil, political, economic and social rights is also applied to children and therefore to UAMs. The Art 24 of the EU Charter of fundamental rights enshrines the right of the child to be heard,

¹⁰¹ It has been also addressed in the CoE, Recommendation (2011) and Resolution (2011)

“*Unaccompanied children in Europe: issues of arrival stay and return*, in the CoE Recommendation (2005) *Protection and assistance for separated children seeking asylum* and in the CoE Recommendation (2003) *Situation of young migrants in Europe*

¹⁰² CoE, *Resolution, Harmonising the protection of unaccompanied minors in Europe*, par. 3, p 1, (2016)

¹⁰³ *Ibidem* par.1, p 1

¹⁰⁴ TEU(1992)

¹⁰⁵ *Charter of Fundamental Rights of the European Union*, (2012)

the principle of the best interests of the child and the right to family unity. After the Treaty of Lisbon entered into force in December 2009 the EU Charter of fundamental rights became a legally binding instrument.

2.3.2 Secondary EU Legislation

2.3.2.1 The Common European Asylum System

The Art 78 of the Treaty on the functioning of the EU¹⁰⁶ (hereinafter TFEU) provides that: “The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring inter-national protection and ensuring compliance with the principle of *non-refoulement*.” and consists the legal basis for the establishment of the CEAS. The CEAS includes five texts:

2.3.2.1.1 Qualification Directive¹⁰⁷

The Qualification Directive establishes the common criteria that MS shall use to decide if a third country national or a stateless person is eligible to be granted International Protection. It is also the part of CEAS that provides the protection from refoulement, residence permits, travel documents, access to education and employment, healthcare, accommodation and specific for children and vulnerable groups in general. Due to the migration crisis that CEAS proved to be inadequate to response, the European Commission decided the reform of the CEAS with its Communication “Towards a reform of the Common European Asylum System and enhancing legal avenues in Europe”¹⁰⁸. In this context, a new Proposal for a Qualification Regulation¹⁰⁹ has been submitted in July 2016 for a further strengthening and harmonisation.

2.3.2.1.2 Asylum Procedures Directive¹¹⁰

The Asylum Procedures Directive is the part setting out the minimum standards for the asylum related procedures are followed in the EU MS while at the same time provides guarantees and safeguards for the applicants in order to have access in a fair procedure.

¹⁰⁶ TFEU, (2007)

¹⁰⁷ Recast Qualification Directive 2011/95/EU

¹⁰⁸ European Commission Communication COM(2016)197

¹⁰⁹ Proposal for a Qualification Regulation (2016)

¹¹⁰ Asylum Procedures Directive 2005/85/EC

It has been also considered for reform with the Proposal for a new Asylum Procedure Regulation in July 2016¹¹¹.

2.3.2.1.3 Reception Conditions Directive¹¹²

The Reception Conditions Directive is the part that regulates the rights and obligations of the asylum applicants till the decision whether they are granted International Protection or not is issued. Among other ensures an adequate standard of living providing accommodation, food, health care including mental health care, employment and access to education. It is the only part of CEAS that despite the reforms proposed it will remain Directive and will not be transformed into a Regulation. The newly proposed Receptions Directive¹¹³ aims to harmonise the minimum standards on the conditions offered to asylum seekers by the MS while at the same time to fight the secondary movements. It also attempts the earlier integration of the applicants through their earlier access to the labour market.

2.3.2.1.4 Dublin Regulation¹¹⁴

The Dublin Regulation regulates the MS responsible for the examination of the asylum application. It is the EU tool that realises the responsibility sharing in the context of solidarity among its MS. It is the part of CEAS that proved to have the main shortcomings which lead to the incapacity of managing the large influxes, especially the rule that establishes the country of first arrival as the country responsible for the examination of the asylum application. In May 2016 it has been proposed the Dublin VI Regulation¹¹⁵ aiming to a more effective functioning of the Dublin system and including a mechanism to deal with emergency situations of MS dealing with disproportionate number of applicants.

2.3.2.1.5 EURODAC Regulation¹¹⁶

The EURODAC Regulation operates the EU asylum fingerprint database to support the functioning of the Dublin system. Everyone who applies for International Protection wherever he/she is in the EU, his/her fingerprints are registered in the EURODAC

¹¹¹ Proposal for a Asylum Procedures Regulation (2016)

¹¹² Recast Reception Conditions Directive 2013/33/EU

¹¹³ Proposal for the Reception Conditions Directive (2016)

¹¹⁴ Recast Dublin Regulation (EU) No 604/2013

¹¹⁵ Proposal for the Dublin Regulation (2016)

¹¹⁶ Recast EURODAC Regulation (EU) No 603/2013

central system. Its proposal for reform¹¹⁷ is also included in the first package of proposals in May 2016. Provided that many irregular movements have been identified in MS that are not located in the external borders of the EU, the main changes will be the registering of all third country nationals (hereinafter TCN) regardless whether they have applied for asylum or not, the introduction of extra biometric data as the facial image and the lowering of the age of the children registering from 14 to 6. The EURODAC Regulation will be transformed from a Dublin supporting tool into a general migration management database.

2.3.2.2 Family Reunification Directive¹¹⁸

The Family Reunification directive does not belong to the EU asylum acquis but it is applied also to asylum applicants and refugees. It is an instrument facilitating the right to family life and enables the TCNs to be reunited with their family members legally residing within the EU. It is also applied in the case of UAMs expanding the term of family member so they can join their first-degree relatives in the direct ascending line. In the case that first-degree relatives do not exist the UAM can be joined by its legal guardian or other members of his/her family.

Chapter III

3. EU Level

As it has been mentioned in the introduction, this Chapter will examine only two instruments of CEAS and, in particular, under the 2016 Proposals of the Reception Directive and the EURODAC Regulation. The first subchapter will deal with the proposed Reception Directive and the second with the proposed EURODAC Regulation.

3.1 Reception Directive

This subchapter will analyse the newly proposed amendments of the Reception Directive and more specifically these that are linked with the prevention of the disappearances of UAMs. The selection of the prevention related provisions resulted

¹¹⁷ Proposal for the EURODAC Regulation (2016)

¹¹⁸ Family Reunification Directive 2003/86/EC

from the reasons why UAMs go missing according to the observations of practitioners working with UAMs, cited in the first Chapter. In particular, I will examine the definitions of family members and absconding/risk of absconding, provisions for access to information, restrictions of the freedom of movement and detention, material reception conditions, needs assessment and guardianship. Working on this, I will attempt to evaluate, in an initial stage, whether the new proposals on these will contribute to the prevention of this phenomenon or not.

3.1.1 Definitions

3.1.1.1 Family Members

Starting with the definitions there have been made some positive steps that contribute to the prevention of the UAMs' disappearances but there are still some gaps created by the general policy of EU to discourage the secondary movements. First of all, Art. 2(3) of the proposed Reception Directive refers to Art. 2(9) of the proposed Qualification Directive for the definition of the "family members". According to this the definition of family members has been extended to include also types of families that have been formed after they left their country of origin, such as unmarried couples and their minor children.¹¹⁹ This extension is positive for UAMs that under the provisions of the current Reception Directive disappear from the reception facilities while trying to "reunite" with their recently formed "family members". Moreover, the proposed definition reflects the reality that emerged from the long journeys that refugee have to make before reaching the EU borders.¹²⁰ However, UNHCR recommends a further extension that will also include the dependent adult children and the siblings.¹²¹

3.1.1.2 Absconding/ Risk of Absconding

The 2016 Proposal of the Reception Directive introduces in its body¹²² two new definitions, the definition of "absconding" in Art 2(10) to describe a completed action and the definition of the "risk of absconding" in Art 2(11) to describe the first signs that

¹¹⁹ Proposal for a Qualification Regulation, Art 2(9)

¹²⁰ UNHCR Comments on the Proposal for a Reception Directive, p 8

¹²¹ Ibidem

¹²² The fact that the definition of the "risk of absconding" existed already in the Dublin Regulation, Art. 2(n) and it is the first time that is proposed to be introduced within the Reception Directive shows the intention of the EU legislators to further support the implementation of the Dublin system.

show intention to absconding. Absconding is an action of moving away with the intention to avoid asylum procedures and can take two forms: 1) leaving the territory where he or she is obliged to be present in accordance with the Dublin Regulation, and 2) not remaining available to the competent authorities or to the court or tribunal. As stated in the Recital 19 the definition is given because the 2016 Proposal introduces restrictions to the freedom of movement and additional grounds for the deprivation of their liberty. The entry of these definitions and their legal consequences have already received strong criticism. In particular, UNHCR is concerned about the degree of discretion left up to the MSs' authorities to interpret whether there is a "risk of absconding" and recommends EU to set out the legitimate criteria on the basis of which the MSs' authorities will decide upon the restriction of the freedom of movement under the Art 7(2)(d) or the detention of Art 8 (3) (b) and 8 (3) (c) of the Reception Directive.¹²³ Another concerning point is the fact that the term "absconding" criminalises on no legal basis the decision of an asylum seeker to choose to apply for International Protection in a country different than the Dublin Regulation foresees.¹²⁴ The Dublin system has been established in order to achieve solidarity and shared responsibility among the Member States and its non-compliance with the Art 18 of the Charter of Fundamental Rights and with the Art 13 of the 1951 Geneva Convention to set out an obligation to apply for International Protection in the first entry should at least not entail legal consequences.¹²⁵

Moreover, asylum seekers moving to other MS than the one that has to be present do not only do it with the intention to "avoid asylum procedures".¹²⁶ The provisions that regulate the phenomenon of "absconding / risk of absconding" to deal with secondary movements and irregular migration are also applied in the cases of missing UAMs, as it will be analysed below. Apart from the concerns that its punitive character raises, this definition that can not respond in a holistic way to the phenomenon of the disappearance of UAMs. If we take into consideration the reasons why UAMs go missing, this term leaves gaps to their protection. For example, there are cases of UAMs forced to leave

¹²³ UNHCR Comments on the Proposal for a Reception Directive, p 8-9

¹²⁴ ECRE Comments on the Proposal of a Reception Directive, p 8

¹²⁵ Ibidem

¹²⁶ Ibidem, p 9

the reception facilities because of the inadequate living conditions (runaways), such as these in the hotspots in Greece and Italy or there are cases that they disappear frequently for 2-3 days and then return to the shelters which is a sign of sexual exploitation or trafficking, or cases of abduction from the reception activities. By using the definition of “absconding/risk of absconding” the prevention of disappearances is left unregulated.

3.1.2 Access to information

The proposed reforms of the Art. 5 transfer the stage of providing information to asylum seekers in regards with their benefits and obligations under the Reception Directive as the phrase “within a reasonable time not exceeding 15 days after they have lodged” is replaced with “as soon as possible and at the latest when they are lodging their application for international protection”. Despite the fact that the legislators have taken into consideration the need of providing information timely, UNHCR urges that in the light of the proposed sanctions for “secondary movements” in Art. 8(3), 17a, 19 (2)(g) the information should be provided at the latest at the time when they make the application and not when they lodge it.¹²⁷ As for minors, the proposed Art.5 introduces the obligation to MS to provide also child friendly information. This provision could lead to better prevention for UAMs going missing. However, apart from information about their rights and obligations, it could be more effective if instead of the consequences that they will face if “abscond”, they were informed about the dangers that it is possible to face if they move away from their guardians.

3.1.3 Restrictions on the freedom of movement

As a general rule under the Art 7(1) of the Reception Directive, “applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State”. Though, this regulation conflicts with Art 26 and 31(2) of the 1951 Geneva Convention under which the general rule is asylum seekers to move freely in the territory of the host state and any restrictions such as the “assigned area” of Art 7(1) should be necessary and proportionate to protect a legitimate aim.¹²⁸ Based on

¹²⁷ UNHCR Comments on the Proposal for a Reception Directive, p 9

¹²⁸ Ibidem, p 10, See also ECRE Comments on the Proposal of a Reception Directive, p 10

this contradiction, UNHCR proposes to delete the provision for the restriction of applicants in an “assigned area” from the general rule of Art. 7(1).¹²⁹

The proposed Art 7(2) introduces new grounds for the restriction of the freedom of movement. In line with the proposed provisions, the authorities of the concerned MS can place the applicants in a specific place not only on matters of public interest, public order or for the effective monitoring of their applications but also for the effective monitoring of his transfer under the Dublin Regulation or for preventing them from absconding. The newly proposed grounds, however, that aim mostly to strengthen the implementation of the Dublin system are not in accordance with Art. 2 of Protocol 4 ECHR, which foresees that restrictions on movement may only be imposed for reasons of national security, public order, crime prevention, the protection of health or morals, the protection of the rights of others, or where it is justified by the public interest in a democratic society.¹³⁰

Art 7(3) refers to the cases that “there are reasons for considering that there is a risk that an applicant may abscond” and foresees for applicants reporting obligations when MS’s authorities assess that there is a risk of absconding. However, the risk of big divergences on the interpretation of this provision by the MS is obvious and UNHCR proposes a “necessity test” and a “proportionality test” to be included in the Art. 7(2), 7(3).¹³¹

While there is not an explicit reference to UAMs, Art. 7(7) indirectly affirms that the restrictions on the freedom of movement are also applied to them. The proposed Art. 7 introduces in paragraph (2) that for a number of reasons, including the prevention from “absconding”, the applicant may be placed in a “specific place” and while reading it in conjunction with Art 10(1) which refers to the detention of adults asylum seekers and provides that the applicants will be placed in “specialised detention facilities”, someone can understand that there is a small difference between the facilities used for the restriction of movement and those used for detention.

¹²⁹ UNHCR Comments on the Proposal of a Reception Directive, p 10

¹³⁰ ECRE Comments on the Proposal of a Reception Directive, p 10

¹³¹ UNHCR Comments on the Proposal of a Reception Directive, p 10

However, if someone reads Art 7(2) about the restriction of the applicants' freedom of movement in comparison with Art 11(3) in regards with the detention of UAMs, they can notice that the provision for the UAMs' detention accommodation provides more guarantees than the "specific place" in the context of the restriction of their freedom of movement. In particular UAMs under detention should be placed in "institutions provided with personnel who take into account the rights and needs of persons of their age and facilities adapted to unaccompanied minors"¹³² while when restricted in a "specific place" no more details are foreseen. By doing so, though, it is like extending the grounds for UAMs' detention. At this point, a harmonised escalation of these restrictions should be placed like in the category of the adult applicants. By extending the grounds for UAMs detention, it also extends the possibility of being detained which in turn extends the fear of detention. The fear of detention is one of the major reasons forcing UAMs to disappear. The extensive use of detention will lead to an increase of the disappearances and not to its reduction, as the new measure wishes to achieve.

3.1.4 Detention

The Art. 2(h) of the Reception Directive defines detention as: 'confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement'. The newly proposed Art 8(3) which sets out the grounds of detention adds the detention of an applicant who has not complied with his obligation under Art. 7(2), in other words the applicant's behaviour leaves the impression that he will abscond. However, the detention of asylum seekers should be imposed only as a last resort and not as a punitive measure of non compliance to a provision set out only for the well-functioning of the Dublin system¹³³. The ECtHR in its recent decision on the *O.M v. Hungary* case, restated that the immigration detention should not have a punitive character, something that consists a guarantee for the Art. 5(1)(b) of the ECHR about detention on the grounds of securing the fulfilment of an obligation prescribed by law.¹³⁴

¹³² Proposal on the Reception Directive, Art 11(3)

¹³³ UNHCR Comments on the Proposal of a Reception Directive, p 10

¹³⁴ ECtHR, *O.M. v. Hungary*, par. 42, See also ECRE Comments on the Proposal of a Reception Directive, p 12

In Art 11(3) of the Reception Directive detention is also foreseen for UAMs in “exceptional circumstances”. UAMs have to be placed in different places from adults and not in prisons. In particular, they have to be detained “in institutions provided with personnel and facilities which take into account the needs of persons of their age”. The 2016 Proposal retained this widely criticised provision despite the fact that it has been urged by researchers and practitioners that the detention of children is never in compliance with the principle of the best interests of the child. The only progress in this provision was the addition of the phrase “and facilities adapted to unaccompanied minors”.¹³⁵ Furthermore, throughout the Art. 11 (3) still exist expressions like “in exceptional circumstances” without listing these circumstances, or phrases such as “as soon as possible” or “as far as possible” which are from their nature imprecise. Moreover, in the ECtHR’s decision on *A.B. and others v France* it is stated that the conditions inherent in detention facilities are a source of anxiety and exacerbate vulnerability of children, leading to a violation of Article 3 ECHR.¹³⁶ The extension of the grounds for detention in the 2016 Proposal will lead to the increase of these symptoms something that field workers have observed that is linked with many cases of missing UAMs.

3.1.5 Material Reception Conditions

The 2016 Proposal broadens the definition of the material reception conditions in Art. 2(7) as apart from housing food and clothing, includes “essential non-food items matching the needs of the applicants in their specific reception conditions, such as sanitary items”. This is a very important addition for UAMs as the particularity of their situation has to be recognised also in the context of the material needs. Another essential addition is the phrase “an adequate standard of living” in Art. 17(1), when material conditions are provided in kind, which clarifies further its general reference in Art 16(2) that the adequate standard of living has to be guaranteed in all housing forms. A very important improvement is also the proposed Art. 17(9) which provides that in

¹³⁵ “alternatives like building on case management, alternative care , counselling and coaching could make children detention unnecessary” at FRA, *Fundamental Rights Report 2018*, p.190

¹³⁶ ECtHR, *A.B. and others v France*, par. 122, See also ECRE Comments on the Proposal of a Reception Directive, p 14

exceptional cases of emergency when the “housing capacities normally available are temporarily exhausted” the MS shall ensure a “dignified standard of living”. In these cases the obligation of the MSs to inform the European Commission and the European Union Agency for Asylum when they are about to implement exceptional measures and when the reasons for resorting to them cease to exist, allows the closer scrutiny which is necessary especially if we think about the situation in the hotspots in the Greek islands and in south Italy.¹³⁷

The two latter proposed provisions are crucial for the prevention of UAMs going missing as there are many of them that they were forced to leave the reception facilities in the frontline countries because of the inappropriate housing conditions and try to reach irregularly, while putting into risk their safety, the north EU MS. At this point, though, it has to be mentioned the newly proposed measure of Art 17a which follows the general spirit of the 2016 proposed Reception Directive to keep a punitive stance to the applicants “absconding” to different MS than the one required by the Dublin Regulation. According to this, applicants are not entitled to material reception conditions when they are present in a MS that is not the one required by the Dublin Regulation. This measure is also applied to UAMs through the paragraph (3) with the only exception that they will have access to educational activities. Moreover, the Art. 16(1) provides that the material reception conditions will be provided “from the moment they make their application for International Protection”. This means that UAMs who do not apply they do not have access even to the basics material conditions. Apart from the fact that the principle of non discrimination enshrined in the Art. 2 of UNCRC is violated, the lack of accommodation and food forces them go missing and end up in criminal networks.

As for the proposed Art 19 about replacement, reduction or withdrawal of the material reception conditions, it has to be underlined that also reflects the European Commission’s efforts for the well-functioning of the Dublin system. Currently, the MS can implement these measures when an asylum seeker abandons the provided place of residence without informing, does not comply with his reporting duties, lodges a subsequent application or his financial resources prove later that were enough and

¹³⁷Ibidem, pp 14-15

therefore he didn't need to be provided the reception material benefits. The 2016 Proposal adds also the cases that an applicant "absconds" his/her place of residence, breaches the rules of the accommodation centre or behaves in a seriously violent way, fails to attend compulsory integration measures, is present in another MS than this required under the Dublin Regulation, is sent back to the MS that he has to be present after "absconding". On the grounds that punitive restrictions can not be implemented only for rescuing the Dublin system, European Council on Refugees and Exiles (hereinafter ECRE) urges for the deletion of Art 19(2)(f),(g) and (h).¹³⁸ However, the proposed reform that guarantees the material reception conditions provided in kind is positive as the MS can only replace the financial allowances and vouchers with benefits in kind or reduce and only in exceptional circumstances withdraw the daily allowances.¹³⁹

3.1.6 Needs Assessment

The definition of the "applicant of special reception needs" is given in Art.2(13) and means "an applicant who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for". UAMs are one category of the applicants with special reception needs. There have been made several improvements in the articles relevant to the assessment of the special needs of the applicants. First of all, the Art 20 that is the general rule sets out an explicit obligation for the MS to embody in their national legislations the provisions about the special reception needs.¹⁴⁰ The importance of the immediate assessment of the needs has been addressed in the 2016 proposal as the phrase "within a reasonable period of time" has been replaced with "as soon as possible". However the phrase "as soon as possible" leaves the time frame still up to the discretion of the MS. Therefore, in the cases of massive influx or emergency situations the things will not change in practice.

At this point, it is essential to be mentioned that in Art. 22 of the Reception Directive it is provided that the assessment of the special needs will take place after "the

¹³⁸ Ibidem, pp 7-8

¹³⁹ Ibidem, p 7

¹⁴⁰ UNHCR Comments on the Proposal of the Reception Directive, p 15

application for international protection”. This means that not all UAMs are eligible for needs assessment and are discriminated depending on whether they applied for International Protection or not. This provision violates the Art. 2 of the UNCRC and does not treat them as children first and foremost.

New paragraph has been added, though, with the 2016 Proposal that includes significant details. The Art. 21(2) provides that the personnel responsible for the needs assessment should be appropriately trained to evaluate the first signs showing the vulnerability, should keep an applicant’s file of each of the vulnerable persons that includes their special needs, the signs of vulnerability and the recommendations for their support. In the cases that victims of trafficking, sexual abuse and torture are identified, the responsible person should refer them to a doctor or a psychologist for specialised further examination. The need of individual assessment of each of these cases, even if it is about minors within their families or UAMs, is also addressed in the explanatory memorandum of the 2016 Proposal.

As for the minors, Art. 22(2) provides additionally the best interests assessment (hereinafter BIA)¹⁴¹, through which MS should take into consideration the family reunification possibilities, the minor’s well-being and social development, safety and security considerations especially in the case that there is a risk for the minor of being victim of human trafficking, and the views of the minor as an expression of the right to be heard. These provisions are also applied to UAMs through the reference made in Art 23(1). As for the missing UAMs, more emphasis should be given in the art. 22(2)(c) about the safety and security considerations and the risk of trafficking.

3.1.7 Guardianship

According to Art.4(2)(f) of the current Asylum Procedures Regulation “guardian” is a “person or an organisation appointed to assist and represent an unaccompanied minor with a view to safeguarding the best interests of the child and his or her general well-being and exercising legal capacity for the minor where necessary”. The 2016 Proposal replaced the term “representative” with “guardian”, something that is also passed in Art 2 (12) of the Reception Directive . This is a positive change because while the relevant

¹⁴¹ FRA, *Fundamental Rights Report 2018*, p.190

regulations for guardianship were implemented by the MS the term “representative” was usually confused with the role of a lawyer/legal counsel/aid provider who only deals with the management of legal issues that an UAM has to deal with.¹⁴² The term “guardian” refers to the representative who acts in *loco parentis* for all the issues that an UAM does not have the legal capacity to deal with and he/she ensures that the principle of the best interests of the child will be respected.¹⁴³

The relevant with guardianship provisions are in Art.23 of the current Reception Directive which follow the provisions of Art. 22 of the Asylum Procedures Regulation. While the current regulations provide that the authorities of the MS have to appoint a representative “as soon as possible”, the 2016 Proposal fixes a deadline of five days after the UAMs makes the application for International Protection within which the appointment of the guardian should be made. Despite the fact that this provision can be considered as a step forward, given that many times it has been urged by practitioners that UAMs usually go missing within 48 first hours in the reception facilities¹⁴⁴, it is not enough for their protection. In the 2017 European Commission Communication about children on migration, it is addressed that a responsible person should be present at an early stage of the identification and registration process¹⁴⁵. This person could also be responsible for the UAM till the appointment of the guardian to inform him about the procedures. It is essential the presence of a temporary guardian before the UAM makes an application to inform him/her about the asylum system in Europe and to assess if it is in accordance to his/her best interests to apply for International Protection. Moreover, the the fact that the guardian is appointed after the UAM makes the application shows that UAMs are forced to apply for asylum in order to be benefitted by the reception conditions. This provision does not treat UAM first and foremost as a child and apart that discriminates UAMs migrants from UAMs applicants, it contradicts the principle of the best interests of the child as the UAM applies for International Protection without the assistance of a guardian.

¹⁴²Ibidem, p 16

¹⁴³Ibidem

¹⁴⁴ See n 57

¹⁴⁵ European Commission Communication COM(2017) 211, p.6

Though, in general there have been made many improvements on the issue of guardianship. More specifically the 2016 Proposal provides that in the cases that guardian is an organisation, it has to be appointed a person responsible to perform the tasks of a guardian. The interests of the appointed guardian should not conflict with these of the UAM and persons that have committed child-related crimes or offences should not be appointed as guardians. Another valuable provision that reflects the situation that its lack from the current Reception Directive has created, is that a guardian shall be changed only when necessary and they not be should not be responsible for a disproportionate that can affect the effective performance of his duties. At this point, UNHCR proposes for the introduction of an numerical upper limit for further strengthening of this provision¹⁴⁶. Finally, the 2016 Proposal introduces a monitoring mechanism for the tasks undertaken by the guardians. The entities or persons mandated to monitor the well-functioning of the guardianship will also receive complaints lodged by UAMs against their guardians as an expression of the right of the child to be heard. All these improvements may not directly prevent the disappearances of UAMs but they contribute to the building of relationship of trust between UAMs and guardians that is important for keeping them in a safe and secure environment, the lack of which could be a reason for abandoning the reception facilities.

3.1.8 Conclusion

From the analysis of the proposals of the provisions that could contribute to the prevention of the disappearances of UAMs comes out that the CEAS preferred to follow a punitive character than a protective one. Their disappearances are treated as secondary movements that put under threat the Dublin system. Introducing the term “absconding” UAMs are considered to follow a plan to reach the north EU MS and not as a vulnerable group that have been abducted by traffickers or forced to run away from the inhuman conditions in the reception centres. This is also reflected by the provisions that punish them through deprivation from the material reception conditions in the case they are found in an MS that are not supposed to be present. Another solution to block their

¹⁴⁶ UNHCR Comments on the Proposal of the Reception Directive, p 16

transfers seems to be the extensive use of detention. Finally, the CEAS still raises the application of International Protection to a prerequisite in order to have access to housing, food, health, representation by a guardian and needs assessment. Apart from the obvious violation of the principle of non discrimination as the UAMs are not considered first and foremost as children and the violation of the best interests principle as the application will be made without the assistance of a guardian, this rewarding approach to the UAMs applied for asylum puts other UAMs under high pressure to apply without considering many times the legal consequences of their decision.

3.2 EURODAC Regulation

In this subchapter it will be examined the proposed EURODAC Regulation. The same concept, that the former subchapter on the proposed Reception Directive followed, of identifying the prevention of disappearances related provisions based on the reasons that derive from the practitioners' observations, will be also applied here. Particularly, I will examine the extension of the purpose, of the categories of TCNs applied to and of the scope of the data of the EURODAC database, the lowering of the age of the children subjected to identification, the sanctions for non-compliance and the access to information. Then, I will attempt to evaluate the role of these proposals in regards with the prevention of the disappearances of UAMs.

3.2.1 EURODAC as a migration management database

The 2016 Proposal of the EURODAC Regulation extended the purpose of the EURODAC System, the categories that it will be applied to and the scope of the data to be collected, transforming it from a supporting to Dublin Regulation tool into a migration management database with a view for a gradual interconnection with other information databases in the broader context of the management of the external borders and EU's internal security.¹⁴⁷ On this ground the European Commission is examining the feasibility of interconnection through a common search portal between EURODAC and the current databases of the SIS which is established to give alerts on persons and

¹⁴⁷ European Commission Communication COM(2016)205, See also the Proposal for the EURODAC Regulation, p 5

objects related to criminal offences, missing persons, TCN with country bans and return decisions, and of the Visa Information Systems (hereinafter VIS), as well as with the future databases of Entry/Exit Systems (hereinafter EES) which will contain information of TCN visiting the Schengen Area for a short stay and of the European Travel Information and Authorisation System (hereinafter ETIAS) that will be set up for registering the data of visa-exempt TCN prior to their arrival at the border to determine whether or not the person can enter the EU.¹⁴⁸

3.2.1.1 Extension of the purpose

The initial aim of the EURODAC Regulation was to contribute to an effective implementation of the Dublin Regulation and the 2013 recast added that MSs' designated law enforcement authorities and Europol may request data for comparison in the context of law enforcement purposes, such as "the prevention, detection or investigation of terrorist offences or of other serious criminal offences". The 2016 Proposal extended its purpose by introducing the Art 1(1)(b) according to which EURODAC database will be used also for the control of illegal migration and secondary movements and for the return of the illegally staying TCNs.

Among the issues analyzed in the explanatory memorandum of the 2016 Proposal is that of the disappearance of thousands of UAMs because of the ineffectiveness of the current system to register the accurate number of the UAMs entering the EU through its external borders.¹⁴⁹ Furthermore, in the last part of the 2016 Proposal about the "expected results and impact", the expected strengthening of the protection of UAMs who "abscond from care institutions or child social services" because of the inadequate current registration system, is included.¹⁵⁰

Despite the fact that the phenomenon of the increased disappearances of UAMs has been attributed to the ineffectiveness of the current system and the reforms are expected to better prevent these cases, there is no reference to this issue in the Art 1(1) where the aims of the proposed EURODAC system are listed. The MSs' authorities can decide to

¹⁴⁸ FRA, *Age assessment and fingerprinting of children in asylum procedures: Minimum age requirements concerning children's rights in the EU*, (2018), p.15,16

¹⁴⁹ Proposal for the EURODAC Regulation (2016) , p.4

¹⁵⁰ Ibidem, p.92

apply either the Art. 1(1)(b) approaching the phenomenon of missing UAMs as secondary movements or the Art. 1(1)(c) linking these cases with the “prevention, detection or investigation of serious criminal offences”. Apart from the issue that there are differences on the procedures that the MSs’ authorities will follow depending on the subparagraph of the Art. 1(1) that they will finally apply, it would be essential the Proposal to include an explicit reference to these cases in order to avoid the discrepancies and their undesirable consequences that its lack will result to. At this point, the European Union Agency for Fundamental Rights (hereinafter FRA) proposes the addition of a protection objective as Art 1(1)(d) which will explicitly refer to the protection of children victims of trafficking and to the prevention and investigation of children go missing, disappear or abscond.¹⁵¹ This provision shall also be accompanied with the appropriate guarantees to ensure that only national law enforcement authorities and Europol will have access to their stored data.¹⁵² On the other hand, law enforcement authorities’ access should be prohibited for the control of illegal immigration and secondary movement (Art. 1(1)(b)), while their access for the purpose of the Art. 1(1)(b) should be justified with additional evidence of the importance of children’s data for combating terrorism and serious crime offences.¹⁵³ In the light of the EU legislators’ discussions about the potentials of a future interconnection of EURODAC with other information databases, a further provision could be added to oblige the EU MS to record the missing UAMs in SIS II in order to be visible by the responsible authorities directly by accessing the SIS II, as it happens for all the missing persons cases.¹⁵⁴

3.2.1.2 Extension of the categories

As a consequence of the extension of the purpose of EURODAC Regulation in regards with the control of irregular migration and secondary movements and the return of illegal TCNs, the 2016 Proposal extends also the categories of the TCNs that will be subjected to the biometrics taking.

¹⁵¹FRA, *The impact of the proposal for a revised Eurodac Regulation on fundamental rights Opinion of the European Union Agency for Fundamental Rights*, (2016), pp.24-25,

¹⁵² Ibidem p. 25, See also about issues of unlawful use and sharing personal data to third parties, risk of violation of the right to privacy and threat to democracy at FRA, *Fundamental Rights Report 2018*, p.135

¹⁵³ Ibidem

¹⁵⁴ Ibidem, p. 24

The current EURODAC Regulation was mostly established in order to store the biometric data of the applicants for International Protection. As for the biometric data of the TCNs apprehended at the borders are currently stored for 18 months while the biometric data of those apprehended staying illegally in a MS are not registered at all.

In the Explanatory Memorandum of the 2016 Proposal, it is mentioned that frontline MS failed to implement the identification procedures due to the massive influxes and as a result of this many TCNs move within the EU illegally and “invisibly”.¹⁵⁵ Consequently, the MS that are not located in the external borders of the EU found many TCNs illegally staying within their territories and highlighted the need to be also registered in the EURODAC database.¹⁵⁶ The current EURODAC Regulation allows only the comparison between fingerprints taken from irregular migrants with these already registered in the EURODAC database and belong to applicants for International Protection, which takes place mostly for return purposes.¹⁵⁷ Moreover, fingerprints taken from apprehended irregularly staying TCNs are not compared with fingerprints of TCNs apprehended irregularly entering at the borders as the data of the latter can be accessed only for the Dublin Regulation purposes.¹⁵⁸

The proposed EURODAC Regulation will apply not only to the applicants for International Protection (Art 10(1)) and to the TCNs that have not applied for asylum and were apprehended at the borders (Art 13(1)) but also to those found illegally staying within the territory of a MS (Art 14(1)). Moreover, their data will be stored for 5 years in order to serve the extension of the EURODAC Regulation purpose in regards with the monitoring secondary movements.¹⁵⁹ The currently foreseen period of 18 months long storage, which refers only to those apprehended at the borders, exclusively served to establish the first country of entry for the implementation of the Dublin Regulation.¹⁶⁰ The registration of the TCNs illegally staying within the EU will be also

¹⁵⁵ Proposal for the EURODAC Regulation (2016), p.2

¹⁵⁶ Ibidem

¹⁵⁷ Ibidem, p.12, See also Art. 17 of the EURODAC Regulation

¹⁵⁸ Proposal for the EURODAC Regulation (2016), p.12

¹⁵⁹ Ibidem, p.4

¹⁶⁰ Ibidem

useful to control those that will enter legally by issuing a short-stay visa under the proposed EES but will continue to stay illegally after the expiration of their visa.¹⁶¹

This is very important for the protection of the UAMs, as independently of whether they have applied for international protection or not, they will be registered in the Central System.¹⁶² Their registration will contribute to the effectiveness of the tracing mechanism for the investigations of the missing UAMs cases as where ever they will be found in the EU, the authorities will keep track of them and prevent them from getting victims of trafficking or other kind of exploitation.¹⁶³

3.2.1.3 Extension of the scope of data

In the Art. 12(1), 13(2) and 14(2), the 2016 Proposal provides that apart from the fingerprints, the designated Member States authorities will also register within the biometric data, a facial image of the TCNs. Furthermore, while the current EURODAC Regulation required only the sex of the TCNs to be registered, the 2016 Proposal introduces the collection of additional personal details, such as name, surname, other official or unofficial names, nationality, place and date of birth, type and number of identity or travel documents or anything else related to the TCNs and enables their further identification. This data is registered in the “EURODAC” system which consists of the “Central System” that serves as the central database and the “Communication Infrastructure” that allows the transmission of the data between the MS and and the Central System.¹⁶⁴ The TCNs of all three categories are registered in the “Central System”. In parallel there is a separate secure “Communication Infrastructure”, the “Dublinet”, within which only the applicants for International Protection are registered for the strengthening the implementation of the Dublin system.

This extension of the scope of the data transmitted in the Central System will allow a comprehensive and thus more effective identification that allows the comparison for the purposes of the EURODAC Regulation.¹⁶⁵ This is an effort to overcome the failure on

¹⁶¹ Ibidem, p.3

¹⁶² Ibidem, p.10, Recital 25

¹⁶³ Ibidem, p.92

¹⁶⁴ Ibidem, p.19, Recital 6

¹⁶⁵ Ibidem, Recital 5

the comparison of data due to the phenomenon of the damage of fingerprints or the non-compliance with the procedure of fingerprinting. Additionally, the immigration and asylum authorities will have access directly to a broader scope of data and will not have to make a request for it from another MS, a currently applied procedure that proved to be time consuming.¹⁶⁶ Therefore, it would also contribute to a more effective and timely tracing of missing UAMs. It would also be a positive addition the inclusion of the family links within the data that will be stored, something that apart from an extra element for comparison, will mostly serve for the family tracing.¹⁶⁷

3.2.2 Lowering the age limit

One of the most discussed reforms that the 2016 Proposal will bring is the lowering of the age in regards with the collection of biometric data. According to the proposed Art.10(1), 13(1) and 14(1) the age of the UAMs should be at least six years old, when MS authorities taking the biometric data, instead of fourteen that the current EURODAC Regulation foresees. The European Commission mentions in the explanatory memorandum of the 2016 Proposal that in many MS biometrics data from children under the age of fourteen are taken for passports, biometric residence permits and general immigration control, something that the EURODAC Regulation could adopt for their protection.¹⁶⁸ Moreover, the Regulation on the uniform format for residence permits for TCNs provides that children at the age of 6 and older are subject to the fingerprinting process for its purposes.¹⁶⁹ In addition, according to the Commission's Joint Research "Fingerprint Recognition for Children" effective recognition could be achieved with fingerprints taken from children aged six and above.¹⁷⁰

The registration of all children who age at least six is a measure that could contribute to the detection of children victims of trafficking and to the tracing of UAMs "including

¹⁶⁶ Ibidem, p.13

¹⁶⁷ FRA, *The impact of the proposal for a revised Eurodac Regulation on fundamental rights Opinion of the European Union Agency for Fundamental Rights* (2016), p.25

¹⁶⁸ Proposal for the EURODAC Regulation (2016), p.4

¹⁶⁹ FRA, *Age assessment and fingerprinting of children in asylum procedures: Minimum age requirements concerning children's rights in the EU* (2018), p.13

¹⁷⁰ Proposal for the EURODAC Regulation (2016), p.14, See also European Commission, *'Fingerprint Recognition for children'* (2013), pp. 79-80

those who go missing, abscond or otherwise disappear”¹⁷¹. On the other hand, taking biometric from children has the character of an interference, which, in order to be justified in the cases of UAMs as young as 6 years old, the Art. 1(1) of the EURODAC Regulation Recast has to include explicitly a protection objective, such as identifying missing children and protecting UAMs victims of trafficking, as it has been mentioned above.¹⁷² Otherwise, this measure raises concerns about the necessity and proportionality if its legal basis is the effective implementation of the Dublin Regulation or the fight against secondary movements and illegal migration.¹⁷³ The protection objective shall be supported with further actions, such as raising awareness of police and border officers about missing UAMs, informing newly arriving UAMs and the wider public about the phenomenon of missing children, systematically recording missing children in SIS II, establishing cooperation mechanisms between authorities and organisations dealing with children.¹⁷⁴ The MS shall ensure that the whole process will respect the right to human dignity, the prohibition of torture and degrading and inhuman treatment and the best interests of the child principle.¹⁷⁵ Moreover, UAMs should be assisted by a guardian¹⁷⁶ during the identification procedure and the fingerprinting should be operated not only in a child - friendly and child - sensitive manner but also in a gender - sensitive manner, something that workers in the hotspots have observed that is not respected.¹⁷⁷

3.2.3 Sanctions for non-compliance

The Art. 2(1) obliges the MS to take the biometric data of applicants and of those irregularly entering or staying in the EU and to impose it on them as a requirement. MS are allowed to impose sanctions on those who do not comply with this requirement

¹⁷¹ UNHCR Comments on the Proposal for the EURODAC Regulation (2017), p.7

¹⁷² FRA, *Age assessment and fingerprinting of children in asylum procedures: Minimum age requirements concerning children’s rights in the EU*’ (2018), p.14

¹⁷³ Ibidem

¹⁷⁴ Ibidem, p.8

¹⁷⁵ FRA, *The impact of the proposal for a revised Eurodac Regulation on fundamental rights Opinion of the European Union Agency for Fundamental Rights* (2016), pp. 14-15

¹⁷⁶ FRA, *Age assessment and fingerprinting of children in asylum procedures: Minimum age requirements concerning children’s rights in the EU*’ (2018), p.8

¹⁷⁷ FRA, *The impact of the proposal for a revised Eurodac Regulation on fundamental rights Opinion of the European Union Agency for Fundamental Rights* (2016), pp. 14-15

under their national legislations. A highly controversial issue that comes from the lowering of the age of children being taken fingerprints is the possible sanctions could be imposed on children at the age of 6 by the MS authorities in the case of non-compliance. When children do not comply with this requirement, three possibilities are given in Art. 1(4): a) when “it is not possible” to take the biometric data “due to the conditions of the fingertips or face” no kind of coercion will be used against them, b) when children without reason refuse to give their biometric data, the designated authority can attempt to retake them, and c) when children without reason refuse being subjected to the process but there is a “high risk” of their safety and protection based on reasonable suspicions, they will be “referred to the national child protection authorities or national referral mechanisms”. It is obvious that the wording of the Art 1(4) leaves a high degree of discretion to the MS in regards with the conditions that make the biometric data taking impossible and the high risk occasions, while does not explicitly denies the application of the Art 1(3) about the imposition of sanctions using violence and the deprivation of liberty to children.

At this point, it is worthy to be mentioned that Civil Society and UN organisations have signed a joint statement on February 2018 to officially express their concerns about the discussions made by the European Institutions on the possible use of coercion by the national authorities while taking the biometric data of children.¹⁷⁸ Taking into consideration the vulnerability of their situation any use of force on UAMs could easily reach the threshold of torture, degrading or inhuman treatment, violating the Art. 4 of the EU Charter of Fundamental Rights and the Art. 3 of the ECHR.¹⁷⁹ Even in the case that the coercive action will not reach this threshold, it can not be considered as necessary or proportionate in the cases of UAMs in contradiction with the Art. 3 of the EU Charter of Fundamental Rights about the physical and mental integrity.¹⁸⁰

Secondly, UNHCR insisting on its position for the prohibition of detention of children for immigration related purposes, asks for the inclusion of an explicit statement in Art

¹⁷⁸ ‘JOINT STATEMENT: Coercion of children to obtain fingerprints and facial images is never acceptable’ (2018)

¹⁷⁹ FRA, *The impact of the proposal for a revised Eurodac Regulation on fundamental rights Opinion of the European Union Agency for Fundamental Rights* (2016), p. 17

¹⁸⁰ Ibidem

2(4) prohibiting the detention of children for refusing to provide biometric data.¹⁸¹ The measure of detention should be used as a last resort according to the Art 37 of the UNCRC and it is broadly accepted that the immigration detention, which is even for the adults a disputed issue, should be prohibited.¹⁸² Instead of considering of imposing sanctions to children unwilling to be registered, the EU legislator could add in Art. 2(4) that a counselling, support and information will be provided explaining the purpose of this process, their rights and safeguards that are provided within the EURODAC Regulation in a child - friendly and gender - sensitive manner.¹⁸³ Children should also be informed about the threats that may face and how this database will help for their protection. Hence, information and counselling apart from being provided before the first effort to retake children's biometric data, could also serve as an non invasive alternative to sanctions for children unwilling to be processed. Additionally, counseling could be implemented either individually or through outreach actions targeting migrant communities in the form of focus group discussions or information sessions.¹⁸⁴ In the case of UAMs, the counselling should be provided by trained guardians or other persons responsible for UAMs at the stage of identification.

3.2.4 Access to Information

The Art. 2(2) of the 2016 Proposal of EURODAC Regulation foresees that children undergoing the fingerprinting and the facial image scanning procedures have to be provided information in an age-appropriate manner. The usage of leaflets, infographics and demonstrations have to be appropriately designed for enabling them understand the functioning and the importance of identification procedure. The UAMs should be accompanied by a guardian to be present in all the procedures who will ensure that the dignity and integrity of the child will be respected.

¹⁸¹ UNHCR Comments on the Proposal for the EURODAC Regulation (2017), pp.6-8

¹⁸² FRA, *The impact of the proposal for a revised Eurodac Regulation on fundamental rights Opinion of the European Union Agency for Fundamental Rights* (2016), p. 18

¹⁸³ UNHCR Comments on the Proposal for the EURODAC Regulation (2017), p.7, See also FRA, *The impact of the proposal for a revised Eurodac Regulation on fundamental rights Opinion of the European Union Agency for Fundamental Rights* (2016), pp. 17

¹⁸⁴ FRA, *The impact of the proposal for a revised Eurodac Regulation on fundamental rights Opinion of the European Union Agency for Fundamental Rights* (2016), pp. 17

In general terms, the provisions of the Art. 2(2) of the 2016 Proposal for the EURODAC Regulation are positive. However, some more details could be added. In particular, the wording of the Art. 2(2) provides that the guardian should be present during the fingerprinting and taking of the facial image of the UAM but it does not foresee his/her presence during the time that the UAM is informed about the procedures by the authorities.¹⁸⁵ It is essential the presence of a guardian at this stage because an UAM needs a third person who does not belong to the authorities to assist him/her and to ensure him/her about the respect of all his/her rights.

Moreover, the appointment of appropriately trained personnel and the undertaking of fingerprinting and facial image in child-friendly environment are essential elements.¹⁸⁶ Finally, a recent research conducted by FRA highlighted that the effectiveness of the provision of the information comes from the combination writing and oral information.¹⁸⁷

3.2.5 Conclusion

The selected provisions analysed above *prima facie* contribute to the prevention of the disappearances. Apart from the fact that throughout the Explanatory Memorandum many references have been made that show the intention by the European Commission to tackle the issue on a legislative level, there are many proposed regulations that reflect it. In particular, the extension of the categories of TCNs will be registered shows that all UAMs regardless whether they have applied for International Protection or not, they will be registered in the EURODAC database in order to be traceable in the case they will disappear. This means that regarding their protection from going missing, are treated like children first and foremost. Moreover, for the better tracing the scope of the data will be expanded. In addition, the age of the UAMs registered will be lowered for covering a wider target group. However, all these well-intentioned proposals are not accompanied by a protection objective and adequate guarantees due to the adoption of a more invasive character. Furthermore, the fact that the EU legislators are thinking about

¹⁸⁵ UNHCR Comments on the Proposal for the EURODAC Regulation (2017), p.10

¹⁸⁶ *Ibidem*

¹⁸⁷ FRA, *The impact of the proposal for a revised Eurodac Regulation on fundamental rights Opinion of the European Union Agency for Fundamental Rights* (2016), pp. 21

imposing sanctions to UAMs do not comply with the requirement of being registered in the EURODAC system adds even more arguments to support the conclusion made after examining the Proposal for a new Reception Directive. This is that the new Proposals, despite the fact that the phenomenon has been addressed by the European Commission, do not reflect the intention to prevent it but the missing UAMs' cases are perceived as secondary movements that threaten the control of the migration flows in the EU and put obstacles in the implementation of the Dublin Regulation.

Chapter IV

4. National level

In this Chapter, I will examine the national legal frameworks of Italy and Ireland. Like following the UAMs' journey, I will start with the case of Italy giving the situation of a frontline country and I will continue with the case of Ireland as a destination country. In each of these subchapters the analysis will begin by giving a general background of the countries regarding missing UAMs and then I will analyse the points of their legislations relevant with the prevention of the disappearances that will be utilised for the comparison with the proposed Reception Directive and EURODAC Regulation in the next chapter.

4.1 The case of Italy

4.1.1 Background

Italy is the country-gateway of the Mediterranean central route. The last decade Italy is under heavy pressure due to the high numbers of migrants arriving mostly at the coasts of Lampedusa and Sicily. While the countries of origin vary, the majority of UAMs come from Gambia, Egypt, Guinea, Albania, Eritrea and the Ivory Coast.¹⁸⁸ In 2017, there were counted around 18.303 UAMs, the majority of whom are males around the age of 17. 5.828 of these UAMs are missing¹⁸⁹, number which shows a concerning increase after comparison with previous years' data¹⁹⁰. The missing UAMs mostly come

¹⁸⁸ *I minori stranieri non accompagnati (MSNA) in Italia*, Report di Monitoraggio, (2017), p.5

¹⁸⁹ *Ibidem*

¹⁹⁰ Ministero dell' Interno, *Persone Scomparse, aumenta il numero dei minori stranieri da rintracciare*, (2017)

from Somalia, Eritrea and Egypt, a concerning percentage of which have disappeared after their arrival at the reception centres.¹⁹¹ The female UAMs consist only the 6,8% of the total number of UAMs.¹⁹² The majority of female UAMs are 17 years old and come mostly from Nigeria, Eritrea, Somalia and the Ivory Coast.¹⁹³

Italy's concerns about missing persons are dated back to 2007, when the Special Commissioner for Missing Persons was first time appointed.¹⁹⁴ The phenomenon of missing UAMs has been addressed in 2009 in a Special Commissioner's hearing on missing persons: "people who choose voluntarily to go missing, children kidnapped by a parent, teenagers who run away from disadvantaged and difficult family situations, minors, especially foreigners, who escape from protected residences and institutions to fall, in some cases, into the hands of unscrupulous exploiters, people with psychological disorders, particularly the elderly suffering from Alzheimer's disease, people victimized by criminals and even incidents related to the world of sects".¹⁹⁵ One of the achievements of the Commissioner was the Law 203/2012 "Provisions for the research of Missing Persons".¹⁹⁶

The reasons why UAMs choose to disappear from the reception centres after their arrival vary. Given that Italy is a transit country, many UAMs disappear in order to be reunited with their families, being discouraged by the delays of the asylum related procedures.¹⁹⁷ There are also many UAMs who have been sent to Europe by their families for economic reasons.¹⁹⁸ These UAMs try to find a job and therefore they are not interested to wait in the raw in order to be offered the reception conditions for UAMs. They try to find a job and their plan is to reach to the wealthy north EU MS even if they do it irregularly.¹⁹⁹ Moreover, there are UAMs that despite the fact that they want to follow the legal procedures, the lack of access to information confuses them and

¹⁹¹ *I minori stranieri non accompagnati (MSNA) in Italia*, Report di Monitoraggio, (2017), p.6

¹⁹² *Ibidem*, p.11

¹⁹³ *Ibidem*, See also *Vita* (2017)

¹⁹⁴ *XVII Relazione* (2017), p.5, See also *Mediterranean Missing: Italy Country Report* (2016), p.22-23

¹⁹⁵ Serena Romano, *Mediterranean Missing: Italian legal briefing* (2016), p.5

¹⁹⁶ *XVII Relazione* (2017), pp.9-10, the Law 203/2012 deals mostly with the part of the response to the disappearances and will not be examined further in this paper.

¹⁹⁷ *Humanium* (2017), UNICEF-REACH Report (2017), p.46

¹⁹⁸ Centre for Migration Studies, *'In search of protection: unaccompanied minors in Italy'* (2018)

¹⁹⁹ UNICEF-REACH Report (2017), p.43, See also Rai Report

in combination with the inappropriate reception conditions makes them drop out of the reception facilities.²⁰⁰ The common denominator of all these cases is the risk of missing UAMs to become victims of trafficking either in Italy or during their journey or after the arrival at their destinations.

As a response to the reality that UAMs face because of the protection gaps of the Italian legislation, on 7th of April 2017 the former Italian government adopted the Law 47/2017 “Provisions for the protection of unaccompanied migrant children”, known as the “Zampa Law”. This law is the outcome of 4 years of advocacy by UNICEF²⁰¹. It has been claimed that is the first law in Europe referring exclusively to UAMs²⁰² and that it could serve as an EU model²⁰³. Moreover, during the conference “Prevention of the disappearance of unaccompanied minors from the reception centers”, the Commissioner for Missing Persons stated that the new law, and in particular the provisions regarding the guardianship, will contribute to the prevention of the disappearances of UAMs.²⁰⁴

4.1.2 Scope of application

The Art. 2 of the L.47/2017 refers to whom the provisions following are applied giving the definition of the UAMs. UAMs are the minors who do not have Italian or EU citizenship and are present for any reason in the territory of Italy or are subject to Italian jurisdiction without the assistance and representation from their parents or other adults legally responsible for them according to the Italian legal system. This definition and especially the phrase “for any reason” entails that the provisions of the L.47/2017 will be applied regardless their aim of applying for international protection or not, in other

²⁰⁰ *Humanium* (2017), See also UNICEF, REACH Situation Overview (2017), See also UNICEF, REACH Report (2017), p. 43,48

²⁰¹ UNICEF Humanitarian Situation Report #22 (2017), p.3

²⁰² Executive Summary for March 30th’ *Refugees Deeply* (2017), See also ‘Syrians in displacement’ *Forced Migration Review* (2018), p.79, See also ECRE, ‘Italy: Developing Europe’s most elaborate system for protecting refugee children’ (2017), *THE WEEK* (2017)

²⁰³ UNICEF Humanitarian Situation Report #22 (2017), p.7, See also ‘Syrians in displacement’ *Forced Migration Review* (2018), p.79, See also ‘UNICEF hails new Italian law to protect unaccompanied refugee and migrant children as a model for EU’ (2017) , See also Executive Summary for March 30th’ *Refugees Deeply* (2017)

²⁰⁴ Ministero dell’ Interno, *Prevenire le scomparse dei minori stranieri, e l’obiettivo a Roma*, (2017)

words regardless they are refugees or economic migrants.²⁰⁵ The protection provisions will be applied on the grounds of their vulnerability as minors and unaccompanied.²⁰⁶ This provision significantly contributes to the prevention of UAMs go missing as a high percentage of these children are in irregular status and being afraid of being returned back to their country of origin they prefer to stay invisible running the risk of becoming victims of trafficking. Moreover, the UAMs that do not express their will of applying for asylum are usually uncounted and not registered in an official database, something that makes them untraceable in the case they go missing.

4.1.3 The principle of non refoulement

While the principle of non refoulement applies to all states as a principle of customary International Law and it is also foreseen in the Art. 19 of the L.D. 286/1998, the Art.3 of the L.47/2017 adds separate paragraph for UAMs. On the one hand, it is absolutely prohibited to reject an UAM at the borders. On the other hand, it provides that an UAM is possible to be deported on the grounds of public order and state security only if this decision will not involve a risk of serious harm to him/her. In this case, the Juvenile Court has to publish a decision within 30 days.

As the fear of deportation is one of the reasons that makes many UAMs go missing, it is very important that the new Law adds more guarantees for their deportation. It bans in an absolute manner the rejection of the UAMs at borders which means that they will enter regularly the country, will be provided with accommodation and social, psychological and legal assistance, will be identified and formally registered. UAMs will not have any reason to turn to smugglers in order to enter the country irregularly. Even if they will disappear at a later than the reception stage, the investigation would be easier as their personal data would have been already registered.

4.1.4 Reception System

Apart from the “hotspots” system, which appeared due to the emergency situation of the massive influxes, in general the reception system in Italy is implemented in two

²⁰⁵ The Twenty-third Italian Report on Migrations (2017), p. 81, See also Center for Migration Studies *In Search of Protection: Unaccompanied Minors in Italy (2017)*

²⁰⁶ The Twenty-third Italian Report on Migrations (2017), p. 81

phases.²⁰⁷ At the initial stage of their arrival, refugees are transferred to the first reception facilities which are mostly governmental collective centers or in the case of unavailability other “temporary” structures.²⁰⁸ After their identification, they are transferred to the second-line facilities of the System for the Protection of Asylum Seekers and Refugees (hereinafter SPRAR).²⁰⁹ The SPRAR is a network of local authorities and NGOs where asylum seekers or beneficiaries of International Protection are accommodated.²¹⁰ The first reception centres are usually big buildings hosting high numbers of asylum seekers where only the basic services are offered, such as food, accommodation, clothing, first aid assistance and legal services.²¹¹ On the other hand, SPRAR are small-scale facilities that offer more services than the first line centers, among of which linguistic-cultural mediation services, teaching of Italian language, education for minors, socio-psychological support, health assistance.²¹²

The Reception System for UAMs is regulated primarily by the Art. 18 and 19 of the Legislative Decree 142/2015. The Art. 18 of the L.D. 142/2015 cites the fundamental principles and the rights of child that consisted the basis for the provisions establishing the reception system for UAMs. In particular, the relevant regulations should be in accordance with the principle of the best interests of the child enshrined in the Art. 3 of the UNCRC to ensure adequate living conditions for the protection, well-being and social development of the child, ensure adequate living conditions for the child. Moreover, the right of the child to be heard should be respected and taken into account for the needs assessment and for the assessment of the risk to become a victim of trafficking.

The general rule, given in the Art 19(2) of the L.D. n.142/2015²¹³, provides that the placement of the UAMs has to be in specific projects adapted to UAMs within the SPRAR .²¹⁴ According to the Art. 19(2-bis) of the L.D. 142/2015²¹⁵, the UAMs should

²⁰⁷ AIDA, Country Report: Italy (2017), p.69

²⁰⁸ Ibidem

²⁰⁹ Ibidem, p.70

²¹⁰ Ibidem, p.70

²¹¹ Ibidem, p.75

²¹² Ibidem, p.76

²¹³ as amended by the Art. 12 of the L.47/2017

²¹⁴ AIDA, Country Report: Italy (2017), p.97

be accommodated in a place chosen according to the needs and characteristics identified during the interview of the Art 19-bis(1)²¹⁶.

When there are no available places in the SPRAR structures, the UAMs are accommodated in the governmental first reception facilities for the immediate response to their needs and for protection.²¹⁷ The Art. 4 of the L. 47/2017 reduced the maximum of the days that the UAMs can stay in the first reception facilities from 60 to 30 days.²¹⁸ This period should be the shortest that is necessary for the needs of identification which has to be completed within 10 days.²¹⁹ It also introduces that the first reception facilities that UAMs will be placed should be “set up for them”. These reforms mostly took place for the prevention of UAMs escaping from first reception facilities²²⁰, as a high percentage of them has been observed that goes missing due to the delays of being placed at the SPRAR facilities.²²¹

According to Art. 19(1) of the L.D. 142/2015, at this stage of the reception it is operated the identification of UAMs and if necessary the age assessment. Moreover, information are provided for their rights and especially for the right to apply for International Protection. The UAMs are interviewed by psychologists, during of which apart from describing their personal psychological situation, they talk about the reasons and circumstances of the departure from his country of origin, the journey they have undertaken and their future expectations. In this interview a cultural mediator is present ascertain the information are given.

The Art. 19(1) of the L.D.142/2015 has to be read in conjunction with the Ministry of Interior Decree n.1/2016 “Establishment of first reception centers dedicated to unaccompanied minors”, which refers to the structural requirements and services provided in order to ensure reception conditions adapted to the needs of minors in respect of the rights of the child and the principles mentioned in the Art. 18 of the L.D. 142/2015.

²¹⁵ introduced by the Art. 12 of the L.47/2017

²¹⁶ introduced by the Art. 5 of the L.47/2017

²¹⁷ AIDA, Country Report: Italy (2017), p.97

²¹⁸ Ibidem

²¹⁹ Ibidem

²²⁰ Leonardo Cavaliere & Francesca del Giudice (2017)

²²¹ AIDA, Country Report: Italy (2017), p.98

The Art. 3 of the D. 1/2016 provides the structural requirements according to which the centers have to be located in easily accessible places in order for minors to have access to services and to the social life and to be consisted of two structures each of them capable to host up to 30 minors. As for the existing services in the first reception facilities, the Art. 4 of the D.1/2016 provides that there is an administrative management responsible for the registration not only of the first entry and exit of UAMs but also of their daily exits from the center, a canteen that takes into account any medical prescriptions, linguistic and cultural mediation to fulfill the right of the child to be heard, Italian language courses, organizing of free time activities, support to the competent authorities for the procedures of identification, verification and the appointment of guardians, legal support for the asylum and immigration issues, interview with a psychologist in the presence of a cultural mediator for the assessment of the risk to become victim of trafficking and keeping of an individual form describing the information and services have been provided.

The efforts of the legislator to provide a more favorable reception system for UAMs is obvious. First of all, while the adults are offered accommodation after expressing their intention of applying for International Protection, the UAMs are placed in facilities adapted to their needs only on the basis of their vulnerability as through the Art. 2 of the L.47/2017 the reception conditions will be offered to all UAMs.²²² Furthermore, the law does not regulate the time limit of the adults asylum seekers in the first reception centres, as it provides that applicants stay “as long as necessary” to complete the identification procedures or for the “time strictly necessary” to be placed in SPRAR²²³. However, in the case of UAMs it provides that they cannot be accommodated more than 30 days in the first reception facilities, 10 of which is the fixed period for their identification. These stricter time limits set up especially for UAMs prove the aim of the legislator to provide as soon as possible to UAMs a complete set of reception conditions and not only the basics, while by shortening the period of their stay in the first reception facilities also prevents them from escaping.²²⁴ In reality though, both the first reception

²²² Ibidem, p.72

²²³ Ibidem, p.70

²²⁴ Leonardo Cavaliere & Francesca del Giudice (2017)

facilities and SPRAR are overcrowded and insecure.²²⁵ According to observations of practitioners, 28 children on average go missing every day while many of them see these structures as de-facto detention centers and run away ending up to live in the streets.²²⁶

In the case that there are no places temporarily also in the first reception facilities, the assistance and reception of UAMs is undertaken by the public authority of the Municipality in which the UAM is found in accordance with the Art. 19(3) of the L.D. 142/2015. This provision refers to the Art. 11(1) of the L.D. 142/2015 about the temporary structures (CAS) set up for the emergency situations due to a massive influx.²²⁷ These temporary structures should satisfy the basic reception requirements as described in the Art 10(1) of the L.D. 142/2015²²⁸, and, in particular, the respect for the private sphere, the gender differences, the age related needs, the protection of physical and mental health, the prevention of any form of violence and guarantees for their security and protection. However, this provision has been strongly criticised by the civil society as a disincentive for municipalities to take part in the SPRAR projects and for discriminating the UAMs placed in temporary structures from those placed in SPRAR and first reception centers.²²⁹

4.1.5 Detention

The Art. 19(4) of the Legislative Decree No.142/2015 explicitly prohibits the detention of UAMs in pre-removal detention centres (CPR).²³⁰ However, due to the emergency situations because of large influxes that Italy faces very often, many children are not placed in the SPRAR due to the lack of available places and end up in hotspots, where in practice they are deprived of their liberty.²³¹ Recently, a case of detained UAMs was brought before the ECtHR, which after deciding upon their admissibility, has requested

²²⁵ Kids Empowerment (2017), p.24

²²⁶ Ibidem

²²⁷ AIDA, Country Report: Italy (2017), p.98

²²⁸ where the Art. 11(1) of the L.D.142/2015 refers to

²²⁹ AIDA, Country Report: Italy (2017), p.98

²³⁰ Ibidem, p.106

²³¹ Ibidem

responses by the Italian government by 14 May 2018.²³² The UAMs were restricted in tent surrounded by metal grids under guard of army soldiers.²³³

4.1.6 Guardianship

The guardianship system of UAMs falls into the scope of the general provisions for guardianship referring to all the minors in the Italian territory that do not have legal capacity and there are no parents or other relatives to represent them.²³⁴ In the context of ensuring the right of the child to be heard during all the asylum related procedures, the Art.18(2-bis) of the L.D. 142/2015²³⁵ provides the presence of a guardian, approved by the UAM, for his or her emotional and psychological assistance in every stage of the procedures, and the Art.18 (2-ter) for the appointment of a legal representative and a cultural mediator for facilitating the UAM's participation in all courts and administrative proceedings.

According to Art. 19(5) of the L.D. 142/2015²³⁶, the public security authority has to notify immediately the Public Prosecutor of the Juvenile Court and the Juvenile Court for the appointment of a guardian. In the case that an UAM has already lodged the asylum claim without the assistance of a guardianship, the police officer of the Art. 26(5) of the Legislative Decree 25/2008 immediately notifies the Juvenile Court for the appointment of a guardian while suspends the procedure. Within 48 hours the guardian will be appointed. The guardian has to contact immediately the police in order confirm the application for International Protection that UAM has lodged. If for any reason a guardian will not be appointed within this time frame, the application for International Protection made by an UAM will be confirmed by the manager of the first reception facilities. In CNDA Circular no. 6425 of 21 August 2017, it is declared that the Art. 26, (5) of the L.D. 25/2008, as amended by L. 47/2017, provides that the manager of the first reception facilities can give the confirmation for the UAM's will to lodge the application for International Protection, if for any reason a guardian is not appointed

²³² Ibidem

²³³ Ibidem

²³⁴ Ibidem, p.56

²³⁵ introduced after the Art. 18 of the L.D. 142/2015 by the Art. 15 of the L.47/2017

²³⁶ as amended by the Art. 2(1)(b) of the Legislative Decree 220/2017

within the aforementioned time frame. However, he is not allowed to take any other decisions on the behalf of the UAM and the guardian will be the responsible person in all the subsequent stages of the procedure. This exception is allowed under the thinking that it is the best interest of the child that the procedure of his/her application for International Protection will not have delays. Moreover, it is an interpretation that reflects the general protection objective of the newly adopted L.47/2017 as till now the common practice was the appointment of the Mayor of the municipality where the UAM was found as his/her guardian.²³⁷ The Mayor delegated individuals who provide social assistance for the all the vulnerable persons within the municipality.²³⁸ This resulted to an inadequate management of the UAMs case due to the fact that the responsible persons were in charge for a disproportionate number of vulnerable people and many times it has been noticed that the municipality had conflicts with the UAMs interests and in order to reduce their numbers arbitrarily referred them to undertake age assessment procedures. After the declaration of the art. 26(5) of the L.D.25/2008 the management of the first reception facilities is in charge only for the UAMs that are placed there and his interests are not in conflict with these of the UAMs.

The Art. 11 of the L.47/2017 introduced the system of the volunteer guardians. Individuals willing to provide free services for the assistance and representation of UAMs, after being selected and trained they are registered in a list for volunteer guardians for UAMs that is kept in the Juvenile Court. The selection and training are undertaken by the Ombudspersons for Children of every region or the autonomous provinces of Trento and Bolzano, while in the regions where there is no Ombudsperson the Independent Authority for Children and Adolescents takes care of these.²³⁹ As one of the purposes that the new system wishes to overcome is the existence of different practices from region to region, the Independent Authority for Children and Adolescents organises the “National Conference for the Rights of Children and Adolescents” where all the Children Ombudspersons gather to be provided with guidance on the selection, training, and registration of the volunteer guardians as well as for their cooperation with

²³⁷ AIDA, Country Report: Italy (2017), p.57

²³⁸ Ibidem

²³⁹ FRA, *Guardianship for unaccompanied children in Italy: Update after the adoption of Law No.47 of 7 April 2017 and Legislative Decree No. 220 of 22 December 2017* (2018), p.1

the Presidents of the Juvenile Courts.²⁴⁰ The main requirements to become a volunteer guardian set up by the Independent Authority for Children and Adolescents are to hold a regular residence permit, to have an adequate and proven knowledge of the Italian language, to be over 25 years old, to have a clean criminal record, not to have any kind of conflict with the child's interests, not have been subject to withdrawal of any other form of guardianship, etc. The Art.11(1) of the L.D.47/2017²⁴¹ foresees that a guardian can be in charge of maximum three UAMs with exceptions in cases that there is an important reason. This regulation reflects the general concept of the establishment of the volunteer guardianship system that is to build a relationship of trust between the UAM and guardian in order the latter to become "the point of reference" for the former.²⁴² In order to ensure the well-functioning of the volunteer guardianship system the Art.11(1) of the L.D. 47/2017²⁴³ establishes the responsibility of the Independent Authority for Children and Adolescents to monitor its implementation through the close cooperation with the Ombudspersons for Children in the regions and the autonomous provinces of Trento and Bolzano.

4.1.7 Identification, Registration, Needs Assessment

Before analysing the identification procedure, it is important to be mentioned that the L.47/2017 provides that it has to be concluded within 10 days after the UAM's arrival in the first reception facilities. The legislator made efforts to deal with the delays of the procedures that in the case of UAMs have severe consequences, such as the phenomenon of their disappearance observed mostly in the first reception facilities.²⁴⁴

After the enactment of the L.47/2017 the identification procedure for UAMs is regulated by the Art. 19(bis)²⁴⁵ of the L.D. 142/2015. According to this, at the moment that the police authorities, social services or other representatives of the local authority or the judicial authority have come into contact or recorded the presence of an UAM,

²⁴⁰ Ibidem, p.2

²⁴¹ added by Art.3(2)(a)(1) of the L.D. 220/2017

²⁴² FRA, *Guardianship for unaccompanied children in Italy: Update after the adoption of Law No.47 of 7 April 2017 and Legislative Decree No. 220 of 22 December 2017* (2018), p.4

²⁴³ introduced by the Art. 2(3)(a)(2) of the L.D. 220/2017

²⁴⁴ Leonardo Cavaliere & Francesca del Giudice (2017)

²⁴⁵ added after the Art. 19 of the L.D. 412/2015 by the Art. 5 of the L.47/2017

the qualified staff of the first reception facilities takes an interview from the UAM, under the guidance of the competent local authority and with the assistance of organisations with experience on the protection of children, in order gain a more in depth understanding of his personal and family history and address every useful information for his/her protection. Moreover, the interview is useful for the UAMs placement in the SPRAR according to their special needs.²⁴⁶ The identity of the UAM will be ascertained by the public security authorities in cooperation with a cultural mediator and the guardian or the temporary guardian. When there are doubts about the age of the UAM and he/she does not have a personal data document, the socio - health services' trained staff makes an age assessment using a multidisciplinary approach.²⁴⁷ However, the UAM remains in the first reception facilities till the results of the age assessment come out. The UAM is informed about all these procedures by the cultural mediator in a language that he/she can understand.

For the implementation of the Art. 19(5) of the L.D. 142/2015 about the reception of UAMs, the L.47/2017 introduced the Art.9 that establishes the national information system for UAMs (SIM) in the Ministry of Labour and Social Policies. According to this, the qualified staff of the first reception facilities who is in charge of the interviews is also responsible for filling in a specific social folder (Cartela Sociale) which includes apart from personal data of the UAM, its social data as well. The social folder will be sent to the social services of the municipality and the public prosecutor's office at the Juvenile's Court where the UAM will be transferred. The purpose of the establishment of this tool is to gather the information that are useful for finding long term solutions in the respect of the best interests of the child²⁴⁸.

At this point it is essential to be mentioned that the right of the child to be heard is foreseen to be utilised for the evaluation of its best interests. The Art.18(2) of the L.D. 142/2015 explicitly provides that it is necessary for the best interests assessment to listen to the UAM while taking into account its age and the degree of its maturity. It is also mentioned that the previous experiences of the UAM revealed during the interview

²⁴⁶ Kids Empowerment (2017), p.9

²⁴⁷ Ibidem, p.11

²⁴⁸ in accordance with CoE *'life projects for unaccompanied migrant minors'* (2007)

should be used for a risk assessment of whether it is possible of being victim of trafficking. Finally, the paragraphs 2-bis and 2-ter of the L.D. 142/2015²⁴⁹ reflect the important role of the right of the child to be heard during all the procedures as it is provided that the UAM will enjoy emotional and psychological assistance by guardian indicated by him/her and that he/she can participate in all the procedures through his legal representative and the cultural mediator.

It is very interesting how the L.47/2017 achieved to include in one stage of the reception procedure three tasks, the identification, the registration and the needs assessment procedure. In particular, while interviewing the UAM, the qualified personnel can collect many information about his identity while also understands its needs for providing the appropriate assistance. Notwithstanding, the difficult part of the identification that many UAMs are afraid of when undertaken by police and border officers and and consists one of the most frequent reasons for escaping, now is practiced by the appropriately trained staff within the first reception facilities for UAMs in a way that mostly looks like a child-friendly conversation. Subsequently, this information together with the personal data of UAMs will be included in their personal social folder and registered in the national database for UAMs. The Social Folder achieves to serve both as an official database and as a tool for integration of UAMs.

4.1.8 Turning 18

It has been noticed that many incidents of disappearance occur when UAMs turn 18.²⁵⁰ In general, at least on European level, the protection framework of the young adults is still unregulated.²⁵¹ Mosts times, the rule for the UAMs who reach the age of majority is to leave the care facilities for minors. They are usually transferred to facilities for adults and many times happens to be placed in other cities. Young adults, even if they do not still gain the decree of maturity that the adult life demands, there are not responsible persons like guardians appointed for them.

²⁴⁹ introduced by the Art. 15 of the L.47/2017

²⁵⁰ information by practitioners gained during the attendance at the conference *Lost in Migration II: from European priorities to local realities* (11-12 April 2018) , See also FRA, *Key migration issues: one year on from initial reporting, Main Findings*

²⁵¹ the issue has been addressed also with CoE Resolution ‘*Migrant children: what rights at 18?*’ (2011)

In Italy, after the adoption of the L.47/2017, the Art.13 provides that when the staff of social services believes that an UAM can not, after turning 18, live autonomous and needs the psycho - social support that the facilities for UAMs provide, can request the extension of his/her stay at and support from the Juvenile Court. The decision cannot extend the social services provided beyond the age of 21 years old. Apart from the Art. 13 that explicitly provides the potential of the “administrative follow-up” of such cases, the general message of social solidarity that the volunteer guardianship system implies that even informally the relationship between the volunteer guardian and the young adult continues.²⁵²

4.1.9 Conclusion

The new Law brought many significant changes regarding the strengthening of the protection of UAMs. The guarantee that of that all UAMs will be registered and being offered accommodation, food and guardianship regardless if they are asylum seekers or economic migrants, the reduction of the time spent in the first reception centres to prevent them from going missing, the strengthening of the guardianship based on the spirit of volunteerism, the extensive use of the cultural mediator for ensuring their access to information and their identification in the form of a child friendly conversation are very promising provisions for the strengthening of their protection and further for the prevention of the disappearances.

4.2 The case of Ireland

4.2.1 Background

Due to its geographical position, Ireland is one of the destination countries of the EU in regards with migration issues. Under the EU’s emergency relocation scheme adopted by EU Council Decisions EU/2015/1523²⁵³ and EU/2015/1601²⁵⁴ in order to alleviate the pressure from Greece and Italy, Ireland voluntarily opted in to both, establishing the Irish Refugee Protection Programme (hereinafter IRPP) by Government Decision on 10

²⁵² FRA, *Guardianship for unaccompanied children in Italy: Update after the adoption of Law No.47 of 7 April 2017 and Legislative Decree No. 220 of 22 December 2017* (2018), p.5

²⁵³ EU Council Decision 1523 (2015)

²⁵⁴ EU Council Decision 1601 (2015)

September 2015 through which pledged to relocate 2.622 asylum seekers²⁵⁵. Under the IRPP, the Irish Government committed also to accept 1.040 refugees from Lebanon through the UNHCR Resettlement Programme, 200 UAMs from Calais camp in France and 530 immediate family members of refugees through the Family Humanitarian Admission Programme (hereinafter FRHAP)²⁵⁶. In total, Irish Government undertook to accept around 4.000 persons²⁵⁷. On the announcement of the IRPP, Irish Government stated that focus will be given on transferring UAMs and family groups²⁵⁸. Though, in April 2017 Government officials announced that they will pause the transfers due to the lack of accommodation. According to Eurostat statistics, Ireland has granted international protection status to 2.220 applicants since 2015²⁵⁹. Information by the Social Workers Team for Separated Children Seeking Asylum (hereinafter SWTSCSA) gives that the UAMs were placed in care were 82 in 2015 and 82 in 2016 and services for Family Reunification procedure were provided to 32 UAMs in 2015 and 42 in 2016²⁶⁰.

As someone can notice, Ireland is not a country that has been affected significantly by the so-called refugee and migrant crisis. However, the case of Ireland is interesting to be examined in regards with the phenomenon of missing UAMs as according to the European Commission's study entitled "Missing Children in the European Union: Mapping, Data Collection and Statistics" conducted by Ecorys in 2013, Ireland is one of the four EU Member States that have legal and procedural regulations on missing UAMs²⁶¹. Moreover, the Irish child care system for UAMs has been characterised one of the best in Europe after its reforms in 2010 and researchers claim that it could consist the basis of an UAMs protection system on EU level in the context of a further harmonised immigration and asylum policy across EU Member States²⁶². Before we

²⁵⁵ *Irish Refugee Protection Programme*

²⁵⁶ *Ibidem*

²⁵⁷ *Ibidem*

²⁵⁸ AIDA, Country Report: Ireland (2017), pp. 49-50, See also Parliamentary Question (8274/17), See also Parliamentary Question (22339/17), See also *Horgan & Ni Raghallaigh* p.4

²⁵⁹ Eurostat (2016), Eurostat (2017)

²⁶⁰ material for the Conference: on Protection of Unaccompanied Minors and Separated Children in Ireland and Europe (2014)

²⁶¹ European Commission, *Missing Children in Europe* (2013), pp.16,47

²⁶² Samantha Arnold & Muireann Ni Raghallaigh (2017), p.6

move to the analysis of Ireland's regulations in regards with the prevention of UAMs going missing, there is a background story which led to the strengthening of its system that worths to be mentioned.

Ireland's economic growth during the 1990s led to increased inflow of migrants, including UAMs, from mid 1990s to early 2000s when the numbers of migrants started to reduce due to the economic recession²⁶³ and, according to Child and Family Agency - TUSLA (hereinafter TUSLA), because of the reforms of the child care system that entailed stricter age assessment tests²⁶⁴. Despite the fact that the number of UAMs has been decreased by mid 2000s, it has been noticed that the rate of UAMs into the care system was higher in 2015 in comparison with that in 2005²⁶⁵. One of the reasons behind this contradictory is that fewer UAMs went missing because of better care provisions²⁶⁶. In particular, the Irish Government being unprepared for the high rate of UAMs entered the country during the mid 1990s, responded to this emergency with the provision of the hostel care system²⁶⁷. UAMs were placed in hostels without 24 hour care staff²⁶⁸ and without social workers responsible for them or a care plan²⁶⁹. As a result of this many UAMs went missing²⁷⁰. Hostel care system has been criticised by researchers and practitioners for violating the principle of non discrimination as Irish children were either hosted by foster families or accommodated in approved residential centers²⁷¹. The SWTSCSA advocated for the "Equity of Care" principle application for the treatment of UAMs in the care system²⁷². After many efforts of the civil society, Irish Government appointed the Commission to Inquire into Child Abuse and the Implementation Plan of the Ryan Report that drafted, resulted to the closure of the hostels as care facilities for UAMs including the appointment of social workers to each

²⁶³ Martin Ruhs & Emma Quinn (2009)

²⁶⁴ Samantha Arnold & Muireann Ní Raghallaigh (2017), p.1, See also Emma Quinn, Corona Joyce and Egle Gusciute EMN (2014), p.61

²⁶⁵ Samantha Arnold & Muireann Ní Raghallaigh (2017), p.1

²⁶⁶ Ibidem

²⁶⁷ *Horgan & Ní Raghallaigh* p.3

²⁶⁸ Samantha Arnold & Muireann Ní Raghallaigh (2017), p.4

²⁶⁹ *Horgan & Ní Raghallaigh* p.4

²⁷⁰ Samantha Arnold & Muireann Ní Raghallaigh (2017), p.4, See also *Horgan & Ní Raghallaigh* p.4

²⁷¹ Samantha Arnold & Muireann Ní Raghallaigh (2017), p.5, See also *Horgan & Ní Raghallaigh* p.4

²⁷² Samantha Arnold & Muireann Ní Raghallaigh (2017), p.4

of them and the organising of an individual care plan²⁷³. Since December 2010, all UAMs under 12 years old are placed into foster care²⁷⁴. UAMs over 12 years old are placed in transit residential units with 24-hour care staff under the auspices of TUSLA, where risk and needs assessment is provided before a permanent solution for them is found²⁷⁵.

4.2.2 Reception System - Equity of Care Principle

Section 14(1) of the International Protection Act 2015 provides that TUSLA has to be “as soon as practicable” notified by the immigration officer or the International Protection officer when an UAM appears to them at the borders or has already entered the country. In particular, the initial intake of UAMs is undertaken by the SWTSCSA, a team within TUSLA specialised on issues related to the particularity of the UAMs’ situation. After the UAM’s referral to TUSLA, the Child Care Acts 1991 to 2013, the Child and Family Agency Act 2013 and other legal frameworks for the protection of children will be applied. This is an expression of the “Equity of Care” Principle that has been mentioned above. Despite the fact that there are no references to UAMs within the legislation relevant to the child care system, through the application of the “Equity of Care” Principle, they are treated in the same way as Irish children that are benefited by the TUSLA care system because of homelessness, poverty or orphanhood.

While before the time of the referral of an UAM to TUSLA, he/she is still subject to the immigration legislation and thus in theory UAMs can be refused entry to the country, in practice it is commonly accepted that UAMs should not be rejected entrance or be deported.²⁷⁶ All UAMs are permitted entrance and are immediately referred to TUSLA.²⁷⁷

In the beginning, UAMs referred to TUSLA are placed in short term residential homes for children.²⁷⁸ There are four facilities operating for this purpose in Dublin and each of

²⁷³ Ibidem, See also *Horgan & Ni Raghallaigh* p.4

²⁷⁴ *Horgan & Ni Raghallaigh* p.4

²⁷⁵ Ibidem

²⁷⁶ Emma Quinn, Corona Joyce and Egle Gusciute EMN (2014), p.17

²⁷⁷ Ibidem

²⁷⁸ AIDA, Country Report: Ireland (2017), p. 72

these can not host more than 6 children at the same time.²⁷⁹ The UAMs over the age of 12 will stay there for 3 to 6 months. During this period, the responsible social worker conducts an initial needs assessment in order to achieve the best matching between UAM and carer according to child's needs and the carer's availability.²⁸⁰ UAMs over 12 years old can be placed either in foster care or in supported lodgings while these under 12 are only hosted by foster families.²⁸¹

4.2.3 Detention

The Section 20(7)(a) of the International Protection Act 2015 explicitly prohibits the detention of UAMs. The subsection (b) that follows this provision, introduces an exception when the immigration or International Protection officer reasonably believes that the person is over 18 years old or after the undergoing the age assessment under the Section 25 the person proves to be adult or he/she refuses undergoing this procedure. However, in practice detention of UAM is a rare phenomenon.²⁸²

4.2.4 Guardianship-Needs assessment

After the referral of UAMs by the the immigration officers or the International Protection officers to TUSLA under the Section 14 of International Protection Act 2015, a social worker of the SWTSCSA is appointed to each of them.²⁸³ The social worker appointed is the guardian of the UAM acting in *loco parentis*, which means that he/she supports and assists it in a general way and not as a legal representative (*guardian ad litem*) in the asylum procedures.²⁸⁴

Upon the arrival of the UAM, the responsible social worker undertakes an initial assessment to identify the child's needs related to its welfare and safety concerns.²⁸⁵ The initial assessment is in the form of an interview where the social worker addresses the

²⁷⁹ Ibidem

²⁸⁰ Emma Quinn, Corona Joyce and Egle Gusciute EMN (2014), pp.46-48

²⁸¹ AIDA, Country Report: Ireland (2017), p. 72

²⁸² Ibidem, p. 81

²⁸³ Ibidem, p.46

²⁸⁴ Emma Quinn, Corona Joyce and Egle Gusciute EMN (2014), p.34

²⁸⁵ Loudon Richason (2017), p.4

immediate needs of the UAM while trying to build a relationship of trust.²⁸⁶ At a subsequent time, the appointed social worker will conduct a comprehensive needs assessment.²⁸⁷ During this stage the social worker evaluates the personal information of the UAM, its family, the reason why left his/her country of origin, its previous educational background, if he/she is victim of trafficking and his/her current psychological situation.²⁸⁸ Using this information as a basis, the social worker draws an individual care plan for each UAM.²⁸⁹ The needs assessment at this stage has mainly the character of a dialogue between the social worker and the UAM.²⁹⁰ The UAM can express his/her concerns and opinions in regard with his/her care placement, the progress of the family reunification procedures or his/her integration.²⁹¹ The right of the child to be heard has been taken into consideration for the implementation of the individual care plan. The plan includes the reason for placement under the state care, the aims and objectives of this placement, the views of the child, issues related to health and education of the UAM, its general needs, possibility for family reunification.²⁹² The care plan has to be periodically updated depending on the change of the UAM's needs.²⁹³ The social worker continues to act as a guardian after the placement of UAMs either in a short-term residential unit and supported lodging or in a foster family.²⁹⁴

As it has been mentioned above there are no specific regulations for UAMs placement and further care within the International Protection Act 2015. For this reason it is mostly up to the social workers to apply the regulations of the Child Care Act 2015 they believe are applicable in each individual case.²⁹⁵ In practice, the SWTSCSA mainly apply the Section 4 about voluntary care and the Section 5 about homelessness care on UAMs cases.²⁹⁶

²⁸⁶ Ibidem

²⁸⁷ Ibidem, pp. 4-5

²⁸⁸ Ibidem

²⁸⁹ Ibidem, in accordance with CoE *'life projects for unaccompanied migrant children'* (2007)

²⁹⁰ Loudon Richason (2017), p.4-5

²⁹¹ Ibidem

²⁹² Samantha Arnold & Muireann Ní Raghallaigh (2017), p.5

²⁹³ Ibidem

²⁹⁴ Loudon Richason (2017), p.7

²⁹⁵ Samantha Arnold, Martine Goeman & Katja Fournier (2014), p.496

²⁹⁶ Ibidem, See also Samantha Arnold & Muireann Ní Raghallaigh (2017), p.3

The social worker is also responsible to assess whether it is in the best interests of the child to apply for International Protection or not²⁹⁷ provided that the services of TUSLA are offered to UAMs regardless their asylum seeking or refugee status. The SWTSCSA believes that very young children are not ready to undergo the pressure of the asylum related proceedings or if during the assessment the possibility of family reunification came up it is preferable the child to be reunited with its family before applying for International Protection.²⁹⁸ Therefore, it is part of the assessment and up to the discretion of the social worker to decide if the UAM will apply for International Protection or not.

4.2.5 Risk assessment

Due to the high number of missing children cases that Ireland faced the previous decade, the Irish policy framework and later the legal framework focused on the implementation of the risk assessment of children under the state care and therefore, thanks to the Equity of Care Principle, of UAMs.

In 2009 the Health Service Executive (hereinafter HSE)²⁹⁹ and An Garda Síochána signed a Joint Protocol on Missing Children to specify the roles and responsibilities of both agencies in the cases of children missing from State care, including UAMs³⁰⁰. According to this, children in care have their individual “Absence Management Plan”, that works as a risk assessment tool and provides guidelines for the actions that a social worker should follow in the case of a child goes missing³⁰¹. There is also a mechanism under the established Garda liaison role with the HSE to identify children that have been reported missing many times³⁰². The social workers can determine when a child is missing with a degree of discretion. Their determination will be based on their concerns that derive from how long the child is absent and from specific circumstances, like if the child didn’t have permission from the carer or his/her whereabouts are not known or the

²⁹⁷ Working Group on the Protection Process, Final Report, (2015), p.108

²⁹⁸ Loudon Richason (2017), p.6, however this is a very controversial issue, See Working Group on the Protection Process, Final Report, (2015), pp.230-231

²⁹⁹ On 1st January 2014 the Health Service Executive, the Family Support Agency and the National Educational Welfare Board were unified under TUSLA, information from the website of TUSLA

³⁰⁰ Emma Quinn, Corona Joyce and Egle Gusciute EMN (2014), p.62

³⁰¹ Ibidem

³⁰² Ibidem, p.63

carer has observed something that raises high concerns about his/her safety³⁰³ etc. The social worker that determined the child missing has to notify its absence to An Garda Síochána and Garda National Immigration Bureau (hereinafter GNIB) filling out a “Missing Child from Care Report” as soon as possible.³⁰⁴ There is not no-action period in missing children’s cases as they are considered to consist high-risk missing persons incidents³⁰⁵. The Missing Persons from Care report and a photograph of the child will be also sent to the local Child Care Manager and all the other Child Care Managers in the country³⁰⁶. It will be also assessed by the Social Work Team in the light of the best interests of the child principle if the name and the picture of the child will be published in the missing children’s website³⁰⁷.

In 2015 An Garda Síochána and TUSLA signed the Joint Working Protocol expanding the fields of their cooperation. The new Protocol apart from missing children cases³⁰⁸ includes in general cases of child abuse, such as neglect, emotional abuse, physical abuse and sexual abuse³⁰⁹. In the case that a social worker or a Garda, as mandated person³¹⁰ by application of Section 14(1) of the Children First Act 2015³¹¹, has suspicions that a child suffers from any kind of the abovementioned kinds of abuse, they should notify the other agency by filling out a Notification Form³¹². The next step is a designated social worker and an investigating Garda to be appointed in order to make a strategy discussion or meeting for planning their actions³¹³. The new Protocol adds a monitoring mechanism, the Liaison Management Team, to keep track of the progress of the case and ensure the cooperation of the two agencies³¹⁴. The main role of the Social Worker is the prevention of child’s re-abuse by assessing the harm that the

³⁰³ Ibidem

³⁰⁴ Ibidem

³⁰⁵ Ibidem

³⁰⁶ Ibidem

³⁰⁷ Ibidem

³⁰⁸ Joint Working Protocol for An Garda Síochána/ Tusla - Family and Child Agency Liaison, pp. 22,26

³⁰⁹ Ibidem, p.4

³¹⁰ Schedule 2(13,14,15) gives the classes of persons specified as mandated persons for the purposes of the Children First Act 2015

³¹¹ Children First Act 2015, s 14(1)

³¹² Joint Working Protocol for An Garda Síochána/ Tusla - Family and Child Agency Liaison, pp. 6, 8

³¹³ Ibidem, p.6, 9, 16

³¹⁴ Ibidem

child has already suffered from and the risk assessment for a future harm while the role of the designated Garda is the response by investigating the child abuse case. In the cases that a Social Worker or a Garda has doubts of whether an incident is considered to be child abuse in order to notify it, shall informally consult with the responsible person of the other agency³¹⁵. When the circumstances show that a child is at risk of a serious harm the Social Worker or the Garda that notices it should take immediate actions and then inform as soon as possible the responsible person of the other agency³¹⁶. The emergency intervention of An Garda Siochana has legal binding character as it is provided by Section 12 and 35 of the Child Care Act 1991³¹⁷.

As it has been explained above all the legal regulations and policies that refer to children in state care are also applied to the category of UAMs. Additionally to the general application provisions, the Joint Working Protocol includes “Arrangements for the Protection of Children at Risk who Migrate to Ireland from Another Jurisdiction”³¹⁸. According to this UAMs are considered to be a priori children at risk and when TUSLA and An Garda Siochana are informed about the arrival of UAMs they follow immediately the notification procedures and make a strategy discussion or meeting in order to plan their actions to protect them³¹⁹.

The Joint Working Protocol between Tusla and An Garda Siochana is a support document to the “Children First: National Guidance for the Protection and Welfare of the Children”³²⁰, a policy document addressed to “the general public, mandated persons, professionals whose work brings them into contact with children and staff and volunteers of organisations providing services”³²¹. Its legal basis is the Section 7(2) of the Garda Siochana Act 2005, according to which An Garda Siochana shall “cooperate, as appropriate, with other Departments of State, agencies and bodies having, by law, responsibility for any matter relating to any aspect of that objective”, while the objective given in the Section 7(1) is “to provide policing and security including vetting services

³¹⁵ Ibidem, p.5,9

³¹⁶ Ibidem, p.7,9

³¹⁷ Child Care Act 1991, ss 12, 35

³¹⁸ Joint Working Protocol for An Garda Siochana/ Tusla - Family and Child Agency Liaison, p. 29

³¹⁹ Ibidem

³²⁰ Ibidem, p.1

³²¹ Children First: National Guidance for the protection and welfare of children, p.0

for the State with the objective of: (a) Preserving peace and public order, (b) Protecting life and property, (c) Vindicating the human rights of each individual, (d) Protecting the security of the State, (e) Preventing crime, (f) Bringing criminals to justice, including by detecting and investigating crime, and (g) Regulating and controlling road traffic and improving road safety.”³²²

This document was the basis for the adoption the Children First Act on 19 November 2015 which establishes the legal binding character of the risk assessment procedure³²³ setting out also time limits for its completion. In particular, the Art.11 of the Children First Act 2015 stipulates that the “provider of the relevant service”³²⁴, within the period of 3 months since his/her assumption of duties shall appoint a social worker³²⁵ or undertake by himself/herself a risk assessment for any potential for harm during the child’s placement in the State care and prepare a written statement, the “child safeguarding statement”, to address the risk and to specify the services and procedures should be followed to prevent any kind of child abuse. A copy of the “child safeguarding statement” should be sent to TUSLA after its request. In the case of non-compliance to send it, TUSLA will inform the provider of his/her failure, ask for the document within a time limit that it will set out and inform that in the case that he/she will fail again to provide it a non compliance notice will be issued against him/her.³²⁶ Furthermore, the Art.14 of the Children First Act 2015 provides that the mandated persons³²⁷ have to report to TUSLA any information that raised their suspicions or any incident that came to their knowledge by the child who is affected or by anyone else and is about a child that has been harmed, is being harmed or is at risk of being harmed. Moreover, the Children First Act 2105 establishes through Art . 20 the “Children First Inter-Departmental Implementation Group” (hereinafter “Implementation Group”)

³²² Joint Working Protocol for An Garda Síochána/ Tusla - Family and Child Agency Liaison, p. 2

³²³ “puts elements of the Children First: National Guidance for the Protection and Welfare of Children on a statutory footing”, information from the website of the Minister for Children and Youth Affairs

³²⁴ Children First Act 2015, s 8 for the definition of “provider”, Schedule 1(1)(e) for the definition of “relevant service”

³²⁵ Children First Act 2015, s 8 for the definition of “relevant person”

³²⁶ Children First Act 2015, s 12

³²⁷ In the case of UAMs mandated person may be a Member of An Garda Síochána, the Guardian ad litem appointed in accordance with Child Care Act 1991, s 26 or the manager of asylum seeker accommodation (direct provision) centre; Child Care Act 1991, Schedule 2 (13)(14)(15c)

composed by a representative of all Government Departments, the TUSLA, the HSE and An Garda Siochana. Its mandate is to monitor³²⁸ the implementation of the Children First Act 2015 provisions and to report³²⁹ the performance of its functions and activities on an annual basis to the Minister for Children and Youths Affairs.

4.2.6 Turning 18

As a general rule, UAMs are under the care of TUSLA till they reach the age of 18.³³⁰ For many years civil society strongly criticized the absence of statutory aftercare plan.³³¹ Most UAMs when turned 18 were not allowed to remain under the care of TUSLA and in the case that they have not applied for International Protection till this time they were placed in the “Direct Provision” facilities which are for the reception of the adults asylum seekers.³³² This transition had a negative impact on the mental health of the UAMs and their access to education or work was restricted.³³³ Aftercare support was mostly part of the SWTSCSA’s policy and upon to their discretion.³³⁴ The use of discretion, though, in regards with the access to aftercare services leads to uncertainty and a lack of transparency.³³⁵

On 1 September 2017 the “Child Care Amendment Act 2015” attributed statutory value to the SWTSCSA’s aftercare policy³³⁶. In particular, Section 45 A provides that TUSLA has to conduct an assessment of the needs of an eligible child or an eligible adult in regards with education, financing and budgeting matters, training and employment, health and well-being, personal and social development, accommodation, and family support. Eligible child is the child aged 16 or over who has been under the care of TUSLA not less than 12 months since attaining 13 years old.³³⁷ Eligible adult is a person aged 18,19 or 20 and has been under the care of TUSLA not less than 12

³²⁸ Children First Act 2015, s 22

³²⁹ Children First Act 2015, s 26

³³⁰ AIDA, Country Report: Ireland (2017), p. 72

³³¹ Samantha Arnold & Muireann Ní Raghallaigh (2017), p.6

³³² Ibidem

³³³ Ibidem

³³⁴ Emma Quinn, Corona Joyce and Egle Gusciute EMN (2014), p.66

³³⁵ Ibidem

³³⁶ in accordance with CoE *‘Migrant children: what rights at 18?’* (2011)

³³⁷ Child Care Act 2015, s 2

months during the 5 year period before reaching 18 years old.³³⁸ However, in practice social workers offer aftercare support also to children that have been under the TUSLA care for less than 12 months preceding the 18.³³⁹ Subsequently, TUSLA has a legal obligation³⁴⁰ to prepare³⁴¹ and update periodically³⁴² an aftercare plan for an eligible child or an eligible adult provided that he/she is under 21 years old, specifying the kind of the assistance that will be provided. TUSLA has to carry out the aftercare plan 6 months before an eligible child reaches the age of 18 or 3 months after the request of the child and in the case of the eligible adult 3 months after his/her request or the request of the responsible for him/her person.³⁴³ The aftercare services will be provided by TUSLA or by other services assessed by TUSLA.³⁴⁴

4.2.7 Conclusion

As we move to a destination country, we realise that the reasons why the UAMs go missing are shrinking but this is not necessarily good news. While fewer are the scenaria after their disappearance and therefore the investigations can be more effective, the possibilities of having been fallen victims of trafficking are higher. This is something that the Irish legislation also reflects. Emphasis has been given to the risk assessment for the prevention of UAMs going missing. The Irish risk assessment tool proves to be a well organised and detailed mechanism that could inspire the EU legislation as till now something like this lacks. Furthermore, in Irish legislation there are included many other aspects for the protection of UAMs, like the “Equity of Care” principle as a special form of the non discrimination principle regarding the state care, their access to state care regardless their intention to apply for International Protection, the extensive use of foster care and the implementation of an individual care and, if necessary, aftercare plan by the social workers.

³³⁸ Ibidem

³³⁹ “*placing the principle of the best interests of the child above the National Standards for Aftercare*”, Loudon Richason (2017), p.8

³⁴⁰ “shall”, Muireann Ní Raghallaigh & Liam Thornton (2017),p.23, See also Working Group on the Protection Process, Final Report, (2015), p.229

³⁴¹ Child Care Act 2015, s 45(1)

³⁴² Child Care Act 2015, ss 45(2), 45D

³⁴³ Child Care Act 2015, ss 45B, 45C

³⁴⁴ Child Care Act 2015, ss 45B, 45C

Chapter V

5.1 Findings

After a detailed analysis of the 2016 Proposals on the Reception Directive and the EURODAC Regulation in Chapter 3 and the relevant regulations of the national legal frameworks of Italy and Ireland in Chapter 4, strengthened protection provisions that contribute to the prevention and gaps that lead to disappearances of UAMs have been identified. The comparative analysis that follows attempts to find out which are the relevant regulations of the national legal frameworks of Italy and Ireland that if transplanted on the EU level as minimum standards could contribute to the prevention of the disappearances of UAMs. The comparison will start with an overview of the reception and identification system under the minimum standards that the EU asylum acquis sets out and the national frameworks of Italy and Ireland to find out in what extent the protection of UAMs is taken into account. The comparison will follow with specific aspects of these frameworks grouped on the basis of the related children's rights of each. Finally, a paragraph will be added for the emerging issue of the protection of these UAMs "turning 18"³⁴⁵.

5.1.1 Overview of the reception and identification systems - The protection approach

Under the EU minimum standards that CEAS establishes, UAMs who arrive at the external EU borders make an application for International Protection and in maximum after 5 days of their application a guardian is appointed. They are offered also material reception conditions that have to cover an adequate standard of living, health care and access to education. Within 10 days after the appointment of the guardian, UAMs have to lodge their application.³⁴⁶ The identification is conducted by the competent authorities with the presence of the guardian. In the case that an UAM does not apply for International Protection none of the reception conditions is offered to him/her. The strict time frames for the application of the procedure and the pressure for applying in

³⁴⁵ FRA, *Key migration issues: one year on from initial reporting, Main Findings*

³⁴⁶ Proposal for the Asylum Procedures Regulation, Art. 28(1), 32(2)

order to get benefitted by the reception conditions are obvious and influences the decision that the UAMs will take. In combination with the fact that the presence of a guardian is not required while the UAM makes an application, concerns arise in regards with the principle of the best interests of the child.

Provided that the relevant provisions of the 2016 Proposal Reception Directive explicitly set the application for International Protection as a requirement in order to be eligible for a guardian, a shelter and healthcare, UAMs not applying are deprived of the reception conditions. However, UAMs that are apprehended at borders have to be formally registered and their biometric and personal data will be stored for 5 years. As it was explained in the Explanatory Memorandum, the purpose of this extension also to UAMs not seeking asylum is for their more effective tracing in the case they go missing. Though, the protection objective was not added in the Art. 2 of the EURODAC Regulation and the missing UAMs cases end up to be treated as secondary movements. The fact that UAMs not applying for International Protection are not benefitted from the reception conditions in combination with the lack of the protection objective in the identification procedure reaffirms the concerns that the identification and registration of UAMs regardless their status is introduced only for the control of secondary movements and the well functioning of the Dublin system.

In the case that UAMs who applied for International Protection move irregularly in another EU MS, the newly proposed regulations stipulate the withdrawal of the material reception material have been provided to them in the first MS of their arrival. Only the access to education is provided. The punitive character of this provision is obvious. UAMs' disappearance it treated as a secondary movement. This provision in combination with the definition of "absconding" criminalises the UAMs that maybe they have been found in other MS irregularly, because they have been abducted by traffickers or they have run away from the reception centres because the conditions under which they lived reached the threshold of inhuman or degrading treatment.

In contrast, within the legal frameworks of Italy and Ireland, it is foreseen that when the border officers identify an UAM they refer him/her immediately to the child protection authorities. When the UAM is placed in the children reception facilities the identification takes place in the form of a conversation. Valuable information are

collected during this stage not only for the personal and biometric data that will be registered but also for the needs assessment, the best interests assessment and in Ireland for the risk assessment proceedings. Drawing on this information an individual plan for each UAM is implemented. Moreover, in both of these systems all the reception conditions are provided both to the UAMs that apply for International Protection and to those who did not. The element of protection is evident. The UAMs are not discriminated on the grounds of applying for asylum or not and the application can take place whenever the UAM decides it and if his/her guardian assess that it is in accordance to its best interests. The identification and registration are undertaken by social workers, psychologists and well trained staff of the reception facilities and it takes place in a child-friendly environment.

The CEAS contradicts the principle of non-discrimination enshrined in Art. 2 of UNCRC. The UAMs should be considered first and foremost as children and on this basis the reception conditions should refer to all UAMs, either asylum applicants or migrants. Moreover, the CEAS has to follow a child protection approach in regards with the regulations relevant to UAMs and not an approach aiming to the securitisation of its borders and the effective management of the flows. In particular, the Art. 2 of the EURODAC Regulation should add a protection objective on whose basis the data registered by UAMs will be used only for their tracing and the term of “absconding” should be replaced with a term that covers the cases of abduction and the runaways. Moreover, the child protection organisations should be notified to undertake the identification and registration in child-friendly environment and in the context of a conversation in order to built with the UAM a relationship of trust.

5.1.2 Protection from abduction, sale and trafficking (Art. 35 UNCRC)

While the Reception Directive provides the needs assessment and the best interests assessment, the notion of risk is only referred as one of the considerations shall be taken into account while the guardian conducts the best interests assessment. In particular, the guardian shall take safety and security considerations into account and especially when there is a risk for the UAM of being victim of trafficking in order to assess the best

interests of the child in regards with the decisions and actions that will be made for the UAM in the future.

In Ireland the risk assessment is a separate procedure. It refers to all the risks that may arise and not only these linked with trafficking and especially in the case of UAMs it is conducted proactively. In particular, the Children First Act establishes a risk assessment to be undertaken by the Social Workers Team in cooperation with the Police. Despite the fact that the risk assessment for all children under the state care takes place when there are signs of child abuse, in the case of UAMs a risk management plan is made on the time that the children care organisation is notified of the arrival of an UAM as they are considered to be under high risk of any kind of child abuse or disappearance. The Irish risk assessment tool is a detailed mechanism for identifying the risks and planning the steps that would be taken both by the child protection organisation and the Police in the context of interagency cooperation. There has been also established a monitoring mechanism to ensure the implementation of the Children Care Act.

By doing so, Ireland has dealt with the phenomenon of high numbers of missing UAMs. A risk assessment procedure should be included in the Reception Directive separately from the needs and best interests assessment. While, a risk assessment procedure exists in the Anti-trafficking Directive and it is applied also to UAMs' cases, the main shortcoming is that it refers to children who are already victims of trafficking for the prevention of the re-trafficking.³⁴⁷ It is urging a risk assessment tool to be introduced for the prevention of trafficking since it is directly linked with the phenomenon of the disappearances. EU asylum acquis should comply with the Art. 35 of the UNCRC to protect UAMs from being abducted, sold or moved illegally to a different place in or outside a MS for the purpose of exploitation.

5.1.3 The right of the child to be heard (Art. 12 UNCRC)

During all the asylum related procedures the UAM's views should be taken into consideration. The main facilitator and guarantor for the right of the UAM to be heard is

³⁴⁷ Anti-trafficking Directive, Art.12(3), the risk assessment to prevent re-trafficking is a good element for the aftercare part of the missing UAMs who were found, but this thesis focuses on the prevention part

the guardian. Governments, in order to provide this right to the UAM, should appoint a well trained guardian as soon as possible.

The 2016 Proposal for the Reception Directive introduces a time limit for the appointment of the guardian, five days after the child makes the application. This means that during the time that the UAM makes the application its views may not be taken into consideration. The guardian, though, will be present during the identification and the lodging of the application to ensure that the UAMs views are respected. A new introduction that is very important and fosters the right of the UAM to be heard is the monitoring mechanism for the guardians. The UAM can lodge his/her complaints against his/her guardian and the case will be examined by the responsible for the well-functioning of the guardianship system persons or entities.

A prerequisite for the right of the UAM to be heard is his/her access to information about all the asylum related procedures. The UAM should be informed about his/her rights, his/her obligations, the consequences of his/her decisions and the risks that he/she may face in a child friendly manner. The 2016 Proposal for the Reception Directive foresees that information will be provided “within a reasonable time and not exceeding 15 days after lodging the application” and in the case of UAMs in a child friendly manner. However, during the identification procedure and especially while taking the biometric data, information are provided in a child friendly and child sensitive matter with the presence of a guardian. This means that there are no information provided to the UAM about the application for International Protection procedure. This lack of information during a very crucial stage may result to more rejections of the applications and deportations of UAMs and the views of the UAM will not be taken into account as he/she may be under pressure to make an application in order to be benefitted by the reception conditions offered to the applicants without have awareness of the consequences. Moreover, it would be a more child friendly approach to the provision of the access to information if the UAMs are not informed for the possible sanctions that they will be imposed on them in the case the move irregularly to another MS, but for the risk of transferring irregularly, the people that they should trust or not and the dangers that they may face.

On the other hand, the national provisions of Italy and Ireland guarantee the presence of a guardian and the access to information as soon as possible after their arrival. In particular when the border officers identify an UAM has to refer him/her immediately to the children protection authorities. In a child friendly environment the UAM will be engaged in a procedure that is mostly like a child friendly conversation. From this conversation the guardians would understand the views of the UAM after hearing his experiences and the reasons that forced him/her to leave his/her country of origin. In a subsequent time and after being informed about his/her the application for International Protection procedure the UAM with the help of the guardian may decide to apply.

In addition, the Italian legislation apart from the guardian and the psychologist, provides the presence of a cultural mediator during all the asylum related procedures. This provision is very important for the facilitation of the right of the UAM to be heard as the cultural mediator apart from interpreter is a professional that has awareness of the situation the UAM faced in his/her country origin and understands better his/her views that may be influenced from his/her past traumatic experiences or because of cultural reasons.

Since one of the reasons UAMs disappear from the first reception facilities proved to be the lack of information, the EU asylum legislative framework should ensure that the views of the UAM are taken into consideration in the related procedures. To guarantee the right of the UAM to be heard, a guardian should be appointed as soon as possible after the arrival of the UAM who will be present during the making and lodging the application for International Protection and during the identification. His/Her presence in all the stages of the asylum related procedures is also important for the UAM to be informed about his/her rights and obligations. Moreover, the appointment of a cultural mediator and his/her presence during all the proceedings would be a step forward to a better understanding of the UAM's views.

5.1.4 The best interests of the child (Art 3 UNCRC)

The best interests of the child should be the criterion for all the decisions that affect an UAM. Guarantor for the best interests of the child to be respected is the guardian. As it has been mentioned above under the 2016 proposals for the Reception Directive the

UAM makes an application for International Protection on his/her own, without the presence of the guardian and access to information. The guardian will be appointed within the next 5 days. However, this provision is in contradiction with the best interests of the child principle. A minor is not able to take such a serious decision on his/her own that may entail serious consequences, like rejection of his application and deportation. A guardian should be appointed upon the arrival of the UAM to assess his/her needs, best interests and views and to explain him/her everything related with the asylum procedures.

At this point apart from the reception system that Italy and Ireland follow that allows the application to take place in a subsequent time, it is worthy to be mentioned an additional provision exists in the Italian protection framework. Particularly, in the case that an UAM is found by the public security authority within the country and has already made an application without the presence and assessment of a guardian, the Public Prosecutor of the Juvenile Court is notified to appoint within 24 hours a guardian and at the same time he/she suspends the asylum procedures. The guardian appointed should contact the police in order to confirm the application that UAM made. This provision reflects the importance of the application for International Protection to be assessed by the guardian and in accordance with the best interests of the child. The Reception Directive should provide a guardian before the UAM makes an application for International Protection as a minimum standard.

Moreover, a provision that is unanimously accepted to be always in contradiction with the best interests of the child is the implementation of the immigration detention also to children. The general rule is that all migrants enjoy the freedom of movement within the territory of the hosting country. Only in exceptional circumstances and in the case that there is not an alternative solution the migrant can be detained for the shortest necessary period and as a last resort. However this provision should not be applied to UAMs because it is contradiction with the best interests of the child. The new Proposals for the Reception Directive not only did not abolished the detention of migrants children but extended its use for preventing them from “absconding”. The UAMs should never be detained and especially because of their disobedience with rules that their legal basis is the better management of the migration flows under the Dublin system. Both Italy and

Ireland are among the EU MS that have abolished the immigration detention for children. The CEAS should establish the prohibition of the detention of migrant children forcing it as a minimum standard to be implemented all around the EU.

5.1.5 Turning 18

The European Commission with the “Action Plan on Unaccompanied Minors (2010-2014)” invited the MS to “ensure a smooth transition” to UAMs who are about to turn 18 and will lose protection and support.³⁴⁸ However, in none of the provisions of the 2016 Proposal for the Reception Directive anything relevant was included. However, it has been noticed by practitioners especially in the destination countries that UAMs approaching the age of 18 disappear because they are afraid of deportation.

In contrast, both Italy and Ireland have specific provisions applied to UAMs turned 18 but they are still in need of the state care. In Italy when the social services assess that an UAM is not still able to live autonomously after turning 18, the UAM can apply to the Juvenile Court and after a positive decision can continue staying at the UAMs facilities till he/she reaches the age of 21. In Ireland, the children protection organisations assess whether the UAM is mature enough to live alone or not and in the case that he/she is not can continue staying in the children facilities while the social workers prepare an aftercare plan to follow.

It is crucial the aftercare provisions to be introduced in the CEAS as minimum standards for the prevention of disappearances because the maturity of a child should not be assessed only by the fact that the UAM reached the age of 18 but on the basis of the level of maturity in every individual cases. A transitional period during which the guardians will prepare the UAM for his/her life as an adult should follow.

5.2 Conclusion

Despite the extent that the phenomenon of missing UAMs took and Europol’s concerns about its link with trafficking, despite the discussions in the European Parliament and the advocacy by the civil society, the analysis shows that the proposed CEAS does not take it into consideration. All the recommendations from experts that

³⁴⁸ European Commission Communication COM(2010)213, p.8

work in the field were included in policy documents and were not proposed to be included in the core of the EU legislation. The prevention of the missing UAMs cases has not been considered as an important factor for the setup of the proposed minimum standards. The fact that the UAMs are still considered within the EU asylum acquis first as migrants and secondly as children still exists despite the global efforts for a uniform approach to migrants and refugees. The application for International Protection still has the character of a “ticket” for being provided the access to the basic services that the Reception Directive offers. The cases of missing UAMs have been translated within the new Proposals as “secondary movements” after “absconding” from the reception facilities. The missing UAMs was one more obstacle to the implementation of the Dublin System.

On the other hand, the phenomenon of missing UAMs is used within the Proposed EURODAC Regulation as a justification to add more biometric data, to be applied both to refugees and migrants “without discrimination”, to include children as young as 6 without the guarantees that coercion for non compliance will not be used at least in their case. Apart from the fact that the principle of non discrimination is selectively endorsed in the CEAS, this toughening of the identification rules on the name of their protection is one more step aiming to a further securitisation of the EU external borders. Priority of the EU is not the safety and security of UAMs but its own securitisation. Within the EU legislation concepts like borders seems that deserve a higher level of protection than human beings.

Towards the new era of CEAS, the EU focus is still only on the security of EU citizens and the effective management and control of the migration flows. The EU, failing to respond to the so-called refugee and migration crisis, has confused the control of the situation with the control of people. If the intention of dealing with the phenomenon of missing UAMs was included within its agenda, the EU could take stock of its local experiences and form a legal framework to tackle the phenomenon on a transnational level. 2 samples of EU MS that took the phenomenon of disappearances into account and adapted their legislations are given in this thesis. Given that there are other more examples on national level, it is time for Europe to examine the feasibility of a more protection-based approach that complies with the rights of the child.

Transnational and cross-border phenomena like this of missing UAMs could only be tackled effectively through the cooperation that the EU could offer.

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