



Matilde Barra Feijão Felgueiras

**THE BEST INTERESTS OF THE CHILD IN EU MIGRATION  
AND ASYLUM LAW: PROGRESS OR SETBACK UNDER THE  
NEW PACT ON MIGRATION AND ASYLUM?**

Dissertation to obtain a Master's Degree in  
Law, in the specialty of International and  
European Law

Supervisor: Professor Veronica Corcodel, Professor at NOVA School of Law

December 2024

*The Best Interests of the Child in EU Migration and Asylum law: Progress or Setback under the New Pact on Migration and Asylum?*



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*Matilde Felgueiras*

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Matilde Felgueiras

*The Best Interests of the Child in EU Migration and Asylum law: Progress or Setback under the New Pact on Migration and Asylum?*

To my family!

*The Best Interests of the Child in EU Migration and Asylum law: Progress or Setback under the New Pact on Migration and Asylum?*

*“Protecting children is more important than protecting borders”*

- François Crépeau

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## **Citation Style**

The present thesis follows the citation style **Norma Portuguesa 405 of the Instituto Português da Qualidade**.

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Additionally, when the in-text citation refers to the same source and page as the previous one, the term *Ibidem* is used in parentheses. When the source is the same, but the page differs, the term *Idem* is used, followed by the new page number in parentheses.

## **List of Abbreviations**

<b>AMMR</b>	Asylum Migration Management Regulation
<b>BIC</b>	Best Interest of the Child
<b>The Charter</b>	Charter of Fundamental Rights of the European Union
<b>CEAS</b>	Common European Asylum Systems
<b>CRC Committee</b>	Committee on the Rights of the Child
<b>CJEU</b>	Court of Justice of the European Union
<b>ECHR</b>	European Convention on Human Rights
<b>ECRE</b>	European Council on Refugees and Exiles
<b>ECtHR</b>	European Court of Human Rights
<b>EU</b>	European Union
<b>EUAA</b>	European Union Agency for Asylum
<b>FRA</b>	European Union Agency for Fundamental Rights
<b>IACrtHR</b>	Inter-American Court of Human Rights
<b>IOM</b>	International Organisation for Migration
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>OPIC</b>	Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure
<b>PICUM</b>	Platform for International Cooperation on Undocumented Migrants
<b>TEU</b>	Treaty on the European Union
<b>Union Framework</b>	Union Resettlement and Humanitarian Admission Framework
<b>UNCMW</b>	United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families
<b>UNCRC</b>	United Nations Convention on the Rights of the Child
<b>UNHCR</b>	United Nations High Commissioner for Refugees

*The Best Interests of the Child in EU Migration and Asylum law: Progress or Setback under the New Pact on Migration and Asylum?*

**UNICEF** United Nations International Children's Emergency Fund

**UN Task Force** United Nations Task Force on Children Deprived of Liberty

**p.** page

**pp.** pages

**para.** paragraph

**paras.** paragraphs

### **Number of Characters**

The body of this dissertation, including spaces and footnotes, accounts for 195 325 characters. This total excludes the cover page, anti-plagiarism statement, dedicatory, acknowledgements, citation style, list of abbreviations, table of contents and bibliography.

## **Abstract**

Children on the move face multiple challenges, including neglect of their best interests. To guarantee that children's rights are upheld, the best interest of the child (BIC) must be considered at every stage of the migration process. European Union (EU) Member States are bound by international, regional, and national legal instruments to determine and prioritise the BIC. However, the implementation and prioritisation of the BIC are ongoing challenges.

The New Pact on Migration and Asylum was formally adopted by the European Council on the 14<sup>th</sup> of May of 2024 and will enter into force by mid-2026. The Pact will shape migration and asylum management in the EU for the coming years, making it essential to adequately uphold the BIC. This thesis aims to evaluate whether the New Pact aligns with and enhances the commitment to respect the BIC.

Chapter 2 offers a comprehensive analysis of the BIC principle, exploring its meaning and scope under the United Nations Convention on the Rights of the Child (UNCRC). Special attention is given to the United Nations Committee on the Rights of the Child's (CRC Committee) General Comment No. 14. Additionally, this chapter examines how the principle has been incorporated into and evolved within EU law.

Chapters 3, 4, and 5 provide a comparative and critical analysis of the pre-entry, entry, and post-entry stages of the legal instruments of the current regime and the New Pact. The chapters will emphasise the main similarities and differences between the regimes, focusing on the strengths and potential pitfalls of the New Pact's provisions concerning the commitment to respect the BIC. Furthermore, suggestions for better aligning the New Pact with the BIC will be provided. These chapters are the heart of the thesis, reflecting on the research question: "*To what extent does the New Pact on Migration and Asylum enhance the EU's commitment to respecting the best interests of the child compared to the current regime?*".

Lastly, Chapter 6 briefly summarises the key findings of this work, focusing on the importance of the BIC, and the strengths and potential shortcomings introduced by

*The Best Interests of the Child in EU Migration and Asylum law: Progress or Setback under the New Pact on Migration and Asylum?*

the New Pact. It also focuses on whether the New Pact reflects progress or constitutes a regression in the EU's commitment to upholding the BIC.

**Keywords:** Best Interest of the Child; New Pact on Migration and Asylum; Children's Rights; European Union Law; European Union migration and asylum policies; United Nations Convention on the Rights of the Child

## **Resumo**

As crianças em movimento enfrentam diversos desafios, incluindo a desconsideração do seu interesse superior. De modo a garantir o respeito pelos seus direitos, o interesse superior da criança (BIC, acrónimo em inglês) deve ser considerado em todas as etapas do processo de migração. Os Estados-Membros da União Europeia (EU, acrónimo em inglês) estão vinculados por instrumentos jurídicos internacionais, regionais e nacionais a determinar e priorizar o BIC. Contudo, a implementação e a priorização deste princípio continuam a ser desafios.

O Novo Pacto em matéria de Migração e Asilo foi formalmente adotado pelo Conselho Europeu a 14 de maio de 2024 e entrará em vigor em meados de 2026. O Pacto moldará, nos próximos anos, a gestão da migração e asilo na EU, tornando-se essencial assegurar o respeito adequado pelo BIC. Esta tese pretende avaliar se o Novo Pacto está alinhado com o BIC e se reforça o compromisso da EU em respeitá-lo.

O Capítulo 2 oferece uma análise detalhada do princípio do BIC, explorando o seu significado e âmbito ao abrigo da Convenção das Nações Unidas sobre os Direitos da Criança. É concedida especial atenção ao Comentário Geral nº 14 do Comité dos Direitos da Criança. Ademais, este capítulo analisa como é que este princípio tem sido incorporado e evoluído no direito da UE.

Os Capítulos 3, 4 e 5 oferecem uma análise comparativa e crítica das fases de pré-entrada, entrada e pós-entrada dos instrumentos jurídicos do regime atual e do Novo Pacto. Os capítulos destacam as principais semelhanças e diferenças entre os dois regimes, com especial foco nos pontos fortes e nas potenciais limitações das disposições legais do Novo Pacto face ao compromisso de respeitar o BIC. Além disso, são propostas sugestões para uma melhor adequação do Novo Pacto ao BIC. Estes capítulos constituem o núcleo da tese, refletindo sobre a questão: “*Até que ponto o Novo Pacto em matéria de Migração e Asilo reforça o compromisso da EU em respeitar o interesse superior da criança comparativamente com o regime atual?*”.

Por último, o Capítulo 6 sintetiza as principais conclusões deste trabalho, focando-se na importância do BIC, assim como nos pontos positivos e potenciais limitações introduzidas pelo Novo Pacto. Será também analisado se o Novo Pacto reflete um progresso ou se constitui uma regressão face ao compromisso da EU em respeitar o BIC.

**Palavras-chaves:** Interesse superior da criança; Novo Pacto em matéria de Migração e Asilo; Direito das Crianças; Direito da União Europeia; Políticas de migração e asilo da União Europeia; Convenção das Nações Unidas sobre os Direitos da Criança.

## **TABLE OF CONTENTS**

<b>1. Introduction .....</b>	<b>17</b>
1.1. Contextualisation of the Theme.....	17
1.2. Justification of the Topic .....	19
1.3. Research Question .....	20
1.4. Adopted Methodology and Research Strategies.....	20
1.5. Limitations.....	22
<b>2. The principle of the Best Interest of the Child .....</b>	<b>23</b>
2.1. The principle of the BIC under the UNCRC .....	23
2.1.1. The Best Interest of the Child and General Comment No 14.....	25
A) Best-Interests Assessment.....	28
B) Best-Interest Determination.....	29
2.2. The Impact of the UNCRC on EU Migration and Asylum Law .....	29
2.2.1. Evolution of the BIC and the perception of children’s rights under EU Law .....	29
2.2.2. BIC and the UNCRC in EU Migration and Asylum Policies.....	32
2.2.3. Case-law .....	37
<b>3. Pre-entry Stage: Current regime and the New Pact.....</b>	<b>39</b>
3.1. Eurodac Regulations.....	39
3.2. Screening Regulation.....	42
3.3. Asylum Procedure Legal Instruments.....	47
3.4. Return Procedures Legal Instruments.....	56
<b>4. Entry Stage: Current regime and the New Pact.....</b>	<b>60</b>
4.1. Dublin III and Asylum and Migration Management Regulations .....	60
4.2. Crisis and <i>Force Majeure</i> Regulation.....	67
4.3. Resettlement Regulation.....	73
<b>5. Post-entry Stage: Current regime and the New Pact .....</b>	<b>76</b>

*The Best Interests of the Child in EU Migration and Asylum law: Progress or Setback under the New Pact on Migration and Asylum?*

5.1. Reception Conditions Directives .....	76
5.2. Qualification Legal Instruments .....	86
<b>6. Conclusion .....</b>	<b>93</b>
<b>7. Bibliography.....</b>	<b>97</b>

## **1. Introduction**

### **1.1. Contextualisation of the Theme**

Children's rights are frequently compromised by States and other stakeholders, leading to the violation of their rights. However, the significance attributed to children's rights and the need to protect them is unequivocally evident in the expressed commitment of States to guarantee these rights. This is exemplified by the widespread ratification of the UNCRC. In fact, the United States of America is the only State that did not ratify it [Office of the High Commissioner for Human Rights (OHCHR), 2023]. The UNCRC has played an essential role in protecting children's rights since it was created solely to apply to them. This Convention applies to all children who are present in a territory of a State, regardless of their immigration status [International Organisation for Migration (IOM), 2008, p.15]. Considering the importance of the UNCRC for all children, including children on the move, this thesis will place a special focus on the UNCRC, particularly on the BIC.

The BIC is incorporated in Article 3(1) of the UNCRC and holds immense significance in ensuring the enjoyment of children's rights since it is "one of the four general principles of the Convention for interpreting and implementing all the rights of the child" (CRC Committee, 2013, para 1). In fact, it aims to ensure "both the full and effective enjoyment of all the rights recognised in the Convention and the holistic development of the child" (*Idem*, para 4). This principle is the foundation of **every decision relating to or affecting children**. If the BIC is not considered, it is not possible to make a decision that fully respects their rights.

In the context of migration flows, all children are entitled to have their best interests considered at all stages of the migration process since their best interests must be a "primary consideration in all actions or decisions" (*Idem*, para 1). The principle of the BIC holds particular significance in the migration context due to the unique and heightened challenges these children face since their departure from their home countries. Their vulnerable situation is exacerbated throughout the asylum and migration process, exposing them to increased dangers, challenges, and traumatic experiences. For instance,

they often face the denial of basic rights and needs, such as “access to food, shelter, housing, health services and education” (CRC Committee, 2005, para 3), as well as “forced separation from family, detention, erroneous classification as adults” (Binford *et al.*, 2023, p.7). Hence, thoroughly considering their best interests in every process is imperative. If States and other relevant stakeholders fail to do so, and, therefore, decisions and actions are taken without (adequately) considering their best interests, the consequences can be deeply aggravating. Accordingly, adequate application of the principle of the BIC in migration contexts requires a nuanced understanding of the child’s concrete situation, demanding comprehensive work, specialised training, capacity, and, above all, political will. Hence, to genuinely assess and uphold each child's best interests, it is essential to identify and address their concrete vulnerabilities and circumstances.

The principle of the BIC is present in the EU's legal framework on migration and asylum. This principle is mentioned and highlighted in numerous legal instruments, emphasising its importance and the Member State's commitment to respecting and implementing it. The New Pact on Migration and Asylum is the most recent legal transformation of EU migration and asylum law. The New Pact is considered a ‘fresh start’ (European Commission, 2020, p.1), aiming to “build a system that manages and normalises migration for the long term, and which is fully grounded in European values and international law” (*Ibidem*). To be fully in line with European and International values and standards, this Pact must ensure full respect for the BIC. Since this legal framework will manage migration for the next years, the BIC must be adequately guaranteed in all legal instruments within the New Pact to effectively secure and respect children's rights. The thought-provoking questions that have accompanied me throughout this thesis and that the present work seeks to answer are: Does the New Pact adequately protect children’s rights and best interests? Are the legal instruments aligned with the BIC? Ultimately, does this New Pact represent a step forward in creating a humane and child-friendly EU migration and asylum framework?

## **1.2. Justification of the Topic**

Migration flows are a long-lasting reality in the EU, often perceived as a burden. This perception is undoubtedly dangerous, as it fosters a view of migrants as the “other” (Moritz, 2020, p.20), leading to numerous challenges concerning human rights – and children are not spared. From the moment they begin their journey, children face significant challenges and violations of their rights, which often continue after they arrive in the EU. The most challenging aspect of protecting these children is ensuring that their best interests are adequately considered at every stage of the migration process.

EU legislation has increasingly highlighted the importance of the BIC. This development particularly stems from the ratification of the UNCRC by all EU Member States and from the binding authority of the Charter of Fundamental Rights of the European Union (the Charter). The UNCRC and Article 24 of the Charter underscore the Member States’ obligation to consider the BIC in all actions concerning or impacting children. Therefore, EU legislation must respect and reinforce the consideration of the best interests **of every child**. Therefore, it is essential to critically analyse the New Pact on Migration and Asylum to determine if it represents a genuine step forward concerning children’s rights, particularly in considering the BIC. This thesis aims to comprehend whether the New Pact adequately aligns with the BIC or if it falls short in adequately considering it. Accordingly, as discussed throughout this thesis, while the legal instruments of the New Pact refer to the BIC, not all provisions are fully aligned with this principle. Therefore, critiques and suggestions were elaborated to enhance their commitment to the BIC and children’s rights.

The focus on the principle of the BIC in this thesis stems from its central role concerning children. The BIC is crucial for ensuring that children’s rights are safeguarded and respected, as well as their acknowledged as right-holders. I believe this principle deserves a central focus and ought to be fully guaranteed in all EU legislation. If the BIC is not adequately considered in the New Pact’s legal instruments, true protection of children’s rights cannot be achieved.

This research is motivated by a commitment to advocate for stronger child-friendly EU policies, ensuring respect for the BIC, and ultimately fostering a brighter future for migrant children through children's rights-centred legislation.

### **1.3. Research Question**

*“To what extent does the New Pact on Migration and Asylum enhance the EU's commitment to respecting the best interests of the child compared to the current regime?”*

This thesis aims to comparatively and critically assess whether the New Pact guarantees the BIC and, consequently, strengthens the protection of children's rights. With the approval of the New Pact, which will reflect and impact how the EU approaches and deals with migration in the coming years, it is crucial to determine whether this legal framework enhances the commitment to fully respect and prioritise the BIC. To achieve this, the research will conduct a thorough comparative analysis between the legal instruments of the New Pact and the current regime. In addition to this comparison, the critical analysis will highlight provisions of the New Pact that represent significant progress in safeguarding the BIC and children's rights, as well as those that fall short and reveal potential shortcomings. In this context, recommendations will be offered to enhance respect for the BIC and to promote more child-friendly legislation, fostering an environment where children's best interests are consistently prioritised and upheld within the migration and asylum policies.

To reiterate, this thesis's comparative and critical components will provide the basis to answer the research question and, as a result, acknowledge whether the New Pact improved Member States' commitment to respecting the BIC.

### **1.4. Adopted Methodology and Research Strategies**

This thesis aims to comprehend whether the New Pact legal instruments represent a progressive step in protecting and upholding the BIC. A focused and in-depth analysis of the BIC is provided by exploring specific and general provisions concerning children

in the New Pact, comparing them with the current regime while offering constructive critiques and suggestions to enhance respect for the BIC.

To develop the present thesis, I employed two key methodologies: doctrinal research and comparative analysis. These methodologies were essential in constructing a comparative and critical examination of the new legal regime, with a particular focus on the BIC.

On the one hand, **doctrinal research** was selected as a methodological strategy to provide a nuanced understanding of the complex legal issues surrounding the BIC, particularly within the context of EU migration and asylum policies, particularly focusing on the New Pact. This approach facilitates an in-depth exploration and explanation of the BIC, as well as providing a deep understanding of the EU Member States' commitment regarding the BIC. Additionally, this methodology enabled the collection of rich, contextual data from various sources, namely primary and secondary EU law and case law. The doctrinal legal research was complemented by secondary sources, such as academic literature, journal articles, and relevant materials from legal websites, non-governmental organisations, international and national institutions, and EU bodies. Doctrinal research played a pivotal role in understanding the importance of the BIC in the context of migration and asylum legislation. Furthermore, it was essential for the development of the New Pact's critical analysis, allowing the identification of both strengths and shortcomings concerning the BIC. Ultimately, the literature gathered provided a solid foundation for developing critiques and thoroughly evaluating the New Pact's approach to the BIC.

On the other hand, the **comparative analysis** allowed me to compare both legal regimes, focusing on provisions that directly and indirectly relate to and/or affect children. The comparative evaluation entails a detailed comparison between the current legal regime and the New Pact, covering their legal instruments. The New Pact legal instruments examined are the following: the Asylum Procedure Regulation, Asylum and Migration Management Regulation, Crisis Regulation, Eurodac Regulation, Qualification Regulation, Resettlement Regulations, Reception Conditions Directive and Screening Regulation. Conversely, the following legal instruments from the current EU regime were

analysed: Regulations Nos. 2013/33/EU, 603/2013, 604/2013, and Directives 2003/109/EC, 2011/95/EU, 2008/115/EC and 2013/32/EU.

This approach allowed me to acknowledge the similarities and differences between both regimes, highlighting the strengths and potential pitfalls of the New Pact regarding the BIC.

Notably, the two methodologies used provided me with a solid perception of the differences between the legal regimes, focusing on the evolutions and potential pitfalls brought by the New Pact regarding the commitment to respect the BIC. Furthermore, it also enabled me to offer constructive critiques and suggestions for improving the new legal framework aimed at further aligning it with the BIC. Hence, the methodologies were essential to critically assess and identify, through the lenses of the BIC, whether the New Pact represents a positive step toward enhancing the protection and commitment to the BIC within EU migration and asylum policies.

### **1.5. Limitations**

This thesis provides a comparative and critical analysis to assess whether the BIC is adequately upheld under the New Pact and whether the legal framework strengthens the EU's commitment to this principle. Furthermore, this work highlights the improvements and potential shortcomings introduced by the New Pact, offering suggestions for enhancing its alignment with the BIC. However, as the legal instruments of the New Pact are set to be implemented in 2026, their impact—strengths, potential shortcomings, and misapplication of the BIC—remains speculative. Indeed, practical implementation from 2026 onward will reveal how Member States implement these instruments and their alignment with the BIC, particularly concerning provisions granting discretion to Member States. Therefore, the actual impact and alignment with the BIC is yet to be determined, remaining an area for future research, analysis, and development.

## **2. The principle of the Best Interest of the Child**

### **2.1. The principle of the BIC under the UNCRC**

Firstly, it is important to clarify the concept of “child” under the UNCRC. A child is “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier” (Article 1).

The UNCRC establishes four general principles (the BIC principle is one of them) and contains a variety of fundamental rights, “from civil rights to socio-economic rights” (Canetta *et al.*, 2012, p.8).

Article 3(1) of the UNCRC outlines the principle of the BIC as follows: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. The BIC is a guiding principle for States and relevant stakeholders to guarantee the prioritisation of the child’s best interests in the decision-making process. The importance of this principle is evident in its recognition as part of customary international law [United Nations International Children's Emergency Fund (UNICEF), 2024, p.12].

The consideration of the BIC is not simple and straightforward, as it demands prudent analysis by assessing and determining the BIC in all situations concerning and affecting children. This principle ensures that children’s rights are not disregarded and marginalised. Indeed, considering the BIC is an indispensable pillar for guaranteeing the protection and respect for children’s rights. This is a complex and multilateral task, involving all the rights of the child- the ones listed in the CRC and present in other legal frameworks [United Nations High Commissioner for Refugees (UNHCR), 2008, p.15]. In addition to children’s rights, when considering the BIC, the other general principles of the UNCRC - principles of non-discrimination, survival and development, and the views of the child - must also be considered (IOM, 2008, p.21). Therefore, the application of the principle of the BIC implies a thorough and holistic reflection to ensure actions and decisions do not frustrate children’s rights.

Despite the importance of this principle, it is a challenging task to understand its concrete meaning. Indeed, Article 3(1) does not provide guidance or clarification on what constitutes the BIC and how to apply it. In fact, upon first reading and reflecting on the principle, its precise meaning and scope remain unclear, which leads to multiple and distinct interpretations. Therefore, one can ask: What does the BIC truly mean? However, the vagueness of the principle has an underlying rationale, as it provides flexibility for interpretation, allowing the consideration of multiple and different contexts and circumstances (Cantwell, 2014, p.17), as well as “to be applied by different actors and diverse national systems” (UNHCR, 2021, p.33). Nevertheless, while flexibility is important, it also creates opportunities for its manipulative use, which has been recognised as a problem by the CRC Committee (CRC Committee, 2013, para 34). Consequently, to avoid manipulation and to foster a more equitable interpretation and implementation of the principle, the CRC Committee developed General Comment No. 14. This General Comment clarifies how Governments and relevant stakeholders can correctly assess and determine the BIC. The content of General Comment No. 14 will be thoroughly analysed in Subchapter 2.1.1. “The Best Interest of the Child and General Comment No 14”.

Furthermore, it is important to note that according to the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (OPIC), the CRC Committee can receive individual complaints submitted by or on behalf of children regarding violations of their rights under the UNCRC and its protocols (Article 5(1)). However, the CRC Committee is only competent if the concerned State is a ratifying party of the OPIC (Article 1(3)). In addition, communication is only admissible if all domestic remedies have been exhausted (Article 7(e), *a contrarium*). Since the OPIC entered into force in 2014, it “has received a few hundred of complaints” (Liefwaard, 2024, p.1). Several of these communications relate to migration, “covering a spectrum of issues, including age verification, deportation, immigration detention and entitlements to medical care, an adequate standard of living and education”. (*Idem*, p.3). Indeed, within the context of migration, “there are many children’s rights violations” (CRC Committee, 2024, para. 30). The OPIC is vital to ensure that children have effective access to justice following a violation of their rights. This is especially important in migration within the EU to guarantee that Member States effectively protect children’s rights and, when they fail to

do so, ensure accountability. However, not all EU Member States have ratified the OPIC (OHCHR, 2023), meaning that communications on violations of children's rights within the migration context cannot be lodged against a Member State that did not ratify the Protocol.

### **2.1.1. The Best Interest of the Child and General Comment No 14**

As mentioned, the CRC Committee's General Comment No. 14 was created to offer guidance on the principle of the BIC, clarifying doubts and avoiding misconceptions and manipulation. However, it is important to note that this General Comment, as well as other General Comments developed by the CRC Committee, is not mandatory since it is soft law. Nevertheless, they are valuable from an interpretive point of view (UNHCR, 2021, p.34). With this said, the CRC Committee considers the BIC to be more than a principle, describing it as a "right, a principle and a rule of procedure" (CRC Committee, 2013, para. 46). As a substantive right, the child holds the right to have his or her best interest considered and prioritised when multiple interests are weighed to make a decision, ensuring that the BIC is considered in every decision concerning the child (*Idem*, para. 6 (a)). Secondly, as a principle, if a legal text can be interpreted in more than one manner, the interpretation that best serves the BIC should be chosen (*Idem*, para 6 (b)). Lastly, as a rule of procedure, any decision affecting a concrete child, group of children, or children in general must include an assessment of the potential impact of the decision on them. Moreover, decisions must explicitly justify how the BIC was considered (*Idem*, para 6 (c)).

According to General Comment No. 14, the principle of the BIC ensures the "full and effective enjoyment" of the rights under the UNCRC and the "holistic development of the child" (*Idem*, para. 4). The application of this principle requires "the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity" (*Idem*, para. 5). Furthermore, it is crucial to underline that the BIC must be a primary consideration "in all actions concerning children", which englobes not only action in the form of "decisions, (...) all acts, conduct, proposals, services, procedures and other

measures” but also inactions, omission and failure to take action (*Idem*, para 17). The word “concerning”, used in the article, refers to “all decisions and actions that directly or indirectly affect children” (*Idem*, para. 19).

The child’s best interest must be taken as a primary consideration by States in all aspects involving children. This duty is broad and applies to “public or private social welfare institutions, courts of law administrative authorities or legislative bodies” in accordance with Article 3(1). The broad scope to whom this duty applies is to “all institutions whose work impacts directly and indirectly on children’s rights”, encompassing “immigration and asylum authorities” (UNHCR, 2021, p.33).

Despite General Comment No. 14 aiding in the practical interpretation of the principle, the concrete meaning of the concept of the BIC does not exist. This is because the concept is complex, and the child’s best interest is not uniform for every child in every situation. Therefore, the BIC “must be determined on a case-by-case basis” (CRC Committee, 2013, para. 32), requiring flexibility in its application (*Idem*, para. 39). Therefore, the content of the BIC depends on a variety of factors and on the concrete situation. For instance, when defining the BIC for a specific individual child, the best interest must be evaluated on a case-by-case basis, considering a range of considerations. In fact, the Comment General detains a non-exhaustive list of factors (*Idem*, para. 50) to be considered when determining and assessing the BIC. These include personal characteristics (e.g., age, gender, level of maturity, life experiences), personal context, concrete situation, vulnerability, needs and opinions (*Idem*, paras. 32, 48, 49 and 50). On the other hand, in the case of collective decisions, the circumstances of a specific group of children or children in general must be considered (*Idem*, para. 32). In both situations (individual and collective case-by-case analysis of the BIC), the “assessment and determination should be carried out with full respect for the rights contained in the Convention and its Optional Protocols” (*Ibidem*).

Additionally, it should be noted that decisions regarding the BIC should not be considered definitive. In fact, as the child grows, several aspects, such as their maturity, needs, and life circumstances, will naturally change. Consequently, the best interest of that child or group of children will inevitably evolve over time. Hence, policymakers

should provide the possibility for decisions to be revised or adjusted (*Idem*, para 84). This ensures that decisions can be reassessed if it is later proved unsuitable concerning the child's best interest, thereby guaranteeing "continuity and stability of the child's present and future situation" (*Ibidem*).

Furthermore, the expression "Shall be a primary consideration" used in Article 3(1), highlights the legal obligation for States to always consider and prioritise the BIC. This legal obligation requires States to adhere to, respect, and implement the BIC principle without the discretion to disregard it (*Idem*, paras. 36-37). The term "primary consideration" essentially means that the BIC must be considered a top priority in the decision-making process, taking precedence over other concerns. The child's vulnerable situation justifies this prioritisation, generally characterised by their "dependency, maturity, legal status and, often, voicelessness" (*Ibidem*). In essence, the legal obligation to prioritise the consideration of the BIC is justified because if the interests of children are not perceived as a central priority, "they tend to be overlooked" (*Ibidem*).

Moreover, it is essential to note that the application of the BIC does not always proceed smoothly, as it "might conflict with other interests or rights" (*Idem*, para.39). In cases of conflict, the balance must be achieved on a case-by-case analysis and resolution. The assessment and determination of the BIC might compete with other children's rights as a group of children or children in general or with the rights and interests of other right holders or the public in general (*Ibidem*). In these situations, the solution to the conflict is necessarily made by "carefully balancing the interests of all parties and find a suitable compromise" (*Ibidem*). However, if compromise is unachievable, authorities and decision-makers must bear in mind the primary consideration of the BIC, which implies that the BIC is not a mere consideration, as it detains high priority. Hence, a "larger weight must be attached to what serves the child best" (*Ibidem*).

In addition, to correctly and lawfully uncover the BIC of an individual child, a group of children, or children in general, two complementary steps must be followed: assessment and determination of the BIC.

### **A) Best-Interests Assessment**

The BIC assessment must take place before any decision concerning a child or children. It is conducted by the decision-maker and the respective team - preferably composed of a multidisciplinary team of professionals (*Idem*, para. 47)-, involving the minor<sup>1</sup>. According to General Comment No. 14, this assessment involves collecting relevant elements, followed by their evaluation and balancing.

To carry out the assessment, pertinent elements must be collected. General Comment No. 14 provides a list of important elements for the assessment of the BIC (*Idem*, paras. 52 – 79). This list is non-exhaustive, allowing the consideration of other relevant elements depending on the concrete context of the child or children (*Idem*, para. 80), adding that “Not all elements will be relevant to every case” (*Ibidem*). Additionally, the CRC Committee underlined the importance of decision-makers constructing a “non-exhaustive and non-hierarchical” (*Idem*, para. 50) list of elements for the best interest assessment, serving as a guiding tool.

Following this, the necessary elements will be balanced, as their weighting will vary, and conflicts might occur according to the situation (*Idem*, paras. 50 and 81). In case of conflict, the decision must respect the BIC to achieve “the full and effective enjoyment of the rights recognised in the Convention and its Optional Protocols, and the holistic development of the child” (*Idem*, para. 82). Additionally, according to General Comment No. 6, the BIC assessment must be conducted in a child-friendly and secure environment and conducted by trained professionals, employing age and gender-appropriate interviewing approaches (CRC Committee, 2005, para. 20).

The CRC Committee characterised the best-interest assessment as a “unique activity” (CRC Committee, 2013, para. 48). Each assessment focuses on and analyses various factors that depend on the specific circumstances of the individual child, group of children, or children in general; therefore, the outcome is not uniform. In essence, it reiterates the reason why the definition of the BIC is not standardised.

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<sup>1</sup> The participation of the child in the assessment of the BIC is in line with the principle of the views of the child (Article 12, UNCRC - the right to be heard). In fact, taking into consideration the child’s view is a crucial aspect to adequately consider the BIC. According to paragraph 74 of General Comment No. 12 (2009): “there can be no correct application of article 3 if the components of article 12 are not respected”.

## **B) Best-Interest Determination**

Following the Best-interest assessment, the Best-interest determination takes place. According to General Comment No 14, this step outlines “the formal process with strict procedural safeguards designed to determine the child's best interests on the basis of the best-interests assessment” (*Idem*, para. 47). In essence, it represents the decision-making phase, which is based on the results of the best interest assessment. However, the formulation of a decision is not solely based on the assessment results, as it also follows a procedure that guarantees legal protections and standards, as well as the adequate enforcement of rights (*Idem*, para. 46 (b)). In other words, the best-interest determination’s primary objective is to achieve a decision reflecting and respecting the BIC.

Similarly to the assessment of the BIC, the determination of the best interest must be guided by “child-friendly procedural safeguards” (*Idem*, para. 85). In this context, States must “develop transparent and objective processes for all decisions made by legislators, judges or administrative authorities, especially in areas which directly affect the child or children” (*Idem*, para. 87). Moreover, General Comment No 14 outlines numerous safeguards and guarantees, inviting States and relevant stakeholders involved in defining the BIC to follow them (*Idem*, paras. 85-99).

## **2.2. The Impact of the UNCRC on EU Migration and Asylum Law**

### **2.2.1. Evolution of the BIC and the perception of children’s rights under EU Law**

Children’s rights occupy a significant position in international, regional, and national legal frameworks, with the BIC at their core. However, this has not always been the case, particularly within EU law. To understand the evolution of the BIC’s role in EU law, it is essential to first acknowledge that the incorporation of children’s rights into EU legislation has been a gradual process. This process involved continuous efforts to align political will with respect for the children’s human dignity and rights, recognising them as legitimate right holders.

At the beginning of what would later become the EU, the European Economic Community's founding document, the Treaty of Rome, did not focus on human rights; as a result, children's rights were absent. The first recognition of children's rights within the EU framework emerged in the context of free movement<sup>2</sup>. In this context, the Court of Justice of the European Union (CJEU) played a crucial role through its case-law, since children's rights "became more and more recognised, primarily through the practice and interpretation of the CJEU" (Petrašević, 2016, p.48).

Following this, the Maastricht and the Amsterdam Treaties came into force. While the Maastricht Treaty marked progress in protecting human rights, children's rights were considered solely as part of the EU's obligation to respect and reflect fundamental rights in its policies (Article F (2) and (3)). In contrast, the Treaty of Amsterdam recognised children's rights by directly mentioning them in the context of security (Article K.1).

Drawing from this progress, the Treaty of Lisbon marked a significant evolution in the EU's recognition of children's rights through modifications to the Treaty on the European Union (TEU) and by providing binding authority on the Charter. On the one hand, Articles 3(3) and (5) of the TEU underscore the EU's commitment to children's rights, explicitly designating their protection as an objective of the Union. Conversely, Article 24 of the Charter recognises children as a concrete EU priority. Indeed, the Article is devoted to children's rights, acknowledging the obligation to consider the BIC in all actions concerning children. As a result, EU policies "must be designed and implemented in line with the child's best interest" (Canetta *et al.*, 2012, p.7). This milestone unquestionably marked the EU's position regarding children, demonstrating its political will to respect, protect, and uphold the rights of the child: "The child is no longer invisible in EU law" (Petrašević, 2016, p.52).

Another treaty that deeply impacted EU law concerning children's rights and the BIC is the European Convention on Human Rights (ECHR). Although this Convention does not detain an express reference to the BIC in its text, the principle is "(implicitly) entailed in its Article 8, which guarantees the right to respect for one's private and family life" (Goldner Lang, 2022). Concerning children in the migration and asylum context, under the ECHR, Member States are required to prioritise the BIC "in all matters that

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<sup>2</sup> Articles 10, 11 and 12 of the Regulation (EEC) No 1612/68 (1968) on freedom of movement for workers within the community.

regard children, including refugee, asylum-seeking and migrant children” [Council of Europe & European Union Agency for Fundamental Rights (FRA), 2023, p. 6]. Furthermore, it is essential to note that the ECHR is considered a “living instrument”. This means that the European Court of Human Rights (ECtHR), when interpreting the Convention and its provisions, takes into account current circumstances and utilises other Conventions as tools of interpretation<sup>3</sup> (ECtHR, 2020, pp. 3-4; Takács, 2022, p. 101).

In addition, the UNCRC also detains a profound influence on the EU’s policies and legal framework. The European Commission has stated that the UNCRC “must continue to guide EU policies and actions that have an impact on the rights of the child” (European Commission, 2011, p.3). Moreover, all 27 EU Member States are ratifying parties to this Convention, binding them to its provisions and principles, which consequently shapes the Union’s approach to children’s rights. While the EU is not a ratifying party of this treaty (Council of Europe & FRA, 2022, p. 29), the UNCRC serves as a “guiding legislative framework for its actions and policies regarding children’s rights” (UNICEF, 2024, p.12). This results from the EU’s “constitutional obligation to follow the principles and provisions set in international human rights law” concerning subjects falling within its competence (Kišūnaitė, 2019, p. 173). Additionally, the wording of Article 24 of the Charter derives from the UNCRC, which strongly implies that it incorporates the BIC and its interpretative function (Goldner Lang, 2022). It is important to note that the EU does not detain “general competence to legislate on children’s rights” (Shreeves, 2022, p. 3). Nevertheless, it is competent to legislate on children’s rights matters “only where it has been given competence under the treaties” (Council of Europe & FRA, 2015, p. 22). This competence is “determined on a case-by-case basis” (Shreeves, 2022, p. 3), driven by the fact that children’s rights are present in various sectors. One sector that the EU has the competence to legislate is asylum and migration (Council of Europe & FRA, 2015, p. 22).

The summary provided *supra* illustrates how the BIC and children’s rights have become integral to the EU legal framework over time, resulting in their acknowledgement as subjects with human rights (Goodwin-Gill, 1995, p. 410; Petrašević, 2016, p. 44). The mentioned legal instruments reflect this commitment and foster a “child-friendly culture

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<sup>3</sup> The ECtHR, in its Case *Demir and Baykara v. Turkey*, No. 34503/97, expressly stated that the ECHR is a “living instrument”, emphasising that it must be “interpreted in the light of present-day conditions, and in accordance with developments in international law” (para. 146).

in EU decision-making” (Shreeves, 2022, p. 3). This commitment naturally extends to the protection of migrant and asylum children’s rights. Consequently, EU migration and asylum policies must align with the protection of children’s rights, ensuring adherence to the BIC. Upcoming Subchapter 2.2.2. will examine the references to the BIC and the UNCRC within the evolution of EU migration and asylum policies.

### **2.2.2. BIC and the UNCRC in EU Migration and Asylum Policies**

As mentioned in the previous Subchapter, there was an evolution within EU law concerning the presence of the principle of the BIC and children’s rights in its legal frameworks. This evolution is aligned with the UNCRC (which, as *supra* noted, influences the EU’s policies and actions) and with the commitment to guarantee children's dignity and rights. This compromise is reflected in all EU policy areas, including migration and asylum.

Given the UNCRC's influence on EU policies and the growing importance of the BIC principle, this Subchapter will explore how the UNCRC and BIC were incorporated into EU secondary law on migration and asylum. It will examine references to the UNCRC and BIC in key legal instruments, both currently in force and no longer applicable, providing a comprehensive overview of their evolution.

However, not all legal instruments will be analysed, as the Subchapter focuses on the Common European Asylum System (CEAS), particularly its first and second phases. The table below presents and organises the legal instruments, starting with those from the first phase of the CEAS and then the recast instruments from the second phase.

<b>Instrument</b>	<b>UNCRC</b>	<b>BIC</b>
Eurodac Regulation (Regulation No 2725/2000)	Articles 4(1) and 8(1)	X
Temporary Protection Directive (Directive 2001/55/EC)	X	Article 15(4)

Reception Conditions Directive (Directive 2003/9/EC)	X	Articles 18(1) and 19 (2), third subparagraph and (3)
Dublin II Regulation (Regulation No 343/2003)	X	Articles 6, first subparagraph, and 15(3)
Qualification Directive (Directive 2004/83/EC)	X	Recital 12; Articles 20(5) and 30(4) and (5)
Asylum Procedures Directive (Directive 2005/85/EC)	X	Recital 14; Articles 2(i) and 17(6)
Recast Eurodac Regulation (Regulation 603/2013)	Article 3(5)	Recital 35
Recast Reception Conditions Directive (Directive 2013/33/EU)	Recital 9 and 18	Recitals 9 and 22; Articles 2 (j), 11(2), second subparagraph, 23(1), (2) and (5), 24(1),(2), and (3)
Dublin III Regulation (Regulation No 604/2013)	Recital 13	Recitals 13, 16, 24, 35; Articles 2(k), 6(1)– (4), 8(1)– (5), 20(3)
Recast Qualification Directive (Directive 2011/95/EU)	Recital 18	Recitals 18, 19, 22 and 38; Articles 20(5) and 31(4) and (5)
Recast Asylum Procedures Directive (Directive 2013/32/EU)	Recital 33	Recital 33; Article 25(1)(a) and (6), first subparagraph and (c)

**Table 1. References to the UNCRC and BIC in CEAS legal instruments**

The table shows that the UNCRC is not mentioned in any legal instrument of the first phase of the CEAS, except for the Eurodac Regulation. Conversely, the BIC is mentioned in all legal instruments except for the same regulation. On the other hand, all the legal instruments of the second phase of the CEAS mention the UNCRC and the BIC.

Concerning the **references to the UNCRC**, both Eurodac Regulations refer to the UNCRC, requiring fingerprint collection to be carried out in compliance with the Convention (Articles 4(1) and 8(1) of the Eurodac Regulation and Article 3(5) of the Recast Eurodac Regulation). However, the Eurodac Regulation limits the safeguards under the UNCRC to children applying for asylum and “apprehended by the competent control authorities in connection with the irregular crossing by land, sea or air of the border of that Member State”. These safeguards are omitted for children “found illegally present in a Member State” (Article 11). Conversely, under the Recast Eurodac, the collection of fingerprints aligned with the UNCRC applies to all children, whether they are applicants for international protection, “apprehended in connection with the irregular crossing of the border of that Member State”, or “found illegally staying in a Member State”.

The Temporary Protection Directive does not mention the UNCRC. As this Directive remains in force without recast, there has been no evolution in this regard.

On the other hand, the Reception Conditions Directive, Dublin II Regulation, Qualification Directive and Asylum Procedures Directive also do not mention the UNCRC. However, their recasts refer to the Convention. Specifically, the Recast Reception Conditions Directive mentions the UNCRC in Recitals 9 and 18. Recital 9 requires the Directive to be applied with “full compliance with the principles of the best interest of the child and of the family unit, in accordance with (...) the 1989 United Nations Convention on the Rights of the Child”. On the other hand, Recital 18 specifies that Article 37 of the UNCRC applies in cases of child detention. Similarly, the Dublin III Regulation, Recast Qualification Directive and Recast Asylum Procedures Directive (Recitals 13, 18, and 33, respectively) emphasise that the BIC must be primarily considered when applying the legal instruments, in accordance with the UNCRC.

**In relation to the BIC**, all legal instruments (except the Eurodac Regulation of the first CEAS phase) refer to the BIC.

Concerning the Eurodac regulations, only the Recast mentions the BIC. Recital 35 requires the BIC to be a primary consideration when applying the Regulation, particularly concerning the use of minors’ data for law enforcement purposes. This reference represents an evolution compared to the previous Eurodac Regulation.

Article 15(4) of the Temporary Protection Directive stipulates that Member States must consider the BIC “When applying this Article”. This provision limits the consideration of the BIC to the circumstances under Article 15 (family reunification). Since this Directive is still in force, without a recast, there is no evolution.

The Reception Conditions Directive of the first CEAS phase mentions the BIC in both a general and specific manner. Article 18(1) requires the BIC to be primarily considered “when implementing the provisions of this Directive that involve minors”. However, the wording suggests that the BIC is only considered under provisions directly concerning children, excluding its consideration under general provisions that, while not mentioning children, also apply to them (Smith, 2009, pp. 50-51). In contrast, the provisions specifically referring to the BIC relate to unaccompanied minors in the following situations: keeping siblings together and family tracing (Article 19 (2) and (3), respectively). On the other hand, the Recast Directive requires Member States to comply with the BIC when applying the Directive (Recital 9) and to primarily consider it while implementing provisions involving minors (Article 23(1)). Furthermore, the BIC is also referred to in relation to the representative (Article 2(j) and 24(1)), detention (Article 11(2)), family unity (Articles 23(5)), keeping siblings together (Article 24(2)), accommodation of children above 16 with adults (Article 24(2)), and family tracing (Article 24(3)). In addition, Article 23(2) provides factors to consider in the BIC assessment.

In relation to the Dublin Regulations, the Dublin II Regulation only mentions the BIC in two provisions concerning unaccompanied minors: family reunification (Article 15(3)) and determining the responsible Member State for evaluating the child’s application (Article 6, first subparagraph). On the other hand, Dublin III Regulation sets out in Recital 13 and Article 6(1), respectively, that Member States must primarily consider the BIC “when applying this Regulation” and “with respect to all procedures provided for in this Regulation”. Additionally, the Regulation outlines the factors to be considered when assessing the BIC (Recital 13 and Article 6(3)). The BIC is also referred in provisions concerning the tasks of a representative (Articles 2(k) and 6(2)), voluntary transfers (Recital 24), relationship of dependency (Recital 16), the power of the Commission to adopt delegated acts (Recital 35 and Article 8(5)), family reunification (Article 8(2 and 3)) and determination of the responsible Member State to consider a minor’s application (Articles 8 (1) – (4) and 20(3)).

The Qualification Directive of the first phase of CEAS sets out that the BIC should be primarily considered when implementing the Directive (Recital 12) and “the provisions of this Chapter that involve minors” (Article 20(5)). Furthermore, specific provisions require the consideration of the BIC, namely, maintaining siblings together and family tracing (Article 30 (4) and (5), respectively).

In contrast, while the Recast Qualification Directive maintains the same references to the BIC as the Qualification Directive (Recital 18, Articles 20(5) and 31(4) and (5)), it also refers to the BIC regarding the expansion of the “notion of family members” (Recital 19), care and custodial arrangements for unaccompanied minors (Recital 22), “entitlements to the benefits” under the Directive (Recital 38). Moreover, it also outlines factors to be considered when assessing the BIC (Recital 18).

Lastly, the Asylum Procedures Directive, in Recital 14 and Article 17(6), requires the primary consideration of the BIC concerning “specific procedural safeguards for unaccompanied minors”. In addition, Article 2(i) mandates representatives to uphold the BIC. In comparison, the Recast reinforces that the BIC must be a primary consideration when applying the Directive (Recital 33 and Article 25(6), first paragraph). It also reiterates the representative’s duty to ensure the BIC (Articles 2(n) and 25(1)(a)). Additionally, it refers to the BIC under inadmissibility consideration of the application (Article 33(2)(c)).

It is important to note that the differences between the two CEAS phases concerning the BIC relate to the evolution of the commitment to protect children under EU law. The legal instruments of the second phase were developed under “a much more coherent Union commitment to the rights of the child, due particularly to the EU Charter of Fundamental Rights” (Smith, 2009, p. 4). As mentioned in Subchapter 2.2.1, with the Treaty of Lisbon, the Charter and the TEU became legally binding, and the protection of children’s rights became one of the EU’s objectives. Consequently, the development of the second phase of the CEAS aligned with Article 24 of the Charter and Article 3(3) of the TEU, placing children’s rights at their core. Indeed, including “the best interests of the child in horizontal clauses” (Frasca & Carlier, 2023, p. 346) within these instruments underscores the importance attached to the principle, alongside Member States’ commitment to respecting it. This integration illustrates the EU’s adherence to

systematically protecting children’s rights and ensuring that their best interests are consistently considered in migration and asylum matters. Ultimately, it demonstrates an effort to establish a child-centred approach to managing migration and asylum policies.

### **2.2.3. Case-law**

The commitment to children’s rights is also evident from case-law, as the constant reference to the principle of the BIC and to the UNCRC underscores their importance and influence. This Subchapter will briefly focus on the role of the ECtHR<sup>4</sup> and the CJEU in implementing and interpreting the BIC in case-law concerning children in the context of migration and asylum. Before focusing on the principle of the BIC, it is important to note that both ECtHR and the CJEU frequently referred to the UNCRC in their case-law<sup>5</sup>.

The principle of the BIC has gained greater notoriety and importance in the CJEU and ECtHR case-law on migration and asylum (Council of Europe & FRA, 2022, p. 199). Indeed, the ECtHR and the CJEU have emphasised “the primacy of the child’s best interests” [European Council on Refugees and Exiles (ECRE) & European Legal Network on Asylum (ELENA), 2016, p. 6]. Furthermore, as it will be demonstrated *infra* through examples, both Courts’ case-law are instrumental in interpreting the BIC by clarifying ambiguities regarding the principle’s interpretation and implementation. Additionally, judicial rulings reinforce Member States’ legal obligation to consider the BIC, emphasising that decisions related to asylum and migration policies require the consideration of the BIC whenever they directly or indirectly affect the child.

Concerning the CJEU, the Court has underscored that the BIC should be a primary consideration in implementing EU secondary law (Frasca & Carlier, 2023, p. 352), which is evident from the following cases. In relation to interpretation aligned with the BIC, the CJEU, in case n. ° C-648/11, “The Queen, on the application of MA and Others v.

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<sup>4</sup> Despite the ECtHR not being an EU judicial body, its case-law is valuable in developing and interpreting fundamental rights and principles under EU law. See Davio, V., & Muir, E. (2023). Introduction. The ECHR in the ECJ’s Case Law Post-Charter: A Dual Perspective. In *European Papers* (Vol. 8), No 1, p.320.

<sup>5</sup> See T. Liefwaard and J.E. Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence*, p. 225; and Council of Europe & European Union Agency for Fundamental Rights. (2022). *Handbook on European law relating to the rights of the child: 2022 edition*, pp. 31 and 32.

Secretary of State for the Home Department”, was required to determine, in light of Article 6 of Regulation No 343/2003, the Member State responsible for the application of an unaccompanied child who had submitted a request in three different Member States, without a family member residing in them. In its ruling, the Court held that the provisions concerning the determination of the responsible Member State for asylum applications must be interpreted in line with the BIC, as outlined in Article 24(2) of the Charter. Consequently, the CJEU recommended that, in such situations, the responsible Member State should be the one where the child is physically present<sup>6</sup>. This position was important, as the Court highlighted that “considerations linked to the best interests of the child (...) prevail over the logic of the Dublin system” (*Idem*, p. 357). In addition, under the case of *M.A. v. État belge*, a question for a preliminary ruling was referred to the Court requesting clarification on whether it was necessary to consider the BIC of a child (an EU citizen) in return and entry ban decisions that only apply to the child’s parent. The CJEU clarified that, in these situations, Article 5 of the Return Directive must be read in conjunction with Article 24 of the Charter, meaning that the BIC must be primarily considered before issuing the decision, as such decisions may (indirectly) negatively impact the child<sup>7</sup>. Furthermore, the CJEU was also instrumental in addressing erroneous BIC assessments. In fact, the Court has underscored in several judgements (aligned with the CRC Committee General Comment No. 14) that the best interest assessment must include the child’s relevant and specific circumstances<sup>8</sup>.

On the other hand, the ECtHR has also underscored that the BIC must be a primary consideration. In its judgment in the case of *Popov v. France*, affirmed that there is “a broad consensus (...) of the idea that in all decisions concerning children, their best interests must be paramount”<sup>9</sup>. Furthermore, the Court has been instrumental in interpreting the BIC by referring to this principle and to the UNCRC in its judgments (ECRE & ELENA, 2016, p. 10). Indeed, in the case of *Ignaccolo-Zenide v. Romania*, the Court highlighted that family reunification is not absolute, requiring the prioritisation of

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<sup>6</sup> CJEU, C-648/11, *The Queen, on the application of MA and Others v. Secretary of State for the Home Department*, paras. 42, 48, 57, 59, 60 and 68.

<sup>7</sup> CJEU, C-112/20, *M.A. v. État belge*, paras. 18, 19, 35-43.

<sup>8</sup> CJEU, C-129/18, *SM v. Entry Clearance Officer, UK Visa Section*, para. 73. CJEU, C-441/19, *TQ v Staatssecretaris van Justitie en Veiligheid*, paras. 46-47.

<sup>9</sup> ECtHR, *Popov v. France*, Applications Nos. 39472/07 & 39474/07, para. 140.

the BIC and children's rights under Article 8 of ECHR<sup>10</sup>. Moreover, similarly to the CJEU, the ECtHR has also been essential in addressing shortcomings regarding the BIC assessment. Indeed, in its judgement in case of *Trapitsyna and Isaeva v. Hungary*, the Hungarian authorities ordered the expulsion of the two applicants based on grounds of national security concerning the first applicant (the mother). However, the judicial body noted that there was "no genuine inquiry to the BIC"<sup>11</sup>, as the decision to expel the child was based on preserving family unit<sup>12</sup>. While family unity is important to consider, the assessment of the BIC, as explained in Subchapter 2.1.1, requires a comprehensive evaluation, including the potential impact of the expulsion on the child's well-being. Therefore, in this case, it should have been considered the child's strong ties to Hungary.

### 3. Pre-entry Stage: Current regime and the New Pact

#### 3.1. Eurodac Regulations

**Regulation (EU) 603/2013** (current regime) establishes two purposes for the Eurodac system: determine the Member State responsible for examining an international protection application and use the fingerprint data for data comparison for law enforcement purposes (Article 1 (1) and (2)). Conversely, **Regulation (EU) 2024/1358** (New Pact's Eurodac Regulation), in addition to these purposes, introduces eight additional ones, including "assist with the protection of children" (Article 1(1)(d)).

Under the current regime, Member States are required to collect fingerprint data of applicants for international protection (Articles 9 to 13) and third-country nationals or stateless persons apprehended in connection with irregular crossing of an external border (Articles 14 to 16) and found illegally in a Member State (Article 17 (1) and (3)). On the other hand, the New Pact's Eurodac Regulation expanded both the digital monitoring and personal scope. It is now required the collection of biometric data, which includes fingerprint and facial image data (Article 2 (1) (s)), as well as additional personal data

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<sup>10</sup> ECtHR, *Ignaccolo-Zenide v. Romania* (Application no. 31679/96), para. 94

<sup>11</sup> ECtHR, *Trapitsyna and Isaeva v. Hungary*, Application, No. 5488/22, para. 83.

<sup>12</sup> *Idem*, para. 82.

(Articles 17 (1) and 19 (1)). In relation to the personal scope, biometric data collection is required from the categories of migrants outlined under the current regime, as well as from ones. These include individuals registered for conducting an admission procedure under the Resettlement Regulation and the national resettlement scheme (Articles 18-19 and 20-21, respectively), third-country nationals or stateless persons disembarked following a search and rescue operation (Articles 24-25), and beneficiaries of international protection (Article 26).

Regarding children, both Regulations emphasise that the BIC must be a primary consideration when applying the legal instrument (Recital 35 of the current regime, and Recital 47 of the New Pact's Eurodac Regulation). In addition, the legal instruments state that finger/biometric data must be aligned with the UNCRC (Article 3 (5) of the current regime, and Article 14(1) of the New Pact's Eurodac Regulation).

Furthermore, under the current regime minors who are 14 or older are submitted to fingerprint data collection (Recital 17, Articles 9 (1), 14 (1) and 17 (1)). In contrast, the New Pact Regulation lowers the minimum age for data collection to 6 years old (Article 14 (1), first subparagraph).

Under the current regime, minors subjected to fingerprint collection need to be informed in an "age-appropriate manner" (Article 29 (2), second subparagraph). Conversely, in accordance with the New Pact's Eurodac Regulation, minors have the right to be informed in an "age-appropriate manner", which may include the use of "leaflets, infographics or demonstrations, or a combination of any of the three, specifically designed in such a way as to ensure that minors understand it". Additionally, information must be provided in a "concise, transparent, intelligible and easily accessible form, using clear and plain language" (Article 42 (1) and (2)).

On the other hand, the New Pact's Eurodac Regulation outlines additional safeguards for children under Article 14. It reiterates the BIC as a primary consideration when applying the Regulation; requires trained officials to take the minor's data, data collection in a child-friendly and sensitive way; in cases of uncertainty whether the child is under 6 years old, and when there is no proof of the minor's age, child must be

considered to be under 6 (principle of the benefit of the doubt); and guarantee the presence of an adult during the child's biometric process. Accompanied minors must have a family member present (when not absent), and unaccompanied minors, a representative or a person trained to protect their best interest and well-being.

Furthermore, according to Article 14 (1), fourth subparagraph, if children hesitate to comply with the obligation to provide biometric data, force should not be used. However, where permitted under EU and national law, while requesting the child's dignity and physical integrity, and as an *ultima ratio* measure, a "proportionate degree of coercion" may be used to ensure the child's compliance.

Following the comparative assessment of the Eurodac legal instruments, the main strengths and shortcomings introduced by the New Pact's Eurodac Regulation concerning children's rights and, therefore, their BIC, will be highlighted *infra*.

One positive feature of the New Pact Eurodac Regulation is the establishment of assisting with the protection of children as one of its purposes (Article 1 (1) (d)).

Furthermore, the safeguards outlined in Article 14 for children throughout the biometric data collection process are noteworthy. These safeguards include child-friendly and sensitive processes conducted by trained professionals, the use of the principle of the benefit of the doubt in cases of age uncertainty, and the requirement for an adult to be present during the process, for both accompanied and unaccompanied children.

Moreover, the right to be informed in an "age-appropriate manner" was improved under the New Pact's Eurodac Regulation, by clarifying age-friendly ways to do so, providing a stronger safeguard on the providence of information.

Under the New Eurodac Regulation, when children are reluctant to provide biometric data, it is allowed the use of a proportionate degree of coercion as a resource of *ultima ratio* while respecting the child's dignity and physical integrity. However, this is, problematic. Indeed, the Regulation does not define the concept of coercion nor clarifies what constitutes a "proportionate level", leaving the vague reference to respect the child's dignity and physical integrity. In this context, an unclear definition of "proportionate level" might lead to the use of disproportionate coercion, potentially disrespecting the

child's dignity and physical integrity. Additionally, the safeguard regarding the child's physical integrity, despite being crucial, is incomplete, as it must also include the child's psychological integrity. Nevertheless, the possibility to use coercion (even to a proportionate degree) contradicts Member States obligation under Article 19 of the UNCRC. Accordingly, they must "protect the child from all forms of physical or mental violence" (Article 19(1), UNCRC). In this context, the CRC Committee has underscored that there is no exception, clarifying that "all forms of violence against children, however light, are unacceptable" (CRC Committee, 2011, para.17). In addition, it highlights that the intent of the use of physical or mental violence cannot justify the breach of the child's right to be free from violence (*Ibidem*).

Furthermore, the Regulation lowers the minimum age for biometric data collection from 14 to 6 years old. Lowering the minimum age, alongside the expansion of the Eurodac system's personal scope, will subject more children to data collection. In this regard, the Platform for International Cooperation on Undocumented Migrants (PICUM) raised an interesting perspective by revealing that the need for additional protection for children throughout the data collection process implicitly acknowledges that these procedures can be harmful and challenging for children (PICUM, 2021, p. 13). Therefore, the new Regulation is allowing more children to be subjected to a potentially harmful procedure. Additionally, requiring biometric data, such as facial image data, from very young children raises questions about its relevance. Children change and grow significantly over the years, making them potentially unrecognisable compared to the facial data collected upon their arrival in Europe. In this context, "the deployment of facial recognition technology may not prove efficient" (Marcu, 2021, p. 5), and consequently, it might be an unnecessary process for children. Therefore, the submission of more children to data collection, combined with lowering the minimum age, the potential ineffectiveness of facial data due to the child's young age, and the implicit acknowledgement that the procedure is harmful, clearly contravenes the BIC.

### **3.2. Screening Regulation**

**Regulation (EU) 2024/1356** (Screening Regulation) establishes a mandatory screening procedure, ensuring fast identification to determine the appropriate procedure

(Articles 1 and 18, and Recital 6). The screening includes health, vulnerability and security checks, identification or verification of identity, biometric data collection, screening form filling, and referral to the appropriate procedure (Article 8 (5)). This procedure applies to four categories of people (Article 1 (a) and (b)).

Additionally, the screening must take place at an “appropriate and adequate location” determined by Member States, both at the external borders and within the territory (Article 8 (1) and (2)). The screening will have a maximum duration of 7 days for screenings at the external border and 3 days for the ones within the territory (Article 8 (3) and (4), respectively). Migrants subjected to screening must “remain available” to the screening authorities, meaning that they must remain in the designated locations until the procedure is finished (Recital 11, Article 8 (1) and (2), and Articles 6, 7 and 9). If necessary and based on an individual assessment, Member States, as a measure of *ultima ratio*, “may detain a person subject to the screening”, in line with the principles of proportionality and necessity (Recital 11).

Moreover, Article 10 establishes Member States’ obligation to set up an independent monitoring mechanism to monetarise fundamental rights compliance, including BIC compliance (Article 10 (2) (a)).

Furthermore, safeguards concerning children are established, as the screening also applies to them. In this context, Recital 26 sets out that Member States, while applying the Screening Regulation, cannot discriminate against individuals based on age. Recital 25 and Article 13 (1) require the BIC to always be a primary consideration during the screening. Moreover, Article 13 establishes that minors must always be accompanied: accompanied minors by an adult family member (paragraph 2) and unaccompanied minors by a representative or trained professional (paragraph 3). The person who assists the unaccompanied minor must be independent from the screening (not conducting it), trained to ensure the child’s best interests and well-being and assist the minor through the screening in a child-friendly and sensitive way, using language that the child comprehends (paragraphs 3, 4 and 5). Additionally, children must be informed in a child-friendly and age-appropriate way within the presence of an adult family member (when present), representative or trained professional (Recitals 33, 38, and Article 11 (3)).

In preliminary health and vulnerabilities check, minors must be provided support “in a child-friendly and age-appropriate manner by personnel trained and qualified to deal with minors, and in cooperation with national child protection authorities” (Article 12 (4)).

Drawing from this brief analysis of the Screening Regulation’s provisions, particularly focused on children, its primary strengths and shortcomings will be subsequently outlined. It is important to note that the Screening Regulation is unprecedented; therefore, the analysis will focus solely on its provisions.

One positive aspect of the Screening Regulation is the implementation of an independent monitoring mechanism in every Member State to monitor compliance with human rights and international and EU law (Recital 27 and Articles (1), *in fine*, and 10). The FRA, in line with Article 10 (2), elaborated a practical guide to collaborate with Member States “in setting up or designating national independent mechanisms to monitor compliance with fundamental rights” (FRA, 2024, p. 1). According to the FRA, an independent monitoring mechanism is “a key fundamental rights protection tool” since it “reduces the risk of fundamental rights violation (...) improves transparency and accountability” (*Ibidem*). Notably, the mechanism will monitor the respect for human rights guarantees, including children’s rights and the BIC (*Idem*, pp. 4 and 7). Therefore, this mechanism can be a turning point in the reality of the EU concerning the protection of children’s rights. It will strengthen the assessment and respect for the BIC, as well as contribute to child-friendly screening and asylum border procedures.

On the other hand, the Screening Regulation aims to do the screening within a maximum of 7 days for screening at the external border and 3 days within the territory (Article 8 (3) and (4), respectively). It is necessary to question the viability of these short periods. Indeed, European experience has demonstrated, for instance, in Greece that “it is not realistic to meet such short deadlines” (Jakulevičienė, 2020). Brief periods could potentially be unachievable in practice; in fact, is it sufficient to establish a maximum period of 7- or 3-day for the authorities to effectively guarantee all the necessary children’s safeguards present in the Regulation? The risk of these highly ambitious periods is that, in order to meet them, the quality of the child-friendly screening, children’s

safeguards, the adequate assessment of the BIC and age-appropriate transmission of information might be compromised. Furthermore, it is particularly worrying to read this concern in conjunction with Article 13 (5). The latter states that a representative or person mentioned in paragraph 3 is in charge “under normal circumstances” of a maximum of 30 unaccompanied children. As mentioned, one professional appointed to assist unaccompanied minors during the screening for such a short period raises concerns about adequate assistance and alignment with the BIC. This problem increases with the maximum number of 30 minors by a representative. This concern is also shared by PICUM in its analysis of October 2024, where it was underscored that this number of children is “much higher than the current maxima in certain member states. For instance, Finland allows just ten children per guardian (...) Italy and Slovenia allow just three children per guardian” (PICUM, 2024, p. 12). Notably, while the number of unaccompanied minors assigned to a representative can be lower than the maximum, the provision grants Member States the flexibility to assign 30 or another high number (below 30) of unaccompanied minors to a representative. If this happens in practice, one might ask if these professionals can adequately protect and assist such a high number of children while effectively ensuring their best interests throughout the screening. However, the true impact of this provision and whether the mentioned pitfalls will take place can only be determined once Member States begin implementing the legal instrument.

Moreover, Article 13 (2) and (3) raises an important safeguard, requiring both accompanied and unaccompanied minors to be accompanied by an adult (adult family member and representative or trained professional, respectively).

Another negative feature of the Screening Regulation is the restriction of movement, as migrants must remain in the appropriate locations until the end of the screening. In this context, detention is possible, which also applies to children (Recital 11). To properly understand the problem at stake, “deprivation of liberty” and “immigration detention” will be defined. On the one hand, “deprivation of liberty” refers to “any form of detention or imprisonment or the placement of a person in a public or private custodial setting, which that person is not permitted to leave at will” (Sironi *et al.*, 2019, p. 46). On the other hand, “immigration detention” is defined as “The deprivation of liberty for migration-related purposes” (*Idem*, p.47) and as a measure “ordered (...) for

reasons such as to establish identity, pending the processing of an immigration or asylum claim or for the purpose of enforcing an expulsion order” (*Idem*, p.48).

Concerning child detention, the Inter-American Court of Human Rights (IACrHR), in its Advisory Opinion OC-21/14: “Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection”, provided a valuable interpretation of Article 37 (b), UNCRC. Indeed, the IACrHR clarified that children cannot be detained on migration grounds and that the principle of last resource applies to child detention under reasons unrelated to the child being a migrant (IACrHR, 2014, para.150). In this context, the CRC Committee and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (UNCMW) also share this understanding by outlining that “States should expeditiously and completely cease the detention of children on the basis of their immigration status” (UNCMW & UNCRC, 2017, para. 5).

The Screening Regulation contradicts the aforementioned position, reflecting regressive measures by allowing and justifying immigration *de facto* detention<sup>13</sup> and detention on immigration grounds, which is deeply problematic. These measures are not aligned with the BIC and international standards, as children are being perceived primarily as migrants and not children (Duić & Čepo, 2021, p. 129). Moreover, detention, regardless of its duration, always contravenes the BIC principle. Indeed, “even short periods of detention have a long-lasting impact on children’s physical and mental health and their development”(PICUM, 2021, p. 8). Additionally, UNICEF’s position on the New Pact’s provisions concerning detention and restriction of liberty highlights that Member States “must not impose movement restrictions which amount to child immigration detention, whether during screening, border, asylum or return procedures. Immigration detention of children (...) is never in their best interests, is a violation of their rights” (UNICEF, 2023). Indeed, the “principle of the best interests of the child

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<sup>13</sup> *De facto* detention refers to a situation that, while not officially classified as detention, effectively restricts an individual's freedom of movement in the context of immigration. Moreover, the ECtHR has underscored that migrants are deprived of their liberty when placed in the so-called “reception” and “accommodation” centres. See UN High Commissioner for Refugees (UNHCR), *Unlocking rights: towards ending immigration detention for asylum-seekers and refugees*, September 2024, p.4; *Children’s rights in the 2024 Migration and Asylum Pact «Analysis of the Screening Regulation, the Asylum Procedures Regulation, the Return Border Procedure Regulation and Eurodac»*, PICUM Analysis, New Migration Pact Series, p. 32. European Council on Refugees and Exiles, *ECRE Comments on the Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 Laying Down Standards for the Reception of Applicants for International Protection (Recast)*, September 2024, p.9.

militates strongly against any resort to detention for children, whatever the context” (ECRE, 2024a, p. 13).

Since detention is not a viable solution, alternatives must be developed and implemented. In this context, the United Nations Task Force on Children Deprived of Liberty (UN Task Force) (UN Task Force, 2024, p. 11) and the CRC Committee (CRC Committee, 2012, para. 79) have argued that States must invest in and work on alternative measures to detention, which aligns with Objective 13 of the Global Compact for Migration (United Nations General Assembly, 2018, para. 29).

In conclusion, *de facto* detention and detention of children connected with immigration grounds should not be a possibility under EU migration and asylum policies.

### **3.3. Asylum Procedure Legal Instruments**

**Directive 2013/32/EU** (Asylum Procedures Directive) and **Regulation (EU) 2024/1348** (Asylum Procedures Regulation) have the same personal scope as they apply to all international protection applications submitted within the territory of EU Member States, “including at the border, in the territorial waters, or in the transit zones”, and addresses the withdrawal of asylum applications (Articles 3 and 2(1), respectively).

The Asylum Procedures Directive requires applicants to be informed about the procedure, their rights, obligations, and the decision in a “language they understand or are reasonably supposed to understand”, as well as receive interpretation services when necessary (Article 12 (1)). Moreover, applicants have the opportunity to have a personal interview before their application is considered (Articles 14 to 17). Conversely, the Asylum Procedures Regulation requires applicants to be informed “in a language they understand or can reasonably be expected to understand” about the right to file an application, relevant procedures and deadlines, rights and duties, consequences of non-compliance and the possibility of withdrawal (Article 8). Regarding personal interviews, the Regulation sets out admissibility and substantive interviews (Articles 11 and 12, respectively). Under justified grounds, applicants might have a remote interview (Recital 15 and Article 13 (10)).

Both legal instruments require the BIC to be a primary consideration in their implementation (Recital 33 and Article 25 (6) of the Directive, and (Recital 23 and 67, Articles 22 (1) of the Regulation).

Furthermore, they also establish the possibility of application submission by the minor or on the minor's behalf (Article 7 of the Directive and Articles 32 and 33 of the Regulation).

Under the Asylum Procedures Directive, Member States could establish, through national law, the minors' opportunity for a personal interview (Article 14 (1), fourth subparagraph). These interviews should be conducted "in a child-appropriate manner" (Article 15 (3) (e)). When the interviewee is an unaccompanied minor, the interviewer must have the "necessary knowledge of the special needs of minors" (Article 25 (3) (a)). Furthermore, the representative should inform and prepare the child for the interview. Additionally, the representative or other person permitted under domestic law must be present during the session, ask questions and make comments (Article 25 (1) (b)). On the other hand, the Asylum Procedures Regulation requires minors to have a personal interview (Articles 11, 12 and 22 (3)) unless it is not in their best interest (Recital 23 and Article 22 (3)). The interview must consider the child's age and best interest (Recitals 13 and 15). Moreover, the interviewer must have the "necessary knowledge of the rights and special needs of minors", conduct the interview in a "child-sensitive and context-appropriate manner", and be competent to consider the child's age, vulnerability and special procedural needs (Article 22 (3), second subparagraph and Article 13 (7) (a)). The possibility of a remote interview for children must be assessed on a case-by-case, as it "may not be suitable for all asylum applicants due to their young age" (Recital 15). Regarding accompanied minors' interviews, it is required the presence of a responsible adult or, when provided and according to the BIC, a legal adviser or a person with the necessary skills and expertise must be present (Article 22 (4)). Conversely, if not in the BIC, the responsible adult might be absent during the interview; however, the presence of a qualified person is required to protect the BIC. When an unaccompanied minor is interviewed, the representative and legal adviser may ask questions and make comments to the interviewer (Article 23 (8), first subparagraph).

Both legal instruments establish specific guarantees for unaccompanied minors (Articles 25 and 23 of Asylum Procedures Directive and Regulation, respectively). Under the Asylum Procedures Directive, a representative with the necessary expertise to act in the BIC must be appointed “as soon as possible”. It also outlines guarantees during interviews (mentioned *supra*). Moreover, unaccompanied minors and their representatives have the right to free legal and procedural information. In contrast, under the Asylum Procedures Regulation, until a representative is appointed, a person must be designated to provide the minor’s assistance (Recital 35). The latter is a “person with the necessary skills and expertise to (...) safeguard his or her best interests and general well-being” (Article 23(2)(a)). The tasks of the representative and person provisionally acting as one are listed in this Article. Furthermore, their tasks must be supervised and, when necessary, executed alongside a legal adviser (paragraphs 6, 8 and 10). Moreover, the representative must have the “necessary qualification, training and expertise” and develop the tasks according to the BIC. Additionally, the representative or the person provisionally acting as one will be in charge of a maximum of 30 and 50 unaccompanied minors under normal and exceptional circumstances, respectively (paragraph 10).

In case of uncertainty about a minor’s age, the Asylum Procedures Directive requires the child to be submitted to medical examinations. These examinations must respect the child’s dignity, be minimally invasive and conducted by qualified professionals (Article 25 (5) (a)). If, after the examination, doubt remains, the applicant is assumed to be a minor – the principle of the benefit of the doubt (Article 25 (5), first subparagraph). In contrast, under the Asylum Procedures Regulation, two steps must be followed by Member States (Article 25 (1) and (2) and Recitals 36 and 37). The first step is a multi-disciplinary assessment “carried out by qualified professionals”. This assessment includes “psycho-medical assessment” and other non-medical methods, such as “interview, virtual assessment based on physical appearance or assessment of documentation” (Recital 37). If doubts remain, Member States must proceed to the second step: medical examination. These examinations must be as non-invasive as possible, respect the child’s dignity, and be conducted by “professionals with experience and expertise in age estimation” (Article 25 (2) and (3), and Recital 37). If the age results “remain inconclusive” after the two steps, then the applicant is assumed to be a minor (principle of the benefit of the doubt).

Concerning accelerated and border procedures, according to the Asylum Procedures Directive, unaccompanied minors may be submitted to these procedures under certain circumstances (Article 25(6)(a) and (b), respectively). There is no specific mention of accompanied children in relation to these procedures; therefore, the general provisions apply to them (Article 31(8) and Article 43). Furthermore, Member States might prioritise the examination of unaccompanied children's applications (Article 31(7)(b), *in fine*). Conversely, under the Asylum Procedures Regulation, children may also be subjected to accelerated and border procedures. However, if they are considered in need of special procedural guarantees and if "the necessary support" cannot be provided during those procedures, they must not be applied (Article 21 (1) and (2)). In relation to accelerated procedures, Article 42 states that they are mandatory for individuals who meet the conditions listed in paragraph 1. However, unaccompanied children can only be submitted to these procedures if one of the subparagraphs of paragraph 3 is fulfilled. Regarding asylum border procedures, unaccompanied and accompanied children who meet the criteria in Article 43 (1) might not be subjected to asylum border procedures. Indeed, unaccompanied children can only be subjected to border procedures if they are considered a "danger to national security or public order" (Article 53 (1)) and accompanied minors if the Member States can meet the special reception conditions for minors and their families (Article 53 (2) (b)). Additionally, when children and their families are submitted to border procedures, their applications should be prioritised (Recital 67).

The Asylum Procedures Directive set out that the determining authority, when necessary, should seek guidance from experts on child-related issues (Article 10 (3) (d)). In relation to the Asylum Procedures Regulation, there is a possibility to request assistance from experts of the European Union Agency for Asylum (EUAA) and other competent authorities of Member States (Article 5).

In addition to the aforementioned provisions, the Asylum Procedures Regulation introduces new ones compared to the Directive. Indeed, the Regulation requires an independent monitoring mechanism to ensure compliance with fundamental rights during border procedures (Recital 71 and Article 43(4)). Furthermore, applicants can have free

counselling, legal support, and representation throughout the application process (Articles 15 to 19).

Concerning children, Recital 36 requires procedures for applying for international protection to include “specific child-sensitive procedural safeguards.”

Additionally, the right to information applies to all applicants, including children. They must be informed “in a language they understand or can reasonably be expected to understand”. In addition, Article 8(2), second subparagraph and Recital 30 emphasise that information must be provided to children in a “child-friendly manner” and “with the involvement of the representative or person referred to in Article 23(2), point (a)”.

Furthermore, children may be entitled to special procedural guarantees. Authorities must evaluate whether these guarantees are necessary based on an individual assessment (Recital 17 and Article 20), which must be completed within a maximum of 30 days (Article 20 (3) second subparagraph).

Article 22 establishes special guarantees for minors. Paragraphs 1 and 2 require competent authorities to apply the Regulation in accordance with the BIC and assess the child’s best interest. Paragraphs 3 and 4, as already mentioned, set out the opportunity and guarantees for children during a personal interview. Moreover, the decision on a child's application must be made by staff with the necessary knowledge and training of the determining authority (paragraph 5).

In addition, minors can be submitted to *de facto* detention and detention during border procedures. Indeed, Article 54 (1) states that applicants during border procedure (including children) must “reside at or in proximity to the external border or transit zones as a general rule or in other designated location”. This restriction of liberty may lead to a situation of *de facto* detention. Moreover, minors submitted to border procedures can be detained (Article 43 (2)).

Following the comparative analysis between the Asylum Procedures legal instruments, the main strengths and shortcomings introduced by the New Pact’ Asylum

Procedure Regulation concerning children's rights and best interests will be outlined *infra*.

A positive feature introduced by the New Pact's Asylum Procedure Regulation is the establishment of an independent monitoring mechanism (Article 43 (4) and Recital 71). The arguments supporting the positive characteristics of this mechanism are provided in Subchapter 3.2. and apply *mutatis mutandis* to this Regulation.

Furthermore, Article 23 provides additional safeguards for unaccompanied minors compared to the Directive, increasing them from six to ten. This expansion strengthens the protection of unaccompanied minors, particularly relating to the appointment and tasks of the representative and person provisionally acting as one, providing more information about the procedure in a child-friendly way and strengthening guarantees during personal interviews. Moreover, the supervision of the tasks of the representative and person acting as one, as well as the possibility for them to work alongside a legal adviser is an important development. Indeed, it will further enhance the protection of children's rights, while ensuring tasks are carried out in alignment with the BIC. Furthermore, the requirement to designate a person acting provisionally as a representative until one is appointed is a strong feature. In fact, it ensures that unaccompanied children are assisted by a professional who will guarantee their best interests and rights until a decision on their application is made.

In addition, Article 5 allows Member States to request assistance from experts of the EUAA and other competent authorities of Member States. This is a positive aspect, as cooperation will ensure that asylum procedures are conducted in a timely manner while respecting child-friendly processes, children's fundamental rights, and adequate respect for the BIC. This collaboration is especially important during periods of high applications, as it helps prevent the authorities of a Member State from becoming overwhelmed and ensure children's rights are not overlooked.

Regarding age assessment, the Asylum Procedures Directive mentions medical examinations when there is doubt about the child's age. Although it is not explicitly stated, medical methods must be divided into radiation-free and radiation-medical methods, the

latter as a last resort (European Asylum Support Office, 2018, p. 44). Moreover, the guarantees in the Directive regarding medical examinations are only mentioned under the guarantees for unaccompanied children. Conversely, the Asylum Procedures Regulation provides, in Recital 37 and Article 25 (1) and (2), two steps to assess the child's age: multidisciplinary assessment and, if doubts remain, medical examination. Recital 37 sets out a strong feature brought by the Regulation, by listing non-medical methods for determining a child's age, enhancing clarity and the prioritisation of less invasive examinations. However, Article 25 (6) might potentially conflict with the BIC. According to this provision, if consent to be submitted to a medical examination for age assessment is not provided, the applicant is presumed not to be a minor. This provision creates an *illusion* of decision by the individuals mentioned in paragraph 4, as they have, in theory, the power to consent or not to the medical examination. However, if consent is not provided, the applicant is no longer presumed to be a minor, leading to the loss of guarantees specifically designed for them under the Regulation. Therefore, this will potentially create an obligation to consent, as the consequences of not consenting will negatively impact the child. Accordingly, PICUM also shares this concern by stating that this provision "puts enormous pressure on the child, their family and their representative/guardian to agree with the medical examination, as the child may otherwise be excluded from the child-specific support they need" (PICUM, 2024, p. 27). In other words, this provision contradicts the principles of the BIC and *in dubio pro minore* because these examinations have the "possibility of interference with the person's dignity, physical and mental health, as well as their personal development"(ECRE, 2022, p. 2). Therefore, establishing, in practice, "mandatory" submission of children to medical examinations is not in line with the BIC.

In addition, Article 23 (10) outlines a negative feature by stating that a representative can assist up to 30 unaccompanied children and, in exceptional circumstances, a maximum of 50. As argued in Subchapter 3.2., having representatives responsible for such a high number of unaccompanied children may affect their ability to perform tasks adequately, reduce their attention to each child's situation and vulnerabilities, and compromise the protection of the child's best interests and fundamental rights. Moreover, PICUM also shares concerns about the possibility of a maximum of 50 unaccompanied children being designated to a representative in

circumstances of a disproportionate number of applications since it is “highly worrying as those are the exact times when procedures and processes are even more harried, timelines shortened, and the quality potentially not ensured” (PICUM, 2024, p. 26).

Regarding accelerated procedures, Article 25 (6) (a) of the Asylum Procedures Directive sets out three circumstances under which unaccompanied children may be submitted to such procedures, while Article 42 (3) of the Asylum Procedures Regulation outlines five. This expansion is concerning, as accelerated procedures may fail to fully uphold the BIC, given that adequate time is essential for an effective and thorough analysis of the child’s situation, vulnerabilities and adoption of child-friendly procedure. Furthermore, both legal instruments distinguish between accompanied and unaccompanied children in these procedures. The specific circumstances under which accelerated procedures may apply to unaccompanied minors are outlined in Article 25 (6) (a) of the Directive and Article 42 (3) of the Regulation. However, there is no explicit mention of accompanied children; thus, they are subject to the rules applicable to adults (Article 31 (8) of the Directive and Article 42 (1) of the Regulation). Notably, Article 42 (1) of the Regulation uses the term “shall”, making these procedures mandatory for accompanied minors under the circumstances outlined in the provision. In this context, the Regulation lists more circumstances, compared to the Directive, for submitting accompanied children to accelerated procedures. While it is positive that the Regulation provides stronger safeguards for unaccompanied minors under these procedures, it fails to offer specific safeguards to accompanied minors, subjecting them to the same conditions as adults. Accordingly, PICUM states that, under Article 42, accompanied children are “Treated the same as adults” (*Idem*, p.20), which, without specific guarantees, does not serve the BIC of these children.

Regarding border procedures for unaccompanied minors, the Directive establishes six specific circumstances under which they can be submitted to these procedures (Article 25 (6) (b)). Conversely, the Regulation reduced the circumstances to one: if the minor is considered to be a danger to security or public order (Article 53(1)). Concerning accompanied minors, there is no specific indication for them under the Directive; therefore, the provisions applicable to adults also apply to these children (Articles 43(1) and 31 (8), which outline ten circumstances under which they may be subjected to border procedures). In contrast, Article 53 (2) (b) of the Regulation stipulates that accompanied

minors may only be subjected to border procedures if the Member States can meet the special reception conditions for them and their families. These changes represent a positive development brought by the New Pact, as both unaccompanied and accompanied children have fewer possibilities in which they may be submitted to border procedures.

Furthermore, Article 23 (2) (b) of the Regulation establishes that the appointment of a representative must be done “no later than 15 working days” from the moment the application was submitted. Conversely, the Directive solely mentioned “as soon as possible” (Article 25 (1) (a)). This expression does not provide clarity of a time limit to appoint a representative; consequently, in practice, Member States meet different timelines (European Migration Network, 2015, p. 19) It is beneficial for the child if Member States are guided by specific deadlines to appoint a representative, as it ensures timely and consistent access to this guarantee and protection for all children across all Member States.

In relation to personal interviews, the Directive provided too much discretion for Member States, as minors’ opportunity to have an interview was established under national laws (Article 14 (1), fourth subparagraph). This discretion is negative because only providing children the opportunity to do a personal interview under the conditions outlined under national law limits the right of the child to be heard (Article 12 of the UNCRC). On the other hand, the Regulation determines that minors should always have the opportunity of an interview unless it is against their best interest (Article 22 (3)). This is an important evolution because personal interviews are an important guarantee in relation to the decision on their application. Indeed, the possibility for children to have personal interviews is aligned with the child’s right to be heard (Article 12 of the UNCRC). Therefore, providing the opportunity for the child to be heard before the decision on the application is made will enhance the alignment of that decision with the BIC. Indeed, the right to be heard and the BIC are “interdependent” and “complementary” (CRC Committee, 2009, paras. 58 and 74). Additionally, Article 3(1) of the UNCRC “cannot be correctly applied if the requirements of article 12 are not met” (CRC Committee, 2013, para. 43). Moreover, the Regulation ensures more safeguards for children during these interviews, as mentioned above.

Lastly, regarding *de facto* detention and detention of children connected with immigration grounds, the critics made in Subchapter 3.2. apply *mutatis mutandis* to these legal instruments.

### **3.4. Return Procedures Legal Instruments**

The New Pact introduces **Regulation (EU) 2024/1349** (Return Border Procedure Regulation), which establishes a return border procedure. It is important to note that **Directive 2008/115/EC** (Return Directive) still applies when an application for international protection is rejected under asylum procedures (Article 37 Asylum Procedure Regulation).

The **Return Directive** is in line with the fundamental rights and principles of the Charter (Recital 24). The Directive applies to third-country nationals “illegally staying” on a Member States territory (Articles 1 and 2 (1) and (3)). In relation to them, a return decision is issued (Article 6), imposing an obligation to return to their country of origin, or a country of transit or another third country (Article 3 (3)). Following a return decision, third-country nationals either voluntarily comply with the decision (Article 7) or are forced to comply (Article 3 (5) and Article 8). The period for the voluntary departure is “between seven and thirty days”, and there is a possibility of extension (Article 7 (1) (2) and Recital 10). However, Member States may grant a voluntary departure period of less than 7 days or choose not to provide one at all (paragraph 4). If the period of voluntary departure was not respected or not provided, applicants are forced to comply, and Member States must “take all necessary measures to enforce the return decision” (Article 8 (1)). As a last resort, “coercive measures” can be used in a proportionate way and not exceed “reasonable force” (paragraph 4 and Recital 13).

Furthermore, the Directive establishes that return, removal and entry-ban decisions must be provided in “writing and give reasons in fact and in law as well as information about available legal remedies” (Article 12 (1)). When requested, Member States must provide “written or oral translation of the main elements of decisions related to return” (paragraph 2). Moreover, Member States must provide general information

explaining “the main elements of the standard form in at least five of those languages which are more frequently used or understood by illegal migrants” (paragraph 3 (3)).

In relation to the general provision for detention, detention can only be applicable when there is no other sufficient and less coercive alternative and when there is a risk of escaping or when the migrant “avoids or hampers the preparation of return or the removal process” (Recitals 16 and 17, and Article 15 (1), (a) and (b)). The period of detention must be as short as possible and maintained until the removal is ensured (Article 15 (1), second subparagraph). The maximum duration of detention cannot exceed 18 months (Article 15 (5) and (6)).

Concerning children, Member States must not discriminate based on an applicant’s age (Recital 21), take the BIC as a primary consideration (Recital 22 Article 5 (a)) and respect for family life (Recital 22).

Concerning unaccompanied minors, before a decision on their return is made, appropriate bodies must assist them with full regard to the BIC (Article 10 (1)). Moreover, it must be guaranteed that the minor, when removed, will return to a family member, a guardian or an adequate reception facility (Article 10 (2)).

During the voluntary departure period and when the removal is postponed, Member States are required to provide children with the opportunity of “family unit”, “emergency health care”, “access to the basic education system”, and consideration of “special needs” (Article 14 (1)).

Regarding detention, unaccompanied and accompanied minors with their families must only be detained “as a measure of last resort and for the shortest period of time” (Article 17 (1)). Their detention must always have their best interest as a primary consideration (paragraph 5). Minors under detention must have the possibility to “engage in leisure activities (...) appropriate to their age” and, depending on the period of detention, “access to education” (paragraph 3). Accompanied minors and their families must be placed in a “separate accommodation” (paragraph 2). Conversely, unaccompanied minors must, if

possible, be accommodated in “institutions provided with personnel and facilities which take into account the needs of persons of their age” (paragraph 4).

The **Return Border Procedure Regulation** “establishes a return border procedure”, which should be carried out “for a period not exceeding 12 weeks” (Recital 7). The Regulation applies to migrants whose application for international protection was rejected in the context of the asylum border procedure. Moreover, it provides “temporary specific rules on the return border procedure in situations of crisis” (Article 1).

According to the Regulation, migrants whose application for international protection has been rejected during the asylum border procedure must not enter the territory of the concerned Member State (Article 4 (1)). They are required to remain, during a period not superior to 12 weeks, in “locations at or in proximity to the external border or transit zones” and, when not possible, in “other locations within the territory” (paragraph 2). This period can be extended for an additional period of a maximum of 6 weeks in situation of crisis (Article 6 (1) (a)).

In relation to detention, the Regulation reflects the provision under the Directive. However, it adds that third-country nationals whose application was rejected and detained under the asylum border procedure might continue to be detained throughout the preparation of their removal process (Article 5(2)). On the other hand, individuals who were not detained under the asylum border procedure may be detained under the return border procedure on certain grounds (Article 5(3)).

The Regulation sets out in Article 4 (5) that a period for voluntary departure will only be provided “upon request”, and it will have a maximum duration of 15 days. Even upon request, Member States might not grant the opportunity of voluntary departure under the situations listed in the provision.

Concerning children, the Return Directive provisions regarding children are going to be applied during the return border procedures, as stated in Recital 9 (“certain provisions of Directive 2008/115/EC should apply, as they regulate elements of the return border procedure that are not set in this Regulation, in particular those on (...) the best

interests of the child, family life (...) return and removal of unaccompanied minors (...) the detention of minors and families”). The Regulation mentions that the BIC “should be a primary consideration when applying the provisions of this Regulation that possibly affect minors” (Recital 5), and that Member States are bound by the international treaties they have ratified (namely, the UNCRC) (Recital 4).

Following the comparative assessment of both legal instruments, a critical analysis concerning the strengths and shortcomings of children’s rights and the BIC will be further outlined.

The Return Border Procedure Regulation failed to provide broader protection to children during these procedures. As mentioned above, the Return Directive provisions concerning children will apply to return border procedures; however, there are not many. Although the Regulation did not strengthen the protection of children, additional safeguards should still be considered. For instance, Article 12(2) of the Directive sets out the possibility of limiting the right of information allowed by national law under certain grounds. This excessive restriction contradicts their human dignity and adequate protection (Recital 11). Moreover, there is no specific mention of the possibility of transmitting information in a child-friendly way. The Regulation had an opportunity to add this safeguard, as children need to be informed in a child-friendly and sensitive way and, if necessary, accompanied by an adult responsible or trained professional to ensure respect for the BIC; however, it failed to do so. Another problematic feature is that the translation is only provided “upon request” – this only makes sense if all the migrants are informed about this possibility (however, there is no mention about this).

Furthermore, the Directive provides the possibility for Member States to resort to coercive measures to enforce a return decision. In this regard, there is no mention that children are exempt from the coercive measures. The position regarding the use of coercion measures on children is mentioned in subparagraph 3.1. also apply to these legal instruments.

Additionally, the Regulation specifies the accommodation for applicants waiting for their return decision (Article 4 (2)). This is a good feature compared to the Directive

since this legal instrument only mentions the obligation to “stay at a certain place” (Article 70) without specifying the location. With Article 4 (2), the Regulation strengthens its compliance with the BIC, as the conditions of these accommodations must meet the child-specific standards laid down in the Reception Conditions Directive. However, this can be problematic since the third-country nationals must remain in the designated locations, which might lead to *de facto* detention. The critics about *de facto* detention and detention of children connected with immigration grounds outlined in Subchapter 3.2. apply *mutatis mutandis* to these legal instruments.

Regarding voluntary departure, the Directive specifies that it is preferable to forced departure (Recital 10). Moreover, there is no need to request it, and individuals have between 7 and 30 days for this, with the possibility of an extension. On the other hand, the Regulation outlines that voluntary departure requires a request and that it can be denied under certain circumstances, or the period to do so reduced to a maximum of 15 days. The shortening of the voluntary departure period may cause practical issues. Indeed, under the Directive, which provides a more favourable period for voluntary departure (between 7 and 30 days), it has been recognised that “close to half of the Member States (...) pointed out that the period for voluntary departure is often too short in practice” (European Migration Network, 2017, p. 73).

#### **4. Entry Stage: Current regime and the New Pact**

##### **4.1. Dublin III and Asylum and Migration Management Regulations**

The **Dublin III Regulation** and the **Asylum and Migration Management Regulation** (AMMR) set out “criteria and mechanisms for determining the Member State responsible for examining an application for international protection (Article 1 of the Dublin III Regulation and Article 1(c) of the AMMR). In addition to this, the AMMR expanded its subject matter by adding two additional purposes (Article 1(a) and (b)).

Both Regulations emphasise that the BIC must be a primary consideration for Member States when applying these legal instruments.

The definition of “family members” was extended by the AMMR. Under Article 2(g) of the Dublin III Regulation, family members included those listed in the subparagraph, provided that the “family already existed in the country of origin.” In contrast, Article 2(8) of the AMMR replaced the term “country of origin” with “family already existed before the applicant or the family member arrived on the territory.”

Concerning information, the Dublin III Regulation requires information to be provided “in writing in a language that the applicant understands or is reasonably supposed to understand” and, when necessary, orally in connection with the personal interview (Article 4(2)). Member States must use “the common leaflet” containing “at least” the information listed in Article 4(1) and use a “specific leaflet for unaccompanied minors”. (Article 4(3)). This information must be provided as soon as the application is lodged (Article 4(1)). In contrast, while the AMMR retains some of the guarantees regarding information provided in the Dublin III Regulation, it introduces new features. Information must be provided “as soon as possible” and until the application is registered (Article 19(1)). The scope of the information was expanded (Article 19(1)), and it includes specific information to be provided to unaccompanied minors: information about their rights, guarantees, role and responsibilities of the representative and how to lodge a complaint against the representative (Article 19(r)). Additionally, applicants can “request information regarding the progress of the procedure”, and if the applicant is a minor, the minor, parent or representative can request that information (Article 19(2)). Furthermore, information must be provided “in a concise, transparent, intelligible and easily accessible form, using clear and plain language and in a language that the applicant understands or is reasonably supposed to understand” (Article 20(1), first subparagraph). When information is provided orally, “multimedia equipment” may be used (Article 20(1), second subparagraph). The “common information material” will be developed by the EUAA in cooperation with Member States and will include information for vulnerable applicants (Article 20(2)). Additionally, information for minors must be presented in a “child-friendly manner by appropriately trained staff and in the presence of the applicant’s representative” (Article 21(3)).

Concerning personal interviews, the Dublin III Regulation requires a personal interview to facilitate the determination of the responsible Member State (Article 5(1)). However, the interview may be omitted under certain circumstances (Article 5(2)). The interview must be done in a “timely manner and, in any event, before any decision is taken to transfer the applicant to the Member State responsible” (Article 5(3)). Additionally, it must be conducted in a language the applicant “understands or is reasonably supposed to understand and in which (...) is able to communicate”. When necessary, an interpreter can be deployed to ensure “appropriate communication” between the applicant and the interviewer (Article 5(4)). Furthermore, the personal interview must respect confidentiality and a written summary must be developed and made accessible to the applicant, the legal advisor or another person representing the applicant (Article 5(5) and (6)). Conversely, the AMMR retains some guarantees under the Dublin III Regulation while introducing additional improvements. The personal interview must be conducted in “a timely manner” and before a “charge request” is made (Article 22(3)). Furthermore, it adds another circumstance for the interview to be omitted (Article 22(2)). The interview may be conducted in the applicant’s preferred language “unless there is another language which he or she understands and (...) is able to communicate clearly” (Article 22(4)). Concerning family reunification, when there are indications that the applicant has family members or relatives in a Member State, the applicant must receive a template to fill with information to “facilitate the application of Article 39” on take charge requests (Article 22(1), third and fourth subparagraphs). The AMMR also introduces specific safeguards for minors and applicants in need of special procedural guarantees. For unaccompanied minors and, where applicable, accompanied minors, interviews must be conducted by an individual with the “necessary knowledge of the rights and special needs of minors, in a child-sensitive and context-appropriate manner, taking into consideration the age and maturity of the minor, in the presence of the representative and, where applicable the minor’s legal adviser” (Article 22(4)). On the other hand, applicants requiring special procedural guarantees, which may include minors (Regulation 2024/1348) must have the “adequate support” (Article 22(6)). Moreover, the personal interview, under certain and justified circumstances, may be conducted by “video conference” (Article 22(5)).

The AMMR introduced the right to free legal counselling for all applicants (Article 21(2)). This legal counselling must include guidance on the “criteria and

procedures” for determining the responsible Member State, the applicant’s rights and obligations during the procedure, assistance in providing information for the determination, and help in filling out the template under Article 22 (Article 21(6)).

In relation to specific guarantees for minors, the Dublin III Regulation requires the BIC to be a primary consideration regarding all procedures under the Regulation (Article 6(1)). Moreover, it also requires the appointment of a representative to represent and assist the unaccompanied minor throughout the procedures under the Regulation. To that end, the representative is required to have “qualifications and expertise” to ensure the BIC is considered throughout the procedures, as well as “access to the content of the relevant documents” in the minor’s file, including the “leaflet for unaccompanied minors” (Article 6(2)). The Regulation also outlines the factors to be considered when assessing the BIC (Article 6(3)). In addition, for the purpose of determining the responsible Member State, it ensures the tracing of the unaccompanied minor’s family within the Member States (Article 6(4) and (5)). On the other hand, the AMMR maintains the guarantees outlined in the Dublin III Regulation while also introducing additional ones. The AMMR emphasises that procedures including minors must be “treated with priority” (Article 23(1)). Furthermore, it expands the requirements for the representative, as he or she must have “resources, qualifications, training, expertise and independence” to guarantee the BIC is considered. The representative is also required to inform the unaccompanied minor of the “progress of the procedures under this Regulation” (Article 23(2)). Additionally, the AMMR introduced a time limit to appoint a representative: within a maximum of “fifteen working days” from the moment the application is made (Article 23(2)(b)). This period can be extended “by ten working days” in cases of a disproportionate number of applications by unaccompanied minors (Article 23(2)(b), second subparagraph). Furthermore, competent authorities are required to designate “as soon as possible” a person detaining the “necessary skills and expertise” to safeguard the child’s BIC and well-being until a representative is appointed (Article 23(2)(a)). The representative must be involved during the entire procedure for the determination of the responsible Member State (Article 23(3)). Under the AMMR, the factors to consider the BIC were expanded from 4 to 6 (Article 23(4)). Additionally, to ensure the implementation of the guarantees for unaccompanied minors outlined in Articles 16 and 27 of the Reception Conditions Directive and Article 23 of the Asylum Procedures Regulation, the transferring Member

State must inform, prior to the transfer, the responsible one or the Member States of relocation (Article 23(5)).

In relation to the criteria for determining the Member State responsible<sup>14</sup>, the Dublin III Regulation sets out 8 criteria, while the AMMR specifies 9. These criteria must “be applied in the order in which they are set out” (Articles 7(1) and 24(1), of the Dublin III Regulation and AMMR, respectively). Under the Dublin III Regulation, responsibility must be determined based on the situation when the application was lodged (Article 7(2)), whereas under the AMMR, it is based on the situation when the application was registered (Article 24(2)).

The first criterion under the Dublin III Regulation addresses “Minors”. According to Article 8, the Member State responsible for an unaccompanied minor’s application is the one where: (i) a family member or sibling is legally present (Article 8(1)); or (ii) a relative is legally present and can after an “individual examination (...) take care” of the unaccompanied minor (Article 8(2)); or (iii) family members, siblings, or relatives are legally present in more than one Member State, the responsible one must be decided in line with the BIC (Article 8(3)); or (iv) in the absence of any family member, sibling, or relative, the responsible Member State is the one where the unaccompanied minor lodges the application (Article 8(4)). It is important to note that these four criteria apply only if they reflect the BIC. Conversely, the first criterion under AMMR (“Unaccompanied minors”) mostly reflect the criteria established under the Dublin III Regulation. The order of the criteria is the same, and it also prioritises the BIC. However, if no family member, sibling or relative is legally present in a Member State, the responsible one is where the unaccompanied minor “was first registered” (instead of lodged) (Article 25(5)).

The second criterion is expanded under the AMMR compared to the Dublin III Regulation. Under the Dublin III Regulation, the responsible Member State is the one where a family member resides as a beneficiary of international protection (Article 9). In contrast, the AMMR adds that the responsible Member State is the one where a family member is residing as a beneficiary of international protection or based on a “long-term residence permit” under Directive 2003/109/EC or national law (Article 26(1)).

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<sup>14</sup> For the purpose of this thesis, the analysis will only include the criteria developed for unaccompanied minors and regarding family members.

On the other hand, the third and fourth criteria remain the same under the Dublin III Regulation and the AMMR. However, the AMMR differentiates itself by expanding the definition of “family members” (Article 2(j)) and allowing circumstantial evidence to demonstrate family links, provided they are “coherent, verifiable and sufficiently detailed” (Recital 54).

Under both legal instruments, detention can be used for transfer purposes to both adults and children. It can be applied to prevent absconding, but only when “other less coercive alternative measures cannot be applied effectively”, in line with the principle of proportionality and based on an individual assessment (Article 28(2) of the Dublin III Regulation and Article 44(2) of the AMMR). In contrast, the AMMR adds that detention can also be employed under grounds of “protection of national security or public order” (Article 44(2)). Furthermore, detention must comply with the guarantees and conditions outlined under Articles 11, 12 and 13 of the Receptions Conditions Regulation (Article 44(4)).

Following the comparison between the Dublin III Regulation and the AMMR, it will be further developed a critical analysis of the strengths and shortcomings brought by the AMMR.

On the one hand, the definition of “family members” was expanded under the AMMR. Indeed, the legal instrument replaced the reference to the “country of origin” with “family already existed before the applicant arrived on the territory”. This change allows applicants to include family members formed after leaving their country of origin, namely, “during flight or in the host country” (ECRE, 2013, p. 4). This benefits children, as the expansion permits the inclusion of minors who were not part of the applicant’s family in the country of origin.

Concerning information, AMMR requires information to be provided in a child-friendly manner by adequately trained professionals and in the presence of the representative (the Dublin II Regulation did not mention child-appropriate transmission of information). Moreover, both legal instruments outline the information that must be transmitted to applicants. While these lists are non-exhaustive, allowing Member States

to include additional information, the AMMR makes a significant addition by including specific information for unaccompanied minors. This is important because it requires Member States to provide information concerning unaccompanied minors (there is no discretion on this matter).

Regarding personal interviews, AMMR introduces specific guarantees for unaccompanied and accompanied minors, as well as for applicants in need of special procedural guarantees (which may include minors). This is a positive development, as requires interviews to be conducted in a child-comprehensive manner and with age-appropriate questions that consider the child's specific situation and needs. By introducing these guarantees, the AMMR creates the appropriate conditions for the children to express their views (CRC Committee, 2009, para.34), which is in line with both the right to be heard (Article 12 of the UNCRC) and the BIC. As mentioned under Subparagraph 3.3., the right to be heard is essential for the alignment with the BIC. Furthermore, Article 22 of the AMMR permits interviews via video conference, under certain circumstances, including for children. However, the Asylum Procedures Regulation emphasises that children must be submitted to individual assessments before being interviewed via video conference as they “may not be suitable for all asylum applicants due to their young age” (Recital 15 of the Asylum Procedures Regulation). Therefore, it would be beneficial for the AMMR to include this safeguard, as minors require additional guarantees that may not be fully addressed via video interview. In addition, the Asylum Procedures Regulation, also states that an interview must not take place if it is against the BIC (Article 22(3)). This requirement should also be included in the AMMR, ensuring that when the interview is not aligned with the BIC, the minor is not subjected to it.

Furthermore, the introduction of free legal counselling is an important feature, which was not provided under the Dublin III Regulation. The legal counselling applies to all applicants, including children, and ensures that applicants fully understand the procedures, their rights and obligations.

Additionally, the AMMR introduced numerous positive features concerning specific guarantees for minors. It introduced a time limit to appoint a representative, which is a notable improvement, as the Dublin III Regulation was silent on this matter.

Furthermore, the expansion of the representatives' requirements are important for strengthening the representative's role and child-friendly capacity in guaranteeing respect for the BIC. Furthermore, the AMMR expanded the list of factors for assessing the BIC. Subparagraph (f) is particularly important as it allows consideration of "any other reasons relevant to the assessment of the BIC". This subparagraph underscores the non-exhaustive character of the list, encouraging Member States to resort to additional relevant factors when assessing of the BIC, which is aligned with the CRC Committee General Comment No. 14. Moreover, the appointment of a person provisionally acting as a representative until one is appointed is another positive feature, ensuring the unaccompanied minor is represented and assisted throughout the entire process. Additionally, the obligation for the transferring Member State to notify the responsible or relocation Member State prior to the transfer of an unaccompanied minor is a beneficial inclusion. This notification ensures that the receiving Member State and competent authorities are prepared to implement the specific guarantees for these minors outlined in Articles 16 and 27 of the Reception Conditions Directive and Article 23 of the Asylum Procedures Regulation. The promptly implementation of these measures is vital for upholding the BIC and addressing their specific needs and rights.

Regarding the criterion related to family members for determining the responsible Member State, the AMMR, as mentioned, expanded the definition of "family members" and established that circumstantial evidence is sufficient to demonstrate family links if it is "coherent, verifiable, and sufficiently detailed". This marks a significant improvement regarding the right to family unity.

In relation to the detention of minors connected with immigration grounds, the critics and position presented in Subchapter 3.2. apply *mutatis mutandis* to these legal instruments.

#### **4.2. Crisis and *Force Majeure* Regulation**

**Regulation (EU) 2024/1359 (Crisis Regulation)** addresses situations of crisis involving mass arrival and instrumentalization, and *force majeure* (Article 1 (4) and (5)). To respond to these exceptional situations, temporary measures will be adopted to

improve solidarity and allow temporary derogation of the AMMR and Asylum Procedures Regulation (Article 1(1)). However, no derogations apply to the Reception Conditions Directive (Recital 9), the Screening, Eurodac and Qualification Regulations and the Anti-Trafficking Directive (Recital 10).

The initial duration of the derogations and solidarity measures must be 3 months, with the possibility of additional extensions for 3 months periods (Article 5(1) and (2)). However, the total duration cannot exceed 12 months (Article 5(3)).

Regarding solidarity measures, a Member State facing a crisis situation may request relocations, financial contributions and alternative solidarity measures (Recital 23 and Article 8(1)).

During situations of crisis and *forced majeure*, the period for registering applications is expanded to a maximum of 4 weeks (Article 10(1)). Under these circumstances, Member States must prioritise the applications of minors, their family members, and persons with special reception needs (Article 10(2)). This derogation applies only during the initial time period of the derogations in case mass arrival (Article 10(4)). This means, according to Article 10(4), *a contrarium*, that in situations of instrumentalisation and *force majeure*, the derogation applies both the initial period and subsequent extensions.

Regarding border procedures, during situations of crisis and *forced majeure*, their duration is extended from a maximum of 12 weeks to 18 weeks (only applicable to applicants who made an application during the period of derogation). Additionally, depending on the exceptional circumstance, Member States may have discretion to exempted certain applicants from border procedures or may be obliged to require them to be submitted to those procedures:

- In situation of mass arrival or *force majeure*, Member States may exempt from border procedures applicants from a country with 20% or less recognition rate (Article 11(2)).
- In situations of mass arrival, Member States must subject to border procedures applicants from countries with 5% or lower recognition rate (Article 11(3)) and with 50% or higher recognition rate (Article 11(4)).

- In situation instrumentalisation, Member States have the discretion to decide on the merits of applications in border procedures of applicants subjected to instrumentalisation and who registered during the period of derogation will be subjected to border procedures (Article 11(6)).

When applying Article 11 (3) or (4), Member States must prioritise the examination of applications from persons with special procedural or special reception needs (which may include minors), minors and their family members, and applications considered “likely well-founded” (Article 11(5)). Furthermore, when applying Article 11(6), Member States must exclude from border procedures “minors under the age of 12 and their family members, and persons with special procedural or special reception needs” (Article 11(7)(a)). Moreover, they are required to cease to apply border procedures to “minors under the age of 12 and their family members” and “vulnerable persons with special procedural or special reception needs” if their application is “likely to be well-founded” (Article 11(7)(b)). In all cases, when applying the derogations under Article 11, the guarantees outlined under Chapters I and II of the Asylum Procedures Regulation must be upheld. These guarantees include specific guarantees for minors and unaccompanied minors.

Under situations of mass arrival and *force majeure*, the time limits for take charge requests, take back notifications and transfer are extended (Article 12). Member States are required to submit a take charge request “within four months of the date on which the application was registered” (the AMMR establishes maximum period of 2 months). Additionally, Member States must reply to a take charge “within two months of receipt of the request” (the AMMR establishes a maximum period of 1 month). Conversely, Member States must submit a take back notification within 1 month “of receiving the Eurodac hit or confirm receipt” (the AMMR allows a maximum period of 2 months). For carrying out a transfer, Member States may complete it within 1 year (AMMR sets a maximum period of 6 months).

Furthermore, under situations of mass arrival, Member States are not obligated to take back an applicant for whom they are responsible (Article 13(1)(a)) or under Article 38(4) of the AMMR. This derogation only applies if the application was registered during the period of derogation (Article 13(1), second subparagraph).

According to Article 15, during situations of crisis, when the derogations under the Crisis Regulation are implemented, Member States must provide the information outlined in this Article to third-country nationals or stateless persons in a language “they understand or are reasonably supposed to understand”.

In relation to the BIC, Recital 8 emphasises that the Crisis Regulation upholds the principles of the Charter, including the principle of the BIC. It also specifies that safeguards concerning minors must be implemented to ensure the primary consideration of the BIC in line with the UNCRC.

The Crisis Regulation is unprecedented; therefore, its provisions will be the core of the critical analysis.

Under the Crisis Regulation, the period of border procedures was extended to a maximum of 18 weeks. This is problematic because, as noted in Subparagraph 3.3., all applicants submitted to border procedures must “reside at or in proximity to the external border or transit zones as a general rule or in other designated location” (Article 54 (1) of the Asylum Procedures Regulation), which could result in *de facto* detention. Furthermore, minors can also be detained during these procedures (Article 43 (2) of the Asylum Procedures Regulation). As a result, extending the maximum period for border procedures to 18 weeks may increase both *de facto detention* and detention for children. The criticism outlined in Subparagraph 3.2. regarding child immigration detention and *de facto* detention apply *mutatis mutandis* to this Regulation.

Furthermore, under the Crisis Regulation, the period for a Member State to carry out the transfer is extended to a maximum of 1 year. This means that children awaiting transfer to the responsible Member State may have to wait for 1 year in the transferring Member State. This is particularly problematic for unaccompanied children who are to be transferred to a Member State where a family member is legally present. Until the transfer occurs, these minors remain in a Member State without a family member, sibling or relative. This is clearly not in the BIC as the period of 1 year to be transferred is far too long. Indeed, it can raise “uncertainty, stress and anxiety” (ECRE, 2024b, p. 48) for the

child applicant waiting to be transferred, which may affect the child's psychological and overall well-being.

Additionally, all applicants subjected to instrumentalisation and who have registered during the derogation period will be subjected to border procedures. However, Member States must exclude "minors under the age of 12" from border procedures. While it is positive to exclude children from these procedures, this provision does not provide the same guarantees for all children, as it distinguishes children above and under 12. Such distinction is not in line with the definition of "child" under Article 1 of the UNCRC. As a result, children over 12 will not benefit from the same safeguards as younger children. Additionally, Member States must cease to apply border procedures in relation to "minors under the age of 12" if their application is "likely to be well-founded". Therefore, according to Article 11(7)(b), *a contrarium*, if an application is not likely to be well-founded, all children will be subjected to border procedures. This means that protection from border procedures depends on the application, which is a problematic approach to safeguarding. Furthermore, persons with special procedural or reception needs are also exempt from border procedures. Children may be considered as such, meaning that they will be exempt from border procedures regardless of their age, which is an important safeguard. However, the submission of these applicants to border procedures must cease only if their application is considered "likely well-founded" (the problems this raises are the same as the ones mentioned above).

A positive feature introduced by the Crisis Regulation is that, when applying the derogation in Article 11, the guarantees outlined under Chapters I and II of the Asylum Procedures Regulation must apply. These guarantees include the right to a personal interview<sup>15</sup>, free legal counselling, assistance and representation, and specific guarantees for minors and unaccompanied minors.

Furthermore, when applying the derogations under Articles 10 and 11 (3) or (4), Member States are required to prioritise applications from minors and their family

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<sup>15</sup> Maintaining the right to a personal interview when applying the derogations under the aforementioned provisions is an essential guarantee. In fact, as noted in Subchapter 3.3, interviews ensure the child's right to be heard, which is crucial for ensuring a full commitment to the BIC.

members, persons with special procedural or reception needs, and likely well-founded applications. This is a good feature, as prioritising children's applications means they may not be subjected to the entirety of the maximum periods for registration or border procedure.

Additionally, Article 15 establishes the requirement for third-country nationals or stateless persons to be informed in a language "they understand or are reasonably supposed to understand". However, it fails to include child-appropriate and friendly manners to provide information. In this context, it would be an important asset to include the same guarantees outlined in other New Pact's legal instruments, such as providing information in an age-appropriate and child-friendly manner, using child-friendly materials and requirement of the presence of an adult family member, or a representative or person acting as one. Including such guarantees is important to ensure children fully understand the information provided.

According to Recital 8, the Crisis Regulation ensures respect for the BIC. Moreover, safeguards concerning minors must be applied to ensure the primary consideration of the BIC. While these mentions are essential to safeguard the BIC, I believe it should be mentioned, in line with the other legal instruments of the New Pact, that the BIC must be primarily considered when applying the Crisis Regulation.

Lastly, while the Crisis Regulation aims to enhance solidarity during times of crisis, its implementation could lead to undesirable outcomes, potentially affecting all applicants (including children). Indeed, solidarity contributions can take the form of relocations, financial contributions, or other alternative solidarity measures. The issue lies in the fact that Member States have the discretion to choose the type of support they wish to provide. For instance, in a hypothetical scenario, if Member States choose only to allocate financial contributions, it might fail to alleviate the burden on the overwhelmed Member State. However, this remains hypothetical, as implementation of the Crisis Regulation will only take place in 2026.

### **4.3. Resettlement Regulation**

**Regulation (EU) 2024/1350 (Resettlement Regulation)** establishes a “Union Resettlement and Humanitarian Admission Framework” (the Union Framework) for the admission of third-country nationals or stateless persons to Member States’ territory by granting them international protection and humanitarian status (Article 1(1)(a)). In this context, it sets out rules on admission on resettlement or humanitarian admission grounds (Article 1(1)(b)). However, the Resettlement Regulation does not establish the right to request admission or be admitted, neither the obligation to admit a third-country or a stateless person (Article 1(2) and (3)).

The Union Framework is designed to provide third-country nationals or stateless persons with “legal and safe arrival to the territory” of Member States (when eligibility requirements are met); enhance EU’s contribution to international resettlement and humanitarian admission initiatives; and strengthen EU’s partnership with third countries hosting a “large number of persons in need of international protection has been displaced” (Article 3).

The criteria for eligibility for admission are set out in Article 5. The third-country nationals or stateless persons listed in Article 5(1) and (2) are eligible for admission under resettlement and humanitarian admission, respectively. However, for them to be eligible, they must fall within one of the categories outlined in Article 5(3), which include both accompanied and unaccompanied minors (subparagraph ii). Article 5(4) further outlines the eligibility of family members of third-country national or stateless persons. Moreover, under humanitarian admission, such family members must be legally residing in a Member State or be EU citizens (Article 5(3)).

While applying Article 5, Member States must consider the BIC. Additionally, if the third-country national or stateless persons is a married minor, but is unaccompanied by the spouse, the BIC “may be seen to lie with the minor’s original family” (Article 5(4), second subparagraph).

Furthermore, Article 6 outlines the grounds for refusing admission under the Resettlement Regulation. Paragraphs 1 and 2 list the third-country national or stateless

persons whose admission must be or may be refused (respectively). It is underscored that the grounds outlined in Article 6 cannot be implemented based on discrimination factors, including age (paragraph 3).

Additionally, the Council is required to adopt a “two-year Union Resettlement and Humanitarian Admission Plan”, which must contain the information outlined in Article 8(3) and may also include the information outlined in Article 8(4). Member States may contribute to the Union Plan on a voluntary basis (Article 1(4)).

The admission procedure is outlined in Article 9. Within this Article, family unity is emphasised. Paragraph 2, subparagraph (a), allows Member States to give preference to third-country national or stateless persons with family links with third-country national or stateless persons “legally residing in a Member State or with Union citizens”. Moreover, information under paragraph 4 must be provided in a manner “adapted to the needs of minors” (Article 9(5)). The outcome of the admission can be negative or positive (Article 9(13) and (14), respectively). Under positive decisions, Member States are required to offer, where necessary, “travel arrangements”, taking into account the “specific needs of the persons” concerning their vulnerabilities (Article 9(21)). Additionally, Member States may, when appropriate, offer “pre-departure orientation programmes” which can include “information about their rights and obligations, language classes, and information about the Member State’s social, cultural and political situation” (Article 9(22)). Moreover, “At all stages of the procedure” Member States must ensure no person is discriminated, including on the grounds of age (Article 9(25)).

Recital 46 establishes that the Resettlement Regulation aligns with the rights and principles of the Charter. It reiterates that the Regulation must be applied while upholding the rights and principles of the Charter (which includes the BIC principle) and, particularly, children’s rights and the right to respect family life.

The Resettlement Regulation is unprecedented; therefore, its provisions will be the core of the analysis. The Resettlement Regulation was introduced by the New Pact to deal with existing gaps and to establish a permanent and common framework, replacing *ad hoc* resettlement schemes (European Council & Council of the European Union,

2024). This legal instrument aims to provide stability concerning resettlement and humanitarian admission, which is a welcome effort.

Under the Resettlement Regulation, the right to family unity is enhanced. Indeed, family unity is prioritised under Articles 5(4) and 9(2)(a). Article 5(4) specifies the family members of third-country national or stateless persons eligible for admission. On the other hand, Article 9(2)(a) establishes that Member States may give preference to individuals with “family links with third-country national or stateless persons legally residing in a Member State or with Union citizens”.

Furthermore, when the decision for admission is positive, Member States are required to consider the “specific needs of the persons” concerning their vulnerabilities. Although not explicitly mentioned, this provision encompasses minors’ vulnerabilities. In addition, Member States may offer “pre-departure orientation programmes”, which can include “information about their rights and obligations, language classes, and information about the Member State’s social, cultural and political situation”. This is beneficial, as they can prepare and facilitate the minor’s integration into the Member State.

Additionally, the Resettlement Regulation upholds the principles enshrined under the Charter, which includes the principle of the BIC. Moreover, Member States are required to consider the BIC when applying Article 5(4). While these are important references, I believe an explicit mention that the BIC will be a primary consideration in the implementation of the Regulation would further reinforce its importance and Member States’ obligation to always consider the BIC.

Moreover, the obligation to provide information to children in a manner “adapted to the needs of minors” is a good feature of the Regulation. However, this provision should be further developed, as the phrase “adapted to the needs of minors” is vague and grants Member States significant discretion on how to provide information to minors. To strengthen this provision, the Regulation could add the use of child-friendly materials and require the presence of an adult family member, representative, or another trusted individual (as it is established and clarified under other New Pact’s legal instruments).

Including such guarantees would help ensure that Member States adequately adopt child-appropriate manners to provide information.

Moreover, the Regulation underscores the prohibition to discriminate, including on age grounds, during the stages of the admission procedure and under the grounds of refusing admission. This mention is noteworthy, as it safeguards the child's right to non-discrimination (Article 2 of the UNCRC).

Furthermore, the fact that Member States do not have an obligation to “admit a third-country national or stateless person” (Article 1(3)) might be concerning, as well as their non-mandatory participation in the Union Resettlement and Humanitarian Admission Plan (Article 1(4)). Additionally, certain provisions highlight Member States discretion, which might result in negative outcomes. For instance, Member States have discretion on the preference for admitting third-country national or stateless persons with family links to people legally residing in the EU or Union citizens (Article 9(2)), which may affect the efforts to ensure family unity. Moreover, the same discretion exists concerning the provision of “pre-departure orientation programmes”, which, as mentioned above, can be beneficial for children by facilitating their integration.

Despite the Resettlement Regulation being considered as a “glimmer of hope” by some Non-governmental Organisations (Portuguese Refugee Council *et al.*, 2024), concerns might arise with the implementation of the legal instrument concerning the provisions and potential pitfalls mentioned above.

## **5. Post-entry Stage: Current regime and the New Pact**

### **5.1. Reception Conditions Directives**

Both **Directive 2013/33/EU** (current regime) and **Directive (EU) 2024/1346** (New Pact's Reception Conditions Directive) establish “standards for the reception of applicants for international protection” (Article 1 of the Directives). These legal instruments apply to adults and children who have made “an application for international

protection on the territory, including at the border, in the territorial waters or in transit zones (...) as long as they are allowed to remain on the territory as applicants” and their family members if “covered by such application for international protection according to national law” (Article 3 of both Directives). Additionally, they are applicable during “all stages and types of procedures concerning applications for international protection, in all location and facilities hosting applicants” (Recital 8 of the current Directive, and Recital 7 of the New Pact’s Directive).

Both Directives emphasise that the BIC must be a primary consideration when implementing them, in accordance with the UNCRC and the Charter (Recitals 9 and 38 of the current and New Pact Directives, respectively).

Furthermore, the definition of “family members” was extended by the New Pact’s Reception Conditions Directive. Under Article 2(c) of the current regime, family members included those listed in the subparagraph, provided that the “family already existed in the country of origin.” In contrast, Article 2(3) of the new Directive replaced the term “country of origin” with “family already existed before the applicant arrived on the territory.”

Regarding information, the current regime requires information to be provided “in writing and, in a language that the applicant understands or is reasonably supposed to understand” and, where appropriate, orally (Article 5(2)). The New Pact’s Directive maintains this guarantee while introducing additional requirements. In fact, it mandates the transmission of information “in a concise, transparent, intelligible and easily accessible form, using clear and plain language”. Furthermore, Member States may, where appropriate, present information in “visual form such as videos or pictograms” under the conditions listed in Article 5(2), third paragraph. Additionally, the New Pact’s Directive also introduces specific provisions for unaccompanied minors, as they must be informed in an “age-appropriate manner” and use “information materials specifically adapted to minors where appropriate” (Article 5(2)). Moreover, the presence of a representative or a person acting like one is required. Since there is no specific provision for accompanied minors, the general guarantees under Article 5 of the new Directive apply to them.

Regarding access to health care, Articles 19(1) and 20(5) of the current regime underscore that Member States must ensure access to the “necessary health care”. Additionally, applicants with “special reception needs” must receive “necessary medical or other assistance”, including “mental health care” (Article 19 (2)). In contrast, the New Pact’s Directive expands this right by adding to the necessary health care: “sexual and reproductive health care”. Article 22(3) requires Member States to provide applicants with special reception needs the “necessary medical or other assistance, such as rehabilitation and assistive medical devices”. Regarding children, Article 22(2) underscores that Member States must provide to minor applicants and applicant’s children “the same type of health care as provided to their own nationals who are minors”. Furthermore, the necessary healthcare must not be interrupted when a minor reaches the age of majority.

Furthermore, the current regime provides that applicants may “move freely within the territory of the host Member State or within an area assigned to them by that Member State” (Article 7(1)). On the other hand, the New Pact’s Directive restricts the applicants’ freedom of movement (Recitals 19 to 21 and Article 9). Specifically, when one of the conditions outlined in Article 9(1) is fulfilled, the applicant may be “allowed to reside only in a specific place” (Article 9(1) and Recital 19).

Concerning education, the current regime requires Member States to provide minor applicants and applicants’ children access to their education systems “under similar circumstances as their own nationals” until an expulsion measure is issued (Article 16(1)). When the child cannot access the Member State’s education system, it must be offered “other education arrangements in accordance with its national law and practice” (paragraph 3). Furthermore, the continuity of secondary education cannot be denied when the applicant reaches the age of majority (paragraph 1, third subparagraph). In addition, the maximum period to postpone access to education is three months from the moment the application was lodged (Paragraph 2). Children must also be provided with “Preparatory classes, including language classes” to facilitate their access to the educational system (paragraph 2, second subparagraph). In contrast, while the New Pact’s Directive includes similar guarantees concerning access to education, it introduces

additional features. In this context, Article 16(1), second subparagraph, specifies that the “specific needs of minors” regarding education must be considered. Moreover, the education provided to these minors must be of “the same quality” as that provided to nationals of the Member State. The New Pact also reduces the maximum period for postponing access to education to two months (Article 16(2)). Also, as a rule, Member States must “provide education within the general education system”. However, as a “temporary measure and for a maximum period of one month, Member States may provide that education outside the general education system” (Article 16(2), second subparagraph).

Children may be detained under both Directives, but only under certain conditions. Concerning the current regime, detention is permitted only as a measure of *ultima ratio* when “less coercive alternative” measures cannot be applied and “for the shortest period of time” (Article 11(2), first subparagraph). In this context, Member States must primarily consider the child’s best interest (Article 11(2), second subparagraph). During detention, children must have the opportunity to “engage in leisure activities” (Article 11(2), third subparagraph). Accompanied minors and their families must be accommodated in “separate accommodations” (Article 11(4)). Regarding unaccompanied minors, detention is permitted only in “exceptional circumstances”. These minors cannot be placed with adults or in “prison accommodation”; instead, they must be accommodated in institutions equipped with facilities and personnel in line with the child’s age and needs (Article 11(3)). On the other hand, the New Pact’s Directive reflects many of the guarantees provided under the current regime, namely, the use of detention in exceptional circumstances as an *ultima ratio* measure when no “other less coercive alternative measures” can be effectively implemented, for the shortest period, with primary consideration of the BIC, access to “leisure activities”, and separate accommodations for detained families. In addition to this, the New Pact’s Directive reduced the circumstances under which minors can be detained: accompanied minors may only be detained “where the minor’s parent or primary care-giver is detained”, while unaccompanied minors when “detention safeguards the minor” (Article 13(2), third subparagraph, (a) and (b), respectively). Additionally, detained minors must have access to education unless it is deemed to be of “limited value” due to the short period of detention (Article 13(2), sixth subparagraph). The Directive emphasises that the separated accommodation for detained

families must be “adapted to the needs of minors” (Article 13(4), second subparagraph). Moreover, detained unaccompanied minors must be accommodated “in facilities adapted to the housing of unaccompanied minors” with qualified professionals to safeguard their rights and needs (Article 13(3)).

Concerning material reception conditions, the current regime establishes a general provision for adults and children (Article 17). It stipulates that material reception conditions must reflect an “adequate standard of living”, ensuring applicants’ subsistence and protection of their physical and mental health (Article 17(2), first subparagraph). Moreover, the standard of living must be appropriate to the vulnerable person’s situation (Article 17(2), second subparagraph), which includes both accompanied and unaccompanied minors (Article 21). The child must be submitted to an individual assessment to determine if he or she requires special reception needs (Article 22(1)). Furthermore, unaccompanied minors must be placed in “accommodation centres with special provisions for minors” or “in other accommodation suitable for minors” (Article 24(2), first subparagraph). On the other hand, accompanied children should be placed with their family members (Article 28(2)(a)). Member States must take into account “age-specific concerns” in relation to the type of accommodations mentioned in Article 18(1) (Article 18(3)). Moreover, persons working in accommodation centres must be “adequately trained” (Article 18(7)). Conversely, the New Pact’s Directive largely mirrors the guarantees provided under the current Directive. However, the new Directive introduces “personal hygiene products” to the material reception conditions (Article 2(7)). Moreover, it underscores that material reception conditions must also reflect “the rights under the Charter (Article 19(2), *in fine*). Concerning “special reception needs” for accompanied and unaccompanied minors, the Directive replaces the term “vulnerable persons” with “applicants with special reception conditions”, although the content remains the same (Articles 20(1), 24(a)(b)), and 25(1)). As for accommodation of accompanied and unaccompanied minors, the New Pact’s Directive maintains the same provisions as the current regime (Articles 20(2)(a) and (3) and Article 27(9)(c) and (d), respectively). In addition, the new Directive mandates Member States to provide “female applicants (...) and their minor children” with “separate sanitary facilities and a safe place” within the centres where they are allocated (Article 20(5)). Moreover, the BIC should be considered “When deciding on housing arrangements” (Recital 35).

Moreover, both directives mandate the maintenance of family unity (Articles 12 and 14 of the current regime and of the New Pact, respectively).

In relation to specific provisions for minors, the current regime requires the BIC to be primarily considered when implementing provisions involving minors. Additionally, Member States must guarantee a “standard of living adequate for the minor’s physical, mental, spiritual, moral and social development” ((Article 23(1)). Furthermore, Article 23(2) outlines the factors to be considered when assessing the BIC. Moreover, children must have access to age-appropriate leisure activities (Article 23(3)). Paragraph 4 strengthens the child’s right to access health, specifying that children who are victims of “abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment” must have access to “rehabilitation services” and, when necessary, mental care and counselling. Furthermore, Paragraph 5 states that if it is in the child’s best interest, minors must be placed with “their parents, their unmarried minor siblings or with the adult responsible for them whether by law or by the practice of the Member State concerned”. Conversely, Article 26 of the New Pact’s Directive largely reflects the current regime; however, it introduces some changes. The Directive states that the BIC must be the primary consideration when implementing provisions that “possibly affect minors” (instead of “involve minors”) (Article 26(1)). Additionally, Article 26(3) requires Member States to provide children access to “school materials where needed”. Moreover, individuals working with children must not have a “record of child-related crimes or offences, or of crimes or offences that lead to serious doubts about their ability to assume the role” (Article 26(6)).

Concerning unaccompanied minors, the current regime establishes that a representative must be designated “as soon as possible”, act in line with the principle of the BIC, detain the “necessary expertise to that end”, and may be changed “only when necessary” (Articles 2(j) and 24(1)). If there are conflicting or potentially conflicting interests between a person or organisation and the unaccompanied minor, then they must “not be eligible to become representatives” (Article 24(1), *in fine*). Regarding accommodation, unaccompanied minors must be placed with the people and in the accommodations mentioned in Article 24(2). However, children above 16 may be placed

in “accommodation centres for adult applicants, if it is in their best interests” (Article 24(2), second subparagraph). Furthermore, Member States must ensure sibling unity and family tracing, if that’s in the BIC and according to the child’s age and maturity (Article 24(2), third subparagraph, and (3)). Any changes of accommodation for unaccompanied minors must be “limited to a minimum” (Article 24(2), third subparagraph, *in fine*). Lastly, professionals working with these minors must continue to receive “appropriate training concerning their needs” (Article 24(5)). On the other hand, the New Pact’s Directive reflects several guarantees from the current Directive, such as the appointment of a representative (Article 27(1)(a)); not appointing a representative when exists conflicting or potentially conflicting interests (Article 27(6), second subparagraph); change of representative “only when necessary” (Article 27(6), first subparagraph); placement of unaccompanied children with the people and in the accommodations listed in Article 27(9); family tracing (Article 27(10)); siblings unity; and changing residence “limited to a minimum” (Article 27(9), third subparagraph). Moreover, the new Directive introduces additional guarantees and a few changes regarding the appointment of a representative<sup>16</sup>. In this context, Member States are required to designate one within a maximum of 15 days from the moment the application is lodged (Article 27(1)(a)). This period can be extended for “ten working days” in situations where there is a “disproportionate number of applications made by unaccompanied children” (Article 27(1), fifth subparagraph). Until a representative is appointed, Member States must designate a person to “provisionally act as a representative” (Article 27(1)(b)), who must be “immediately informed” when an unaccompanied minor applies for international protection and about the child’s “relevant facts” (Article 27(2)). Both the representative and the person acting as one must “meet with the unaccompanied minor” and consider their views and needs (Article 27(1), second subparagraph). Moreover, the unaccompanied minor will be “immediately informed” when a representative and a person acting as one is appointed (Article 27(5)(a) and (2)). Additionally, the competent authorities must inform the unaccompanied minor “how to lodge a complaint” against the

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<sup>16</sup> The provisions under Article 27 of the New Pact’s Directive, concerning a representative, must be read conjunctly with the New Pact’s Asylum Procedures Regulation because this Article and Article 25(1) of that Regulation refer to the same representative (Article 27(4), of the Directive). The Regulation provides additional information regarding the representative’s tasks. See: European Council on Refugees and Exiles, ECRE Comments on the Directive (EU) 2024/1346 of the European Parliament and of the Council of 14 May 2024 Laying Down Standards for the Reception of Applicants for International Protection (Recast), September 2024, p.27.

representative (Article 27(5)(a)) and the representative “about the relevant facts” concerning the unaccompanied minor (Article 27(5)(c)). Furthermore, the Directive specifies that the representative and person acting as one can oversee a maximum of 30 and 50 unaccompanied minors under normal and exceptional circumstances, respectively (Article 27(7) and (1), fifth subparagraph). Additionally, the tasks of the representative and person acting as one must be supervised (Article 27(8)), and neither of them must not have a “record of child-related crimes or offences, or of crimes or offences that lead to serious doubts about their ability to assume the role” and be “continuous appropriate training concerning the rights and needs of minors” (Article 26(6)). Furthermore, the possibility of placing unaccompanied children above 16 in “accommodation centres for adult applicants” is also reflected under the new legal instrument (Article 27(9), second subparagraph).

Drawing from this comparison, it will be further highlighted the strengths and shortcomings introduced by the New Pact’s Reception Conditions Directive.

On the one hand, the definition of “family members” was extended by the New Pact’s Reception Conditions Directive. Indeed, the legal instrument replaced the reference to the “country of origin” with “family already existed before the applicant arrived on the territory”. The positive aspects of this expansion mentioned under Subchapter 4.1., also apply to this Regulation.

A vital feature introduced by the new Reception Conditions Directive is ensuring that information is being provided in an age-appropriate manner, using child-friendly materials and in the presence of a representative or person acting as one strengthens. However, despite the positive introduction of this child-friendly approach, it applies only to unaccompanied minors. This means accompanied children will be informed under the same guarantees as adults. Regarding general guarantees to provide information, the New Pact requires information to be provided in a “concise, transparent, intelligible and easily accessible form, using clear and plain language”, which represents an evolution compared to the current regime. However, it still lacks a child-focused approach for accompanied children. Therefore, the age-appropriate and child-friendly guarantees, as well as the

presence of an adult (e.g. family member) to ensure the child's best interest, should be extended to accompanied minors.

Furthermore, the New Pact's Directive introduces several positive features concerning the representative and the person acting as one. For instance, the establishment of a deadline for the designation of a representative, within a maximum of 15 days, is an advancement compared to the current regime, which only provided "as soon as possible." As mentioned in Subchapter 3.3., the abstract concept of "as soon as possible" can lead to the adoption of different timelines for appointing a representative. Additionally, designating a person acting provisionally as a representative until one is appointed is a vital measure. This ensures that unaccompanied children are under the care of a professional who will guarantee their best interests, rights and needs until a decision is made regarding their application. Furthermore, both Directives state that a representative can be changed "only when necessary". However, the New Pact's Directive clarifies that a change of representative or person acting as one can occur if they do not perform their duties adequately. This addition aligns with the BIC, emphasising that inadequate performance is a sufficient reason for changing a representative or person acting as one. Moreover, the tasks of both the representative and the person acting as one must be supervised. This is an important development, as it improves the protection of unaccompanied children by ensuring that their tasks are carried out appropriately in the child's best interest. Furthermore, both Directives stipulate that people working with minors must have continuous training about their needs. However, the New Pact's Directive adds that training must also focus on the child's rights. Moreover, it requires that people working with minors must not have a "record of child-related crimes or offences, or of crimes or offences that lead to serious doubts about their ability to assume the role". This further enhances children's protection by ensuring that these professionals are competent and trustworthy.

Additionally, the New Pact expanded the right to health care. Indeed, the definition of "necessary health care" has been broadened compared to Article 19 of the current regime to include "sexual and reproductive health care". Moreover, the New Pact's Directive requires Member States to provide minor applicants and applicants' minor children "the same type of health care as provided to their own nationals who are minors".

The Directive also mandates the non-interruption of necessary treatment when the child reaches majority. Furthermore, Article 22(3) states that Member States must provide applicants with special reception needs with the “necessary medical or other assistance, such as rehabilitation and assistive medical devices”.

Regarding the right to education, while the New Pact’s Directive largely reflects the current regime, it introduces important features. For instance, it mandates Member States to grant children under their scope “the same access to education as their own nationals” (Article 16(1)). Additionally, as a general rule, these children must access education under the general education system (Article 16(2)); however, as a temporary measure, they might access education outside the general education system for a maximum period of 1 month. The Directive also adds that the “specific needs of the minor” regarding education must be considered (Article 16(2)).

On the other hand, a potential feature concerns the establishment of a maximum number of unaccompanied minors per representative (30 in normal circumstances and 50 in exceptional ones). The critiques and positions outlined in Subchapter 3.3. apply *mutatis mutandis* to the New Pact’s Directive.

Additionally, both Directives establish the possibility for unaccompanied minors above the age of 16 to be placed in centres for adult applicants if it is in line with their best interest (Article 24(2), second subparagraph of the current Directive; and Article 27(9), second subparagraph of the New Pact’s Directive). However, this provision is problematic, as I find it difficult to argue that placing unaccompanied minors with adults aligns with the BIC. Indeed, placing these children in adult accommodation centres increases their vulnerability, sense of insecurity and exposure to risks such as “Sexual and Gender Based Violence” (UNHCR Bureau for Europe, 2015, p. 56). To underscore the problem of placing minors in adult centres, I will briefly analyse the Case of *Darboe and Camara v. Italy*. In this case, the applicant was a 17-year-old unaccompanied minor who was placed in an adult reception centre in Italy. The reception centre was overcrowded, lacking basic needs, medical care, psychological and legal assistance, staff members and

interpreters<sup>17</sup>. According to the ECtHR, the applicant was “subjected to inhuman and degrading treatment”<sup>18</sup> and highlighted that “This could have been avoided if the applicant had been placed in a specialised centre or with foster parents”<sup>19</sup>.

Therefore, to better protect unaccompanied minors and to further enhance alignment with the BIC, the New Pact had an opportunity to remove this possibility, but it failed to do so.

Lastly, concerning freedom of movement, the New Pact imposes potential concerning restrictions. While Article 7(1) of the current regime allows applicants to “move freely within the territory (...) or within an area assigned”, Article 9(1) and Recital 19 of the New Pact’s Directive specifies that, under certain circumstances, applicants may be “allowed to reside only in a specific place”. Although Recital 19 clarifies that this restriction does not amount to detention, there is a risk that it could lead to *de facto* detention. In relation to *de facto* detention and detention of children connected with immigration grounds, the critics and position made in Subchapter 3.2. apply *mutatis mutandis* to these legal instruments.

## 5.2. Qualification Legal Instruments

**Directive 2011/95/EU** (Qualification Directive) and **Regulation 2024/1347** (Qualification Regulation) establish standards for the qualification as beneficiaries of international protection, “for a uniform status for refugees or for persons eligible for subsidiary protection” and for “the content of the protection-granted” (Article 1 of the legal instruments).

Both legal instruments emphasise that the BIC should be a primary consideration in their implementation, in line with the UNCRC. Moreover, they list the same factors to be considered when assessing the BIC. However, the Qualification Regulation introduces an additional factor: “linguistic skills” (Recitals 18 and 15 of Qualification Directive and Regulation, respectively).

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<sup>17</sup> ECtHR, *Darboe and Camara* (Application no. 5797/17), paras. 22, 23 and 158.

<sup>18</sup> *Idem*, para.183.

<sup>19</sup> *Idem*, para.156.

The definition of “family members” was expanded by the Qualification Regulation. Under Article 2(j) of the Qualification Directive, family members included those listed in the subparagraph, provided that the “family already existed in the country of origin.” By contrast, Article 3(9) of the Qualification Regulation replaced the term “country of origin” with “family already existed before the applicant arrived on the territory.” Additionally, the Regulation specifies when a minor is considered unmarried.

During the assessment of the applications, under the Qualification Directive, Member States may determine that the applicant is “not in need of international protection” if the applicant can “safely and legally travel”, be admitted and settle in a part of the country of origin where they have no fear of persecution or serious harm, or if they have access to protection against persecution and serious harm (Article 8(1)). Conversely, under the Qualification Regulation, this determination is mandatory when the actors of persecution or serious harm are not the State or its agents (Article 8(1)). In this context, the Regulation introduces safeguards for children, requiring the determining authority to consider the age of the applicant when assessing the application and the possibility of an internal alternative. Additionally, for unaccompanied minors, the child’s best interests must be taken into account, along with the “availability of sustainable and appropriate care and custodial arrangements” (Article 8(5)(b) and (c)).

Moreover, both legal instruments outline the same grounds of exclusion from the refugee status. However, the Qualification Regulation includes a specific safeguard for minors. Concerning a minor, when it is being assessed the “serious reasons” related to the commission of crimes listed in paragraph 2, or cases of “incite” or participation “in the commission” of those crimes (paragraph 3), the determining authority must consider the minor’s capacity to be held responsible in line with “national law on the age of criminal responsibility” (Article 12(5)). Notably, the same safeguard is provided under the Qualification Regulation concerning the exclusion from subsidiary protection (Article 17(5)).

Under the Article on “General Rules”, both legal instruments safeguard children's rights when applying Chapter VII, with the only difference being the wording used in the Qualification Regulation. Specifically, the Qualification Directive states that when

applying Chapter VII, the “specific situation of vulnerable persons”, which includes minors and unaccompanied minors, must be considered (Article 20(3)). Moreover, it stipulates that the BIC must be a primary consideration “when implementing the provisions of this Chapter that “involve minors” (Article 20(5)). In contrast, the Qualification Regulation replaces the term “vulnerable persons” with “persons with special needs”, which also includes minors and unaccompanied minors, and specifies that their needs must be considered (Article 20(4)). Additionally, regarding the consideration of the BIC in the Chapter’s provisions, it changes the term “involve minors” with “concern minors” (Article 20(5)).

Regarding the provision of information, the Qualification Directive solely states that information about applicants’ rights and obligations connected with their status must be provided “as soon as possible” and in a language “they understand or are reasonably supposed to understand” (Article 22). In contrast, the Qualification Regulation stipulates the same requirements but also clarifies the (minimum) information to be provided, as it is listed in Annex I of the Regulation. Moreover, it adds the obligation to provide information about the “consequences of not complying with the obligations provided for in Article 27 on movement within the Union” (Article 22 of the Qualification Regulation).

Both legal instruments, in their respective Article 23, require Member States to ensure family unity. The Qualification Directive stresses that “family members of the beneficiary of international protection who do not individually qualify for such protection are entitled to claim the benefits referred to in Articles 24 to 35”. These benefits include residence permits, travel documents, access to employment, education, healthcare, social welfare, accommodation, integration facilities, procedures for recognition of qualifications, freedom of movement within the Member State, special guarantees for unaccompanied minors and repatriation (Article 23(1)). On the other hand, the Qualification Regulation provides the same guarantees but with a different structure. Article 23 focuses on issuing residence permits “to the family members” (Article 23(1)) and adds family members “who has been issued a residence permit (...) shall be entitled to the rights laid down in Articles 25 to 32, 34 and 35”. These rights encompass nearly all the benefits under the Qualification Directive but include additional rights such as freedom of movement within the Union and access to social security and social assistance

(unlike the Directive, which defines “social welfare” only including social assistance—Article 29(1)). However, the Regulation excludes repatriation and special guarantees for unaccompanied minors, though it ensures these under the Regulation.

Regarding education, both legal instruments require Member States to provide minors access to their education system under the same conditions as their nationals (Article 27(1) of the Qualification Directive; Article 29(1) of the Qualification Regulation). In addition to this, the Qualification Regulation mandates the completion of secondary education under the same conditions as the Member States nationals even if they “reach the age of majority” during their studies (Article 29(1), second subparagraph).

For healthcare, both legal instruments ensure that the beneficiaries of international protection have “access to healthcare under the same eligibility conditions as nationals of the Member State” (Article 30(1) of the Qualification Directive and Article 32(1) of the Qualification Regulation). They also guarantee beneficiaries with special needs, including “minors who have been victims of any form of abuse, neglect, exploitation, torture, or cruel, inhuman and degrading treatment”, access to “adequate health care, including treatment of mental disorders (...) under the same eligibility conditions as nationals of the Member State” (Article 30(2) of the Qualification Directive and Article 32(2) of the Qualification Regulation).

In terms of social assistance, both legal instruments specify that beneficiaries of international protection are entitled to social assistance. The Qualification Directive sets out that beneficiaries must receive “the necessary social assistance as provided to nationals of that Member State” (Article 29(1)). Conversely, the Qualification Regulation provides that they must “enjoy equal treatment with nationals of the Member State” in relation to social assistance and social security (the latter was introduced by the Regulation) (Article 31(1)). Both legal instruments allow social assistance to be limited for beneficiaries of subsidiary protection “to core benefits” under national law. These “core benefits” must include a minimum of benefits which are listed under the legal instruments ((Recital 45 and Article 29(2) Qualification Directive and Article 31(2) Qualification Regulation). The Qualification Regulation further expands these benefits to include child-care assistance and housing benefits.

Concerning unaccompanied children, the Qualification Directive requires Member States to ensure representation to unaccompanied minors “As soon as possible after the granting of international protection”. This representation can be carried out by a guardian, an organisation “responsible for the care and well-being of minors”, or by “other appropriate representation” (Article 31(1)). Member States must guarantee that the unaccompanied minors’ needs are “duly met” by the guardian or representative in the implementation of the Directive. In this context, regular assessments must be put in place (Article 31(2)). The Directive also requires people working with unaccompanied minors (including the guardian and the representative) to receive and “continue to have appropriate training concerning their needs” (Article 31(6)). Additionally, Article 31(3) outlines where and with whom the unaccompanied minor can be placed. In this process, the views of the minor must be considered according to the age and maturity of the child. Moreover, siblings must be kept together “as far as possible” and in line with the BIC and the age and maturity of the child. Additionally, changes in the unaccompanied minor’s residence must be “limited to a minimum” (Article 31(4)). According to Article 31(5), Member States have the obligation to trace the unaccompanied minor's family if that is in their best interests. On the other hand, the Qualification Regulation maintains these guarantees and introduces enhancements. It specifies that a guardian must be appointed, and competent authorities may designate the representative appointed under the Asylum Procedures Regulation or the Reception Conditions Directive to act as a guardian until one is formally appointed (Article 33(1), first, second and third subparagraphs). The Regulation prohibits individuals or organisations with conflicting or potentially conflicting interests to become guardians (Article 33(1), fourth subparagraph). Moreover, the Regulation developed the duties and characteristics of the guardian under Article 33(2). In order to safeguard the unaccompanied minor’s best interest and general well-being, the guardian must ensure the child’s access to the rights under the Regulation, assist and, if necessary, represent the unaccompanied minor in case of status withdrawn, and support family tracing if necessary. Guardians must have the “necessary expertise”, receive and continue to receive training on the needs and rights of unaccompanied minors; be bound to confidentiality rules, and not have a “record of child-related crimes or offences, or of crimes or offences that lead to serious doubts about their ability” to become a guardian. Furthermore, guardians are required to represent a “proportionate and

sufficiently limited number of unaccompanied minors” (Article 33(3)). In addition, it is required the supervision, monitorisation and review of the guardian’s tasks, in line with national law and by the entities designated by Member States. Guardians can be replaced if the tasks are not being adequately executed. Moreover, the competent authorities must inform, in an age-appropriate way, how to lodge a complaint against the guardian (Article 33(4)). The Qualification Regulation adds that the BIC must be considered when placing unaccompanied children (Article 33(5)).

Following the comparative analysis of the Qualification legal instruments, the strengths and shortcomings of the Qualification Regulation will be further analysed.

The definition of “family members” was expanded under the Qualification Regulation. Indeed, the legal instrument replaced the reference to the “country of origin” with “family already existed before the applicant arrived on the territory”. The positive aspects of this expansion mentioned under Subchapter 4.1., also apply to this Regulation. Moreover, the Regulation clarifies when a minor is considered unmarried –under the Member State’s national law and legal age of marriage -is important because unmarried children fall within the definition of family members and, therefore, can enjoy the rights and benefits provided under the legal instrument.

Regarding information, the Qualification Regulation stipulates the same guarantees as the Directive but clarifies the (minimum) information to be provided, which is listed in Annex I of the Regulation. Additionally, it includes the transmission of information about the “consequences of not complying with the obligations provided for in Article 27”. The inclusion of minimum information in Annex I of the Qualification Regulation is a positive point since the Qualification Directive grants Member States discretion over the content of such information. This discretion led to practical implementation obstacles in providing information to applicants “mainly related to inadequate/insufficient information in some sectors (for example, family union and social security)” (Directorate-General for Migration and Home Affairs, 2019, p. 169). Annex I now establishes clear guidelines for all Member States on the (minimal) essential information to be provided.

Moreover, both provisions establish that the information must be provided “as soon as possible” after the status is granted. In practice, most Member States provided the information in conjunction with the status grant, while some delivered it before the decision on the status (*Ibidem*). Although the term “as soon as possible” did not raise issues regarding timeliness, I believe it would be beneficial to establish a specific period for providing information and prevent extensive delays when it is impossible to provide information immediately upon granting the status.

Furthermore, neither legal instrument includes the transmission of information in a child-friendly and appropriate manner, which is a crucial aspect that the Qualification Regulation should have introduced. Providing information to minors in an age-appropriate way, using child-friendly methods, ensures they understand their rights and obligations. The Qualification Regulation should have adopted a similar approach to the New Pact’s Asylum Procedures and Eurodac Regulations, which require that information be provided in a child-friendly way, with the presence of a representative (or other equivalent person) and, if necessary, resorting to child-friendly material.

Regarding education, both legal instruments ensure that minors have access to the Member States’ education system under the same conditions as their nationals. Additionally, the Qualification Regulation grants the right to complete secondary education under the same conditions as Member states’ nationals, even if the applicant reaches the age of majority. This is a positive development, as it encourages minors to continue and complete secondary education, ensuring that reaching majority is not a barrier to completing this level of education. However, neither legal instrument mentions the provision of language courses for applicants. Indeed, when applying the Qualification Directive, “Knowledge of the national language of the Member State was reported to be the main obstacle to accessing education at all levels” (*Idem*, p.209). Therefore, offering such courses would be an important asset to applicants, particularly migrant children, as it would better prepare them to fully exercise their right to education within the Member State’s education system.

Regarding social assistance, both legal instruments outline a minimum set of benefits to integrate the “core benefits” for beneficiaries of subsidiary protection. While this list is non-exhaustive, allowing Member States to include other benefits, especially child-related ones, the Qualification Regulation makes an important addition by including

“child-care assistance”. This is important because, when implementing the Qualification Directive, there was no consensus among “Member States of what constituted ‘core benefits’” (Idem, p.227). This introduction will ensure that all Member States provide child-care assistance under the situation described in Article 31(2) of the Qualification Regulation.

Finally, regarding unaccompanied minors, the guarantees under the Qualification Regulation are consistent with those under the Qualification Directive. However, the Regulation introduces improvements that enhance protections for unaccompanied minors. Specifically, the development of the guardian’s tasks and qualifications is essential to ensuring a qualified and child-friendly professional represents these children. The Regulation also specifies that guardians must represent a “proportionate and sufficiently limited number of unaccompanied minors”, which is an improvement since the Directive is silent about this. Moreover, the Regulation allows competent authorities to designate the representative under the Asylum Procedures Regulation or the Reception Conditions Directive to act as a guardian until one is appointed. This important measure guarantees representation for unaccompanied minors when a guardian is still to be appointed. Furthermore, supervising, monitoring, and reviewing the guardians' tasks, allowing for a change of guardians if they inadequately perform their duties, and explaining to the unaccompanied minors how to lodge a complaint are positive measures for these children. These measures enhance respect for their rights, needs, and best interests, strengthen their protection, and ensure accountability.

## **6. Conclusion**

Migration is an integral aspect of the EU’s reality. Children on the move face numerous challenges from the moment they begin their journey and even after arriving in the EU. In this context, the inadequate respect for their best interests and violation of their rights are particularly concerning challenges they face within the EU. For this reason, it is essential to learn from past mistakes and to develop migration and asylum policies that enhance the protection of these children. The New Pact on Migration and Asylum presented an opportunity to achieve this.

Considering the importance of adequately respecting the BIC in the context of migration and asylum, particularly through robust and child-friendly policies, this thesis focused on the BIC within the New Pact on Migration and Asylum. The ultimate objective of this work was to conduct a comparative and critical analysis to determine whether the New Pact enhances the EU's commitment to safeguarding the BIC in comparison to the current regime. The emphasis on the BIC within the new legal framework is motivated by the vital role this principle plays in guaranteeing the protection and respect for children's rights. However, despite the BIC being firmly established under EU law, concerns persist regarding its practical application in EU policies on migration and asylum.

Notably, the New Pact on Migration and Asylum introduces valuable provisions aimed at properly protecting children and promoting their best interests. These provisions represent an evolution compared to the current regime. Indeed, the New Pact's legal instruments enhanced references to the BIC and provided more detailed protections and guarantees for children. Among the positive features highlighted throughout this thesis are the expanded safeguards for accompanied and unaccompanied minors; broadened definition of "family members"; enhanced child-friendly communications and interviews; developments concerning representatives and the assignment of a person acting provisionally as one; strengthened rights to education and health; BIC assessment aligned with the UNCRC and the CRC Committee General Comment No. 14; and the implementation of an independent monitoring mechanism.

Despite these vital safeguards, the New Pact's legal instruments also introduced provisions that collide and that might contravene with the BIC in practice. Among the shortcomings, it is important to underscore *de facto* and *jure* detention; lowering the minimum age for data collection; use of coercion; the assignment of an excessively high number of unaccompanied minors to each representative; provisions that grant excessive discretion to Member States; the differentiation between children under and above 12 concerning border procedures; and possibility to accommodate children above 16 in adult centres.

It is important to highlight that the enhancements and shortcomings introduced by the New Pact, as analysed throughout this thesis, are intrinsically linked to the BIC. The provisions strengthening the protection of children's rights directly enhance the commitment to respect the BIC. Indeed, the enjoyment of children's rights reflects the BIC, as this principle aims to ensure "both the full and effective enjoyment of all rights recognised in the Convention" (CRC Committee, 2013, para. 4). Conversely, the shortcomings and potential pitfalls that undermine children's rights necessarily contravene the BIC.

Hence, despite the evolution reflected in the New Pact, there are still provisions that collide and might potentially contravene the BIC when implemented. Therefore, while the positive features introduced are important, they are not sufficient to consider the New Pact a truly child-friendly legal framework. Furthermore, although the EU's commitment to safeguard the BIC was enhanced compared to the current regime, I believe a future reform is needed. Indeed, future legal instruments need to be developed through the lenses of the BIC to ensure they fully reflect the BIC in all provisions. Moreover, they need to be developed with children's rights and best interests at their core, rather than the prioritisation of security and border management.

It is essential to acknowledge the limitations of the present thesis, as the true impact of the New Pact's legal instruments concerning the BIC will only become visible from 2026 onward. Indeed, some of the identified shortcomings and potential contradictions with the BIC and children's rights remain speculative. Only the practical implementation by Member States will reveal the alignment with the BIC, especially concerning those provisions granting discretion to Member States. As such, the actual impact of the New Pact on the BIC by the new legal instruments is yet to be determined, and this remains an area for future research, analysis and development.

With this thesis, I aspire to contribute to the discussion on children's rights within EU migration and asylum policies. I hope to see, in the coming years, reforms that demonstrate a full commitment to the principle of the BIC. Indeed, the EU must adopt fully child-friendly migration and asylum policies with children's rights and the BIC at their core, rather than focusing primarily on border security and irregular migration. We

must strive to build an EU that treats these children adequately, following international and EU legal standards. Hence, we must foster a more humane and child-friendly Union with migration and asylum policies that do not contravene their human dignity or perceive them uniquely as migrants. All stakeholders must bear in mind that constructing a more child-friendly policy on migration and asylum is not a favour being granted. It is their responsibility and the child's right.

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