

# **UNIT. 8 Selected issues on alternative care to family care & adoption**

Master's programs: Public Law and e-Government

## **COURSE**

European Standards and Institutional  
Practices of Family and Child's Rights  
Protection

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**GENERAL PRINCIPLES OF  
ALTERNATIVE CARE - TEMPORARY  
PROTECTIVE MEASURES.  
CHILDREN'S RIGHT TO INFORMATION  
AND TO EXPRESS THEIR VIEW WITH  
RESPECT TO THEIR PLACEMENT IN  
ALTERNATIVE CARE.**

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**CERTAIN CRITERIA OF ADOPTION  
PROCESS WHICH OF MUST ADHERE  
TO ENSURE THE BEST INTERESTS OF  
THE CHILD (UNDER EU LAW AND COE  
LAW.**

# **1. General principles of alternative care - temporary protective measures. Children's right to information and to express their view with respect to their placement in alternative care.**

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**The general principles of alternative care, particularly temporary protective measures, are guided by both European Union (EU) and Council of Europe (CoE) law. While there may be specific directives and conventions addressing these principles, the following key principles generally apply:**

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## **European Union Law:**

### **Best Interests of the Child:**

**The paramount consideration is the best interests of the child. Decisions regarding alternative care and temporary protective measures must prioritize the well-being and development of the child.**

### **Non-Discrimination:**

**EU law emphasizes the principle of non-discrimination. Children in need of alternative care should be treated without discrimination based on race, ethnicity, gender, religion, disability, or any other factor.**

### **Child's Right to Participation:**

**The child has the right to be heard and to express their views in matters affecting them. EU law promotes the active participation of the child in decisions related to their care, taking into account their age and maturity.**

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## **Family Reintegration:**

**Efforts should be made to reintegrate the child into their biological family whenever possible and in the child's best interests. Temporary protective measures aim to provide a secure environment while working towards family reunification.**

## **Proportionality and Necessity:**

**Temporary protective measures must be proportionate and necessary, considering the specific circumstances of each case. They should not be more intrusive than required to safeguard the child's well-being.**

## **Continuity of Care:**

**There should be a focus on maintaining continuity in the child's life, including educational and cultural aspects, to ensure a stable and nurturing environment.**

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**The Court of Justice of the European Union (CJEU) has determined that the Brussels IIa Regulation (recast) is applicable to decisions concerning the placement of a child in alternative care. Notably, the "grounds of non-recognition for judgments relating to parental responsibility" outlined in Article 39 of the Brussels IIa Regulation (recast) provide guidance.**

**Article 39 specifies that recognition of a decision shall be refused if the decision was made without affording an opportunity for a child capable of forming their own opinion to be heard. However, exceptions to this rule exist, such as when the proceedings solely pertain to the property of the child or in cases where there are compelling grounds, taking into account factors such as the urgency of the situation.**

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**Council of Europe Law:**

**European Convention on Human Rights (ECHR):**

**The ECHR, under the Council of Europe, protects the right to family life (Article 8). Temporary protective measures should be in line with this right and should be necessary and proportionate to achieve a legitimate aim.**

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## **Convention on the Rights of the Child (CRC):**

**While not specific to Europe, the CRC emphasizes the best interests of the child, non-discrimination, and the right to be heard. States parties, including European countries, are bound by its provisions in matters concerning children. As stipulated by the Convention on the Rights of the Child (CRC), children are entitled to receive care from their parents (Article 7). Additionally, the CRC recognizes the right of children to be placed in alternative care, whether on a temporary or permanent basis, when such measures are deemed to be in their best interests (Article 20). Alternative care serves as a protective measure, ensuring the interim safety of the child and facilitating their return to their families whenever it is feasible and in line with their well-being[1].**

**[1] United Nations, General Assembly (2010), Guidelines for the alternative care of children, A/RES/64/142, 24 February 2010, paras. 48–51; United Nations, Committee on the Rights of the Child (2013), General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, CRC/C/GC/14, 29 May 2013, paras. 58–70**

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**Ideally, alternative care serves as a temporary solution. On occasion, it functions as a protective measure while awaiting family reunification, such as in the case of unaccompanied or separated child migrants being reunited with their families[1]. In other instances, it acts as a protective measure during transitional phases in family life, such as improvements in a parent's health or the provision of support to parents. A child placed in alternative care possesses the right to be informed about their rights and available options. Moreover, they hold the right "to be consulted and to have their views duly taken into account in accordance with their evolving capacities." [2]**

**[1] United Nations, General Assembly (1989), Convention on the Rights of the Child, 20 November 1989, Art. 22; United Nations, Committee on the Rights of the Child (2005), General Comment No. 6 (2005): Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6, 1 September 2005, paras. 81–83.**

**[2] United Nations, General Assembly (2010), Guidelines for the alternative care of children, 4 February 2010, A/RES/64/142, para. 6.**



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**International law, including the Convention on the Rights of Persons with Disabilities (CRPD), affirms that family-based care, such as foster care, stands as the optimal form of alternative care for ensuring the protection and development of children. This principle is underscored in the UN Guidelines for the alternative care of children. Regarding children with disabilities, the CRPD specifies that "States Parties shall, where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting." [1] Non-family based care, such as residential care, "should be limited to cases where such a setting is specifically appropriate, necessary, and constructive for the individual child concerned and in his/her best interests." [2]**

[1] United Nations (2006), Convention on the Rights of Persons with Disabilities, 13 December 2006, Art. 23 (5).

[2] United Nations, General Assembly (2010), Guidelines for the alternative care of children, 24 February 2010, A/RES/64/142, para.

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**Aligned with this approach, the Council of Europe (CoE) Recommendation CM/Rec(2010)2 on deinstitutionalisation and community living of children with disabilities urges member States to adopt suitable legislative, administrative, and other measures. The recommendation calls for the replacement of institutional care with community-based services within a reasonable timeframe and through a comprehensive approach.**

**The child's right to a guardian or representative is pivotal in ensuring broader rights. In most cases, the mandate of a legal guardian involves safeguarding the child's best interests, ensuring their overall well-being, and exercising legal representation to complement their limited legal capacity. Seven EU legal instruments mandate Member States to appoint a guardian for children within various contexts, some directly related to children without parental care.**

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**At the Council of Europe level, both the Convention on Action against Trafficking in Human Beings and Recommendation CM/Rec(2019)11 on effective guardianship for unaccompanied and separated children in migration provide guidance on aspects of guardianship and legal representation.**

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## **European Social Charter (ESC):**

**The ESC contains provisions related to the protection of children and families. It emphasizes the right to social and economic protection for families and children.**

## **Recommendation on the Council of Europe on Children's Rights in Foster Care:**

**This recommendation provides guidance on the rights of children in foster care. It stresses the importance of the child's participation, the quality of care, and the promotion of family relationships.**

**In both EU and CoE contexts, temporary protective measures are seen as a means to ensure the safety and well-being of the child while respecting their fundamental rights. The principles outlined above are fundamental in shaping legal frameworks and policies related to alternative care and temporary protective measures.**

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**Speaking about children's right to information and to express their view with respect to their placement in alternative care, we can mention the following:**

**In accordance with EU law, the Brussels IIa Regulation (recast) stipulates that when a court or competent authority in a Member State is contemplating the placement of a child in another Member State, it is required to seek the consent of the competent authority of the Member State where the child would be placed before initiating or organizing the placement[1]. Additionally, consistent with the jurisprudence of the Court of Justice of the European Union (CJEU), Member States are obligated to establish transparent rules and procedures for obtaining consent under this regulation. This is crucial to ensure both legal certainty and prompt resolution. Importantly, the mere approval from the institution where the child is intended to be placed is not considered sufficient.**

**[1] EU, Council of the European Union (2019), Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, recital 83 and Art. 82.**

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**In Council of Europe (CoE) law, the placement of a child in alternative care aligns with Article 8 of the European Convention on Human Rights (ECHR) only when it adheres to certain criteria. Specifically, it must be in accordance with the law, serve a legitimate aim (such as safeguarding the child's best interests), and be deemed necessary in a democratic society. This necessity aspect necessitates that the courts provide reasons that are both pertinent and adequate to justify the methods employed in achieving the intended objective.**

**Under both European Union (EU) and Council of Europe (CoE) law, children have rights related to information and expressing their views regarding their placement in alternative care. These rights are in line with broader principles outlined in international conventions and treaties.**

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**EU Law:**

**Charter of Fundamental Rights of the European Union:**

**Article 24 of the Charter of Fundamental Rights of the EU specifically addresses the rights of the child. It emphasizes the child's right to express their views freely in all matters affecting them, taking into account the child's age and maturity.**

**Brussels IIa Regulation (recast):**

**In the context of parental responsibility and the placement of children, the Brussels IIa Regulation (recast) includes provisions emphasizing the child's right to be heard. Article 23 highlights the child's right to express their views in proceedings that concern them.**

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**CoE Law:**

**European Convention on Human Rights (ECHR):**

**Article 8 of the ECHR guarantees the right to respect for private and family life. In the context of alternative care, this includes the right of the child to be informed and to express their views regarding decisions affecting their placement.**



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**Example:** In *Y.I. v. Russia*, the applicant was deprived of parental authority and her two youngest children were placed in public care, because she was a drug addict and unemployed. The ECtHR considered that the children's removal and initial placement in public care at the beginning of the criminal proceedings against the applicant were justified, but not the far-reaching measure of deprivation of parental authority. The domestic courts had failed to provide any concrete evidence that the applicant had left her children unattended, had not provided care for them or had neglected them in any other way, let alone endangered their health or life. The domestic authorities had not considered a less drastic measure, such as restriction rather than deprivation of parental authority, nor had they warned her about the possible consequences of her allegedly negligent behaviour. The ECtHR concluded that the domestic authorities had failed to demonstrate convincingly that, despite the availability of less radical solutions, the impugned measure had constituted the most appropriate option corresponding to the children's best interests, in breach of Article 8 of the ECHR.

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**Example:** In *Wallová and Walla v. the Czech Republic* the applicants complained about the placement of their five children in two separate children's homes due to their poor housing situation. The care orders were ultimately lifted when the parents' economic and housing situation improved. The ECtHR found that the underlying reason for the decision to place the children in care had been the lack of suitable housing and as such a less drastic measure could have been used to address their situation. Under Czech law, there was a possibility to monitor the family's living and hygiene conditions and to advise them on how to improve their situation, but this option was not used. While the reasons given for placing the children in care were relevant, they were not sufficient, and the authorities did not make enough efforts to help the applicants overcome their difficulties through alternative measures. In concluding that there had been a violation of Article 8 of the ECHR, the ECtHR also took note of the conclusions of the UN Committee on the Rights of the Child, which observed that the principle of primary consideration of the best interests of the child was still not adequately defined and reflected in all Czech legislation, court decisions or policies affecting children.

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**Example:** In *Paradiso and Campanelli v. Italy*, a couple requested registration of the birth certificate of a child born through a surrogacy arrangement in Russia. Since neither of the applicants had had biological links with the child, and they were considered to have brought the child to Italy illegally, the child was placed in a foster home with a view to adoption. For the authorities, the primary concern had been to put an end to an illegal situation. Although the child was not an applicant in the case, his best interests and the way in which the domestic courts had addressed them were relevant. The ECtHR accepted that the Italian courts, having assessed that the child would not suffer grave or irreparable harm from the separation, struck a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them, and found no violation of Article 8 of the ECHR.

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**The ECtHR requires under Article 8 of the ECHR that decision-making concerning respect for family life must adhere to certain procedural safeguards. It has stated that the decision-making process (administrative and judicial proceedings) leading to measures of interference with family life must be fair and afford due respect to the interests protected by Article 8. What is considered under Article 8 is whether “the parents have been involved in the decision-making process [...] to a degree sufficient to provide them with [a] requisite protection of their interests”. This includes keeping them informed about developments, ensuring that they can participate in decisions made about them and, in certain circumstances, hearing from the children concerned.**

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**Example:** In *B. v. Romania (No. 2)*, the applicant had been diagnosed with paranoid schizophrenia and taken by the police on a number of occasions to psychiatric institutions for treatment. Her children no longer lived with her and were placed in a care home because of their mother's illness. The ECtHR had to examine whether, having regard to the serious nature of the decisions to be taken as regards placing children into care, the decision-making process, seen as a whole, provided the parents to a sufficient degree with the requisite protection of their interests. In that connection, the Court observed that the applicant, who was suffering from a severe mental disorder, had not been assigned either a lawyer or guardian ad litem to represent her during the proceedings, so that it had been impossible for her to take part in the decision-making process concerning her minor children. In addition, the applicant's situation and the situation of her children had been examined by a court on only two occasions over a period of 12 years before both children had reached majority, and there was no evidence of regular contact between social workers and the applicant, which may otherwise have provided suitable means of representing her views to the authorities.

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In light of these facts, the Court concluded that the decision-making process around her children's placement in care had not adequately protected her interests, and that there had thus been a violation of her rights under Article 8 of the ECHR.

**Example:** In *B.B. and F.B. v. Germany*, 295 following allegations from the applicants' 12-year-old daughter that she and her eight-year-old brother had been repeatedly beaten by their father, the parental rights in respect of the two children were transferred to the Youth Office and the children were placed in a children's home. The District Court made a full order transferring parental authority from the applicants to the Youth Office, reaching its decision on the basis of direct evidence from the children. About a year later, at the first subsequent meeting with their parents, the daughter admitted that she had lied about having been beaten, and the children were eventually returned to their parents.

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## **CoE Convention on the Rights of the Child:**

**The CoE Convention on the Rights of the Child addresses the child's right to be heard. Article 12 of the convention underscores the child's right to express their views freely in all matters affecting them, and those views should be given due weight in accordance with the age and maturity of the child.**

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**CoE Recommendation CM/Rec(2010)12 on children's rights and social services:**

**This recommendation emphasizes the importance of involving children in decisions concerning their lives, including decisions about their placement in alternative care. It recognizes the right of the child to be informed and heard in accordance with their age and maturity.**

**In summary, both EU and CoE legal frameworks recognize and emphasize the child's right to information and the right to express their views regarding their placement in alternative care. These rights are integral to the principles of respecting the child's autonomy, best interests, and dignity in the decision-making process.**



## **2. Certain criteria of adoption process which must adhere to ensure the best interests of the child (under EU law and CoE law).**

**Under both European Union (EU) law and Council of Europe (CoE) law, the adoption process is guided by principles and criteria that prioritize the best interests of the child. Here are some key criteria that must be adhered to ensure the best interests of the child in the adoption process:**

### **European Union (EU) Law:**

#### **1. Charter of Fundamental Rights of the European Union:**

**•Article 24 of the Charter emphasizes the child's right to protection and care. Adoption processes must align with this fundamental right.**

#### **2. EU Directive on Standards of Quality and Safety of Human Organs Intended for Transplantation:**

**While primarily addressing organ transplantation, this directive underscores the need to consider the best interests of the child in any decision related to organ donation and transplantation.**

## **2. Certain criteria of adoption process which must adhere to ensure the best interests of the child (under EU law and CoE law).**

### **Council of Europe (CoE) Law:**

#### **1. European Convention on Human Rights (ECHR):**

**• Article 8 of the ECHR protects the right to respect for family life. Adoption processes must respect the family life of the child and prospective adoptive parents.**

#### **2. CoE Convention on the Adoption of Children (Revised):**

**• This convention sets out principles and standards regarding intercountry adoption. Key considerations include ensuring the best interests of the child, the necessity of adoption, and the importance of continuity in care.**

#### **3. Recommendation CM/Rec(2005)4 on Intercountry Adoption:**

**• This recommendation provides guidelines on intercountry adoption. It emphasizes that intercountry adoption should only be considered if it is in the best interests of the child and when domestic solutions have been exhausted.**

## **2. Certain criteria of adoption process which must adhere to ensure the best interests of the child (under EU law and CoE law).**

### **Common Criteria:**

#### **1. Best Interests of the Child:**

**•Both EU and CoE laws prioritize the best interests of the child. Adoption decisions must be made with a primary focus on the child's welfare, development, and well-being.**

#### **2. Legal Procedures and Safeguards:**

**•Adoption processes should adhere to clear and transparent legal procedures. Adequate safeguards must be in place to prevent any form of exploitation, trafficking, or abuse.**

#### **3. Consent and Informed Decision-Making:**

**•Informed consent is a fundamental aspect of adoption. Birth parents, where applicable, should provide voluntary and informed consent, and adoptive parents should be fully aware of the implications and responsibilities of adoption.**

## **2. Certain criteria of adoption process which must adhere to ensure the best interests of the child (under EU law and CoE law).**

### **4. Child's Right to be Heard:**

**• Both EU and CoE laws emphasize the child's right to be heard in matters that affect them. Adoption processes should provide an opportunity for the child to express their views according to their age and maturity.**

### **5. Post-Adoption Support:**

**• Adequate post-adoption support and monitoring should be in place to ensure the well-being and adjustment of the adopted child and the adoptive family.**

**By adhering to these criteria, adoption processes in the EU and CoE member states aim to safeguard the rights and best interests of the child involved.**