



SAVE THE CHILDREN COMMENTS ON THE REVISION OF THE DUBLIN II REGULATION

Save the Children (“SC”) is an international child rights NGO working in over one hundred countries worldwide. The SC Europe Group comprises the national SC organisations working in eleven European countries. SC, partner NGOs in 30 European countries and UNHCR work together in the Separated Children in Europe Programme (“SCEP”) – a programme to realise the rights of separated children within Europe, including in asylum seeking situations.

In the context of the European Commission’s preparation of a proposal amending Council Regulation (EC) NO 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national (hereafter “the Dublin II Regulation”), SC makes the following submissions largely relating to those provisions which focus on the situation of children.¹

SC is making further submissions in relation to the other three key asylum instruments under revision, namely, the Dublin Regulation, the Asylum Procedures Directive and the Asylum Qualifications Directive. Given that the four key instruments will work together to form the basis for the Common European Asylum System (“CEAS”), our comments on all four should be read together. We refer also to our response to the Commission Green Paper on the Future of the Common European Asylum System dated September 27, 2007, which discusses more generally SC’s positions on how the CEAS should be designed.

In the introduction in Section I below, this paper describes some of the general implications of the UN Convention of the Rights of the Child in this field. Section II then summarises key revision needs, before proposing specific amendments to the existing Dublin II Regulation.

Our comments recognise that the Commission is currently engaged in a revision, rather than an overhaul, of the Dublin II system. Ultimately we will welcome the opportunity, potentially in the context of the upcoming Stockholm Programme, to discuss a more radical overhaul of the responsibility determination mechanism under the CEAS as well as to explore the possibility of an overall EU framework to identify, provide protection and assistance to, and find durable solutions for all separated and/or unaccompanied children in the EU.

I. GENERAL INTRODUCTION

SC’s submissions derive from a child rights based approach rooted in the 1989 UN Convention on the Rights of the Child (and its Optional Protocols) (“UN CRC”). They also draw on a range of guidelines in the field, including General Comment No. 6 of the Committee on the Rights of the Child addressing the treatment of unaccompanied and separated children outside their country of origin and the Separated Children in Europe Programme Statement of Good Practice.

In particular, we draw the Commission’s attention to the fact that:

¹Save the Children Europe Group would like to thank a range of organisations and individuals who have contributed their views to the discussions which informed Save the Children’s positions in this paper. These include, in particular, members of the SCEP Network and Blanche Tax of UNHCR Brussels Office.

(a) the UN CRC applies fully to all children within the jurisdiction of the Member States, including children outside their country of origin. From this perspective, Member States must have as their primary consideration the best interests of the child in all actions in their regard and must fully respect the principle of non-discrimination, the right of all children to life, survival and development and the right for children to have their views heard. These core principles, and the general child protection system which they require, should inform EU rules on international protection (including the application of the Geneva Refugee Convention) as they apply to children. All mechanisms addressing the situation of children, including the Dublin II rules, should take these principles as their starting point.

(b) Ultimately the EU should consider a general instrument for all unaccompanied or separated children dealing with reception, assistance and potentially the determination of durable solutions (whether that be asylum, some other form of protection, transfer to a third country or return to country of origin).

(c) In the interim, when determining which Member State should be responsible for examining an asylum application and consequently deciding on the transfer of asylum seekers between Member States, the best interests principle must in all circumstances be central to any assessment of whether a child should be transferred to another Member State or not.

(d) Regional funding may be necessary to support those States who bear the largest burden in terms of addressing the situation of unaccompanied or separated children.

II. PROPOSALS FOR SPECIFIC AMENDMENTS TO THE DUBLIN II REGULATION

Executive Summary

SC's key submissions in relation to the revision of the Dublin II Regulation are as follows:

- The definitions of “separated child” and “family members” must be clarified and amended, with a definition of a “child” being introduced.
- The best interests principle, a right for a child to express his views and have them taken into account and the protection of family life (where it is in the best interests of the child) should each be set forth as overarching principles in relation to children;
- Individual attention must be paid to the situation of children within families.
- Decisions on responsibility for determining the asylum applications of separated or unaccompanied children must be expressly anchored in best interests considerations, and, inter alia, require broader family reunification possibilities and safeguard against “default” transfers of children, i.e. transfers back to the Member State in which they first made an asylum application, regardless of whether this may prove against their best interests or indeed put them at risk (for example of trafficking).
- Dublin II determinations in relation to separated or unaccompanied children should be underpinned by formal and comprehensive assessment procedures.
- The guarantees of the Reception Directive and the Procedures Directive should apply during the Dublin II determination period; these include, in particular, the appointment of both a guardian and a legal representative during a Dublin II determination.
- Detention of children and families with children should also be avoided.

Specific Comments

Relationship of the Dublin II Regulation with the Asylum Procedures Directive and the Reception Directive

We understand that, through an amendment to the Regulation and the above Directives, the Commission intends to clarify that the procedural safeguards under the Procedures Directive (as amended) and conditions of reception under the Reception Directive (as amended) will be extended to those persons whose cases are subject to a determination under the Dublin II Regulation. SC welcomes this clarification and notes that some of our comments below may ultimately be reflected in the amendments to those two Directives or in the amendment to the Dublin II Regulation.

Recitals

The Recitals should make reference to the new EU objective, to be introduced by the Lisbon Treaty, to the protection and promotion of children's rights. It could also refer to Article 24 of the Charter of Fundamental Rights of the EU

“Having regard to Article 2 of the Treaty on the European Union and more particularly the objective of the EU to promote and protect the rights of the child and Article 24 of the Charter of Fundamental Rights of the EU”

The Recitals should make a reference to the UN CRC and in particular to the key principles of best interests, right to life, survival and development, right to have their views heard and non discrimination. Each of these has a specific role in relation to the Dublin II Regulation.

“This Regulation seeks to ensure full respect for the 1989 UN Convention of the Rights of the Child and its four fundamental principles, namely, non-discrimination, the best interests of the child, the right to life, survival and development and the right of a child to express its views and have due account taken of them.”

The Recitals should refer to Article 20 of the UN CRC which provides that *“a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.”* In this regard, the Recitals might also refer to General Comment No 6 of the Committee on the Rights of the Child on the treatment of separated or unaccompanied children outside their country of origin.

The Recitals should refer to Article 22 of the UN CRC which obliges States to take appropriate measures to ensure that a child who is seeking refugee status shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights in the UN CRC and in other international human rights or humanitarian instruments to which the said States are Parties.

Definitions

Article 2: definition of a child/minor

A definition of a child/minor is necessary as the Directive expressly applies to all minor asylum seekers, yet it currently defines only an unaccompanied minor and a minor child of an asylum applicant. We recommend that the Directive uses the definition of a child set out in the UN CRC, taking account of Member State practice, namely that the age of eighteen typically constitutes the age of majority within the EU.²

“A child (minor) is every human being below the age of eighteen years.”

² The comparative overview of the implementation of the Directive 2003/09 of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the EU Member States notes that all Member States consider an asylum seeker under the age of 18 as a minor. Moreover, the Committee on the Rights of the Child has encouraged States to review the age of majority if set below 18, for example, in the case of Saudi Arabia, Sri Lanka and the Dominican Republic.

Article 2: the definition of separated/ unaccompanied children in Dublin II:

We recommend that the Commission propose the use of the term “separated children” throughout the asylum instruments. The use of a broader term emphasises that, although some children may appear accompanied, in practice the accompanying adult may be unable or unsuitable to assume responsibility for their care. Moreover, the definition of “separated child” which we propose³ defines more clearly the type of responsibility (“legal or customary *primary* caregiver”) which should be borne by the accompanying adult for a child. The term ‘separated child’ is already used by the Committee on the Rights of the Child, UNHCR, the International Committee of the Red Cross, a range of international NGOs including Save the Children and in a variety of contexts in various Member States, for example by the Ombudsman for Children in Ireland.

“Separated children are children under 18 years of age who arrive in the territory of the Member States separated from both parents, or their previous legal or customary primary caregiver or who subsequently become separated.”

In the event that the term “unaccompanied minors” is retained, the definition should refer to an “adult who is their legal or customary primary caregiver”, instead of “an adult responsible for them whether by law or custom.

To the extent that the existing definition of unaccompanied minor is retained, we recommend that the Commission delete the term “unmarried” from its definition. Its inclusion is not consistent with the definition of unaccompanied minors in the other asylum instruments. Such a limitation is not well grounded and would clearly not be legitimate in the context of situations of forced marriages.

The Dublin II Regulation should also include appropriate provisions for identifying separated children. Identification procedures must relate to both (a) age and (b) whether the child is separated. These are discussed further below.

Article 2: definition of family member

SC recommends removal of the phrase “insofar as the family already existed in the country of origin”, in particular as it relates to children.

SC also recommends reference to the national law of the asylum applicant as well as that of the Member State concerned.

In subsection (ii) relating to minor children of couples, SC would suggest removing the term “dependent” and would suggest subjecting the term “unmarried” to the caveat that married children may be considered to be family members where this is in the best interests of the child and taking into account the views of the child. (For example, a married child may be separated from a spouse or may be involved in a forced marriage.)

SC also recommends extending the definition of family members to include (i) children for whom an asylum seeker bears legal or customary primary responsibility and (ii) in the case of a child asylum seeker also their minor siblings.

*“ ‘Family members’ means the following members of the applicant’s family who are present in the territory of the Member States:
(i) the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or*

³ The definition of separated child which we propose is that set out in the SCEP Statement of Good Practice and General Comment on No 6 of the Committee on the Rights of the Child.

practice of their country of origin or country of reception treats unmarried couples in a way comparable to married couples under its law;

(ii) the minor children of couples referred to in point (i) or of the applicant, regardless of whether they were born in and out of wedlock or adopted as defined under the national law, and the children for whom they bear legal or customary primary responsibility, on the condition that they are unmarried, save in the case of married children where it is in their best interests, taking into account their views, to form a family with their parents or legal or customary primary caregiver;

(iii) the father, mother or legal or customary primary caregiver when the applicant or refugee is a minor and on the condition that they are unmarried, save where it is in their best interests, taking due account of their views, to form a family with their parents or legal or customary primary caregiver. In addition, minor siblings accompanying the father, mother or legal or customary primary caregiver are also considered to be family members on the condition that they are unmarried, save where it is in their best interests, taking due account of their views, to form a family with their parents or legal or customary primary caregiver”.

Article 3(3): Possibility of a Member State to return a separated child to a third country

Application of Article 3(3) to separated children should only occur when it is in their best interests. As a safeguard, an express reference should be included in Article 3(3) to best interests.

“Any Member State shall retain the right, pursuant to its national laws, to send an asylum seeker to a third country in compliance with the provisions of the Geneva Convention. When addressing the situation of a separated child under this Article, Member States shall have as a primary consideration the best interests of the child.”

Article 3 (4): Information to the asylum seeker on the application of the Dublin II Regulation

Article 3(4) should expressly indicate, in general terms, the type of information that should be provided in relation to the Dublin II Regulation. It should also expressly provide for child friendly communication of such information in a language which the child can understand. In practice, this is a significant requirement in light of cases of disappearances from centres (and the protection risk that this poses).

Introduction of an Article on Overarching Principles in Actions Relating to Children Under the Regulation

We would recommend the introduction of an article reflecting the principles which should guide actions in relation to all children (as referenced above in relation to the recitals), in particular in the context of the Dublin II Regulation: (a) the best interests principle and (b) the right for children to express their views and have due account taken of them. Also, given the context of Dublin II, namely, transfers of persons between Member States, the principle of respecting family life including preserving family unity (where it is in the best interests of the child) should be expressly recognized.

In assessing the best interests of the child, Member States shall in particular take due account of the following factors:

- (a) the preservation of family life, including family reunification possibilities in the case of separated children;*
- (b) the minor’s well-being and social development, taking into particular consideration the minor’s ethnic, religious, cultural and linguistic background and further having regard to the need for stability and continuity in care and custodial arrangements and access to health and education services.*
- (c) safety and security considerations, in particular, where there is a risk of the child being a victim of any form of violence and exploitation, including trafficking;*
- (d) the views of the child, with due weight being given to such views in accordance with the child’s age and maturity.*

Article 6 Member State responsible for examining the application of a separated child

SC recommends that the Regulation contain a separate chapter addressing the situation of separated children. This chapter should set out (i) the criteria for determining the Member States responsible for examining the applications as well as (ii) the means to identify separated children; (iii) the reception conditions that apply to them and the assistance which should be provided to them as well as family tracing obligations; (iv) the decision-making procedure applicable to them and (v) transfer conditions.

(i) The criteria for determining responsibility

The Dublin II Regulation currently provides that the Member State responsible for examining the application [of an unaccompanied minor] shall be (i) that where a member of his or her family is legally present provided that this is in the best interests of the minor and (ii) in the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum.

Save the Children submits that the Dublin II Regulation be revised to ensure that the first and fundamental criterion for determining the Member State responsible for examining the application of a separated child is the best interests' principle. In other words, the Member State responsible for examining the application shall be determined by the best interests of the child in all circumstances.

We would recommend that in accordance with General Comment No 6, the Regulation should state that such a best interests' assessment will take a number of factors into account, including the views of the children, family life and family reunification possibilities, safety and security (particularly where a risk of trafficking exists), the child's level of integration in any of the Member States, the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

We would then propose that the Regulation acknowledge that typically the best interests of the child will lie in family unity. This means that application of this principle will often lead to the application of a separated child being examined in the Member State where a member of his or her family is present (according to the definition of family member in Article 2). If the term "legally present" is retained, it should be clearly and broadly defined to include beneficiaries of international protection or those having made an application for international protection.)

We would further recommend that the Regulation acknowledge that the best interests' principle will also require Member States to bring together separated children with relative(s) who can take care of him, based on the consent of the child and the relative(s), where this is in the child's best interests. Relatives should include in particular adult siblings. This means Article 15 (3) should be deleted.

Although it should be captured under a best interests' assessment, as a precautionary measure, Article 6 should also expressly indicate that no transfer of children from one Member State to another will take place to countries in which there is an inadequate child protection/reception system.

(ii) Identification of separated children

As noted above, the Dublin II Regulation should also include appropriate provisions for identifying separated children. Identification procedures must relate to both (a) age and (b) whether the child is separated. We refer the Commission to our submissions on the Reception Directive which provide our recommendations on each element.

In addition, in the case of Dublin II cases, Member States should be under an obligation to make their own assessment of age where this is necessary, even though a different age may be recorded in Eurodac by another Member State through which the child has transited. For example, sometimes a separate child travels first to country X with a false document stating that s/he is 18 or older, with a view to being able to travel further or seek work. If apprehended, this false age might be recorded in Eurodac by country X as his age. When s/he travels onwards to country Y, they may be suspected of being a child and even placed in child care but a subsequent Eurodac hit with information will point to an older age. In that instance, we would advocate that country Y be required to satisfy itself of age rather than rely on Eurodac information or any other country's assessment. SC is happy to discuss this further with the Commission

Moreover, we would also recommend that express provision should be made to prevent any transfer under the Dublin II Regulation pending a proper status determination and any appeal arising there from.

(iii) Reception Conditions, Assistance and Family Tracing

(a) Reception

It should be clearly established that the (improved) conditions set out as regards reception in the (amended) Reception Directive should apply to all children falling under the Dublin II Regulation. This should include:

- (a) overarching principles to be applied as regards children and separated children, including the obligation to provide special assistance and protection to separated children;
- (b) the appointment of a guardian for separated children, definition of the qualifications and role of the guardian;
- (c) the grant of legal assistance;
- (d) obligation to provide interpretation assistance;
- (e) initial screening and needs assessment taking into account both short and long term perspectives;
- (f) access to education and health services;
- (g) proper accommodation;
- (h) prohibition on detention and principles underpinning alternatives to detention;
- (i) family tracing obligations;
- (j) leaving care and aftercare supports for aged-out minors;
- (k) ongoing monitoring of care arrangements;
- (l) child friendly complaint procedures in relation to the application of the Dublin II Regulations provisions; and
- (m) training of officials interacting with children.

Please see our submissions in relation to the Reception Directive which we do not reproduce here.

(iv) Decision-making under Dublin II

It should be clear either under Article 6 or elsewhere in the Regulation that the best interests assessment under Article 6 (and Article 3(3)) should take the form of formal and documented procedure. As noted above, the child should be expressly permitted to participate and express its views. Again, in practice, this is a significant requirement in light of cases of disappearances from centres (and the protection risk that this poses).

"A separated child should benefit from a formal procedure determining in what Member State his or her claim for asylum should be heard, taking as a primary consideration the best interests of the child. The child's guardian should be involved in the procedure. In addition, a legal representative should be appointed free of charge, to assist

the child during the procedure, such representative having the necessary knowledge of the special needs of minors. In accordance with the UN Convention on the Rights of the Child, children should have the right to express their views freely and to have those views given due weight having regard to their age and maturity when an assessment of the child's best interests is being made. Provision should be made for child friendly procedures”.

If possible, the Regulation should oblige Member States to establish a panel to make a recommendation to a determining authority.

Insert “Member States should provide that a recommendation of the best interests of the child be made by an independent panel of experts which is multi-disciplinary, gender-balanced and composed of persons with professional expertise in child development and child protection. The guardian should be consulted in order to provide information and to recommend particular action.”

Reflection Period

Finally, there should be a recognition that before any substantive analysis of the best interests of the child, s/he should be provided with a reflection period.

Timing

There should be an explicit prohibition on expedited procedures not basing themselves on a full assessment of the facts. There should also be an explicit provision on timeliness as follows: decisions should be made in a timely manner as this is in line with the best interests of the child. The guardian should be consulted on the appropriate deadlines.

Appeals

There should be a suspensive appeal from any decision under Dublin II, and free legal assistance to any child falling under Dublin II.

(v) Concerning transfers under Dublin II Regulation

Specific provisions should be included to ensure safe transfer of a separated child from one Member State to another Member State and the immediate availability of adequate reception conditions in the State to which a child is transferred. Provision should be made for information exchange between the child's guardians in different countries (and potentially for the accompaniment of the child in any transfer by the guardian).

Children Within Families

Article 4(3) Indissociability of the situation of a minor who is accompanying a family member from that of his parent or guardian

This provision, although generally welcome, should be subject to the caveat that it applies provided that this is in the best interests of the child. There should be a proactive obligation to determine whether an individual application is relevant.

*“For the purposes of this Regulation, the situation of a minor who is accompanying the asylum seeker and meets the definition of a family member set out in Article 2, point (i), shall be indissociable from that of his parent or guardian and shall be a matter for the Member State responsible for examining the application for asylum of that parent or guardian, even if the minor is not individually an asylum seeker, **provided that this is in the best interests of the child. Member States are obliged to ensure an individual assessment of the situation of the child within each family in this regard.** The same treatment shall be applied to children born after the asylum seeker arrives in the territory of the Member States without the need to initiate a new procedure for taking charge of them.”*

Article 7 and 8

Article 7 and 8 should be deleted and replaced by a revised version of the provision in Article 14, namely that, in the case of family members and provided each family member consents and it is in the best interests of any children involved, the Member States responsible shall be as follows:

the Member State in which a family member is already recognized as a refugee or has already applied for asylum. If more than one family member is a refugee or an applicant for asylum in more than one Member State, the family will be consulted.

In the case of simultaneous applications in different Member States, the Member State responsible shall be:

- (a) *the Member State which the criteria indicate is responsible for taking charge of the largest number of family members;*
- (b) *failing this, the Member State which the criteria indicate is responsible for examining the application of the oldest of them.*

This would imply the revision of the first sentence of Article 15.

Chapter VI Administrative Cooperation

More detailed provisions should be put in place in relation to administrative cooperation between States as regards the reception of children and other matters, including family tracing.

Collection of Data

Member States should be obliged to compile uniform and anonymised data in relation to the identification and assistance afforded to separated children under Dublin II procedures. Such data compilation would serve a series of purposes and in particular would allow for proper planning, funding and regional cooperation in relation to the reception of separated children. For example, it may be particularly relevant in the case of child trafficking where patterns of movement can change due to policies and practices at national level.

Data collected within such a system might include, basic biographical data on each child (including age, sex, country of origin and nationality, ethnic group); total number of separated children attempting to enter the country, number of those admitted, number of requests for asylum, assignment of a guardian, assignment of a legal representation, legal and immigration status, living arrangements, enrolment in school or vocational training, family reunifications, return to their country of origin, disappearance, suspected cases of trafficking, children affected by armed conflict, any transfer under Dublin II Regulation and if so, the country to which a child was transferred.

Funding

In the context of the Dublin II Regulation, SC would welcome a further discussion on the extent to which funding issues might be available to support Member States bearing a significant burden in relation to the reception of unaccompanied minors.

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