

## Briefing Paper and Key Recommendations Concerning Measures at EU Borders for Unaccompanied Children



### Contents

Introduction .....	2
In a nutshell: what should happen with unaccompanied children at the border .....	2
What does experience show? .....	3
Key recommendations on legal assistance for unaccompanied children .....	3
Further resources.....	5

## Introduction

The European Commission is currently reviewing EU measures concerning international protection procedures and migration management as it prepares the upcoming EU Migration and Asylum Pact and accompanying legislative proposals. We understand this may include considering new EU rules concerning procedures at the EU external borders relating to identification, screening and expedited procedures concerning eligibility for international protection and return. Child Circle and Kids in Need of Defense (“KIND”) share a summary of core recommendations below on what measures should be in place at the EU borders as regards unaccompanied children. This briefing paper identifies how, from the border onwards, States should fulfil the obligation to identify, protect and assist these children, and find durable solutions in their best interests. In particular, it focuses on ensuring access for these children in vulnerable circumstances to essential procedural safeguards, including quality legal assistance and representation.

KIND is the pre-eminent US non-governmental organization devoted to legal protection of unaccompanied and separated children. Child Circle is an expert non-governmental organization in the field of EU migration and child rights based in Brussels. In 2020, Child Circle and KIND have been reviewing challenges and good practices in the provision of legal assistance to unaccompanied children in light of recent experience in both the EU and US. Later this year, Child Circle and KIND will publish a report to share key learnings and further recommendations on how the EU, national authorities and key stakeholders can make progress to enhance the operation of this key safeguard.

### In a nutshell: what should happen with unaccompanied children at the border

The UN Convention on the Rights of the Child applies to all children within the jurisdiction of the State, including children attempting to enter the State. It requires that special protection and assistance must be provided to unaccompanied children. Protection and assistance begin at the border and the best interests of the child should be a primary consideration in all decisions and actions affecting children from the border onwards. Consequently, when national authorities encounter unaccompanied and separated children from third countries, two key State responsibilities arise simultaneously - migration management and child protection. Border procedures must be shaped to take account of both and, in doing so, must ensure that immigration control measures do not override the best interests of the children concerned.

It is clear that **border procedures provide a crucial opportunity to identify unaccompanied children and to ensure that they are protected from serious risks, including trafficking, violence and neglect.** Concrete measures and safeguards must be in place to ensure this happens.

**It is equally clear that certain responsibilities precisely cannot be fulfilled at the borders.** For example, the State’s obligation to find durable solutions for children involves best interests assessments and best interest determinations, taking account of the child’s individual circumstances and rights. It demands a multidisciplinary approach, proper procedures and adequate time to build a relationship of trust with the child as well as to gather and examine information. Cases may involve transnational procedures (for example, in Dublin cases, where the child has family members or relatives in other countries). Successfully identifying and implementing durable solutions requires adequate support and assistance for the child. Key procedural safeguards in this process are guardianship and quality legal assistance.

In contrast, border procedures often take place at a remote location, in restricted facilities and with limited availability of appropriate personnel and services, including those specifically responsible for ensuring that procedural guarantees for unaccompanied children are met. Typically, there is a lack of vital independent support and assistance, with children finding it difficult to access lawyers, and with lawyers constrained in their ability to consult with children. Moreover, accelerated or expedited border procedures are precisely

designed to decide on the eligibility of claims in a quick and summary manner, typically with limited access to appeals. By their nature, they are not suitable to ensure access to the special procedural safeguards required for unaccompanied children, nor are they equipped to examine the broader range of considerations that need to be taken into account in decisions concerning unaccompanied children. These problems are aggravated by the fact that, in and of themselves, border procedures often become protracted due to lack of capacity at the frontline and frequently involve detention or restrictions on liberty of movement, which put the children's mental and physical health at serious risk, with long term consequences.

Accordingly, border procedures in relation to unaccompanied children must operate actively to screen and identify unaccompanied children. **Unaccompanied children must then be referred rapidly away from the borders in order to ensure access to special procedural guarantees and to undertake effective durable solution procedures. Every unaccompanied child should be supported by a guardian and have access to legal assistance before any procedures are initiated, in particular, those which will have long-term consequences for the child and which should be informed by a best interests determination.**

## What does experience show?

Policy makers and authorities may be concerned that the challenges to fulfilling their obligations in this way are very high. They may be concerned that referring unaccompanied children away from borders undermines effective border management. They may believe that certain child-specific safeguards at the borders will allow the processing there of children's claims. However, experience shows that failing to put in place a child-sensitive entry system, which ensures the identification and onward referral of unaccompanied children, leads both to significant violations of children's rights as well as to significant bottlenecks in border management.<sup>1</sup> Experience also shows that mechanisms to identify children and refer them onwards to proper support and legal assistance can succeed in securing timely outcomes in line with the best interests of the child concerned. In this context, it is important to recognise that lawyers *"enhance efficiency by, among other actions, identifying children's grounds of eligibility for relief—or, conversely, helping them understand when they may lack such eligibility—and enabling immigration judges to spend less time explaining to children the court's processes"*.<sup>2</sup>

## Key recommendations on legal assistance for unaccompanied children

We urge the European Commission in any future legislative proposals (such as any recast proposals concerning EU asylum procedures and Dublin transfers) to ensure quality legal assistance and representation for unaccompanied children from the earliest possible moment. We urge Member States and the Parliament to ensure such legal information and assistance for unaccompanied children is embedded as a key safeguard throughout legislative negotiations.

## Key recommendations on measures to put in place at the border

**Any EU rules and measures concerning border procedures should ensure that:**

- Border procedures are part of an integrated child protection system through which child-sensitive entry procedures allow access to the territory for unaccompanied children

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<sup>1</sup> For example, providing proper protection for them from violence can be very difficult, even within designated areas for unaccompanied children. In its Update of the 2016 Opinion of the European Union Agency for Fundamental Rights (FRA) on fundamental rights in the 'hotspots' set up in Greece and Italy, FRA notes that in spite of important developments – such as new guardianship laws in Greece and Italy, shorter stay of unaccompanied children in Italian hotspots and the creation of dedicated areas for unaccompanied children in most hotspots in Greece – serious child protection issues still persist.

<sup>2</sup> Statement for the Record by Kids in Need of Defense (KIND) "Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts" House Judiciary Subcommittee on Immigration and Citizenship January 29, 2020.

- Registration and screening procedures ensure the identification of an individual as an unaccompanied or separated child, namely as being under 18 years old, and travelling alone or travelling with adults who are not responsible for him or her whether by law or by practice
- When there are any doubts about whether an unaccompanied youth is under 18, he or she is treated as a child pending the results of a holistic and child-sensitive age assessment
- Upon identification, unaccompanied children are exempted from any fast track or accelerated border procedures and prioritised for rapid referral to services away from the border, who will carry out an initial needs assessment and address the child's immediate care arrangements
- Any public health measures necessary at borders should fully respect the rights of children. As stated by the Fundamental Rights Agency and the Council of Europe, "protection needs cannot be set aside while implementing measures to address public health considerations at borders."<sup>3</sup>
- An independent professional guardian is appointed as soon as possible to guarantee respect for the best interests of the child
- Unaccompanied children are provided with appropriate child-friendly information, in a language they understand, and with quality legal assistance as this will be key to securing a durable solution for the child. Access to quality legal assistance should occur prior to any procedures which have a bearing on the determination of the child's claim
- Appropriate reception and care arrangements respect family unity and prevent immigration detention.
- Alternative care placements for unaccompanied children, including foster care, group care and independent living, are based on a best interests assessment. Institutional care is avoided
- Following referral, procedures to identify a durable solution are initiated including procedures to restore family links where this is in the best interests of the child
- The number of interviews and assessments to which an unaccompanied child is subjected is limited and carried out by trained qualified staff in order prevent re-traumatisation of the child.

**These actions will depend on measures at and near the border which inter alia allow for use of:**

- ❖ Screening tools to assist in the rapid identification of individuals as at-risk children and referral on to appropriate services
- ❖ Techniques and Standard Operating Procedures to assist in the identification of children as unaccompanied or separated
- ❖ Forms and templates for the registration and documentation of unaccompanied and separated children
- ❖ Referral mechanisms to, and coordination with, services away from the border, including child welfare services, guardianship and legal assistance and representation

Many of these tools, SOPs, forms and mechanisms have already been developed by EASO and others and can be directly used or adapted for use at the border.

**These steps must be underpinned by the following safeguards:**

- √ Presence of child protection actors, alongside migration control authorities, where each is leading on their respective areas of responsibility and children are protected through an integrated child protection system
- √ Proper child-friendly and culturally appropriate information being available to the child on the procedures involved

<sup>3</sup> "Fundamental rights of refugees, asylum applicants and migrants at European borders", joint note of the Fundamental Rights Agency and the Council of Europe

- ✓ Support available to each child: at minimum, the availability of a pool of temporary guardians, who are independent and can facilitate the child's access to information and legal counselling
- ✓ Professional interpreters available to support actors on the frontline
- ✓ Specially designated child-friendly areas at the border for children
- ✓ Independent monitoring and complaints mechanisms

## Further resources

The importance of excluding unaccompanied children from border procedures which address status determination has been underlined by stakeholders, including the European Council for Refugees and Exiles and UNHCR.<sup>4</sup> The need for special safeguards for unaccompanied children throughout procedures has been discussed in [UNHCR Discussion Paper "The Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children in Europe."](#)<sup>5</sup>

More generally, the positions of these organisations also underline the essential need for legal assistance to be granted to asylum seekers throughout all stages of the procedure, as has also been emphasized in the recent [Statement of the Council of Bars and Law Societies of Europe on the need to guarantee legal assistance to all persons requesting international protection.](#)

It has been recognized by the Commission itself in its [Communication on the Protection of Children in Migration](#) which notes:

*"Appropriate safeguards must be applied to all children present on the territory of the European Union, including at all stages of the asylum and return procedure. Currently, a number of key protection measures, notably as regards access to information, legal representation and guardianship, the right to be heard, the right to an effective remedy and multidisciplinary and rights-compliant age assessments, needs to be stepped up."*

And further notes:

*"Following their arrival in the European Union, children in migration should always be identified and registered as children, using a uniform data set across the European Union (for example, to indicate whether a child is unaccompanied, separated or travelling with family, nationality/statelessness, age, sex, etc.). Children should be prioritised in all border-related procedures and receive adequate support from specialised staff in the process of identification and registration. They should notably apply child-friendly and gender-sensitive approaches when collecting fingerprints and biometric data. Vulnerabilities and special protection needs, including healthcare needs, should be better systematically and individually assessed."*

Equally, in [The Commission Recommendation \(EU\) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks](#) the Commission notes

*"Durable solutions are crucial to establish normality and stability for all minors in the long term. Return is one of the options to be examined when identifying a durable solution for unaccompanied minors and any Member State's action must take into account as key consideration the best interests of the child. Before*

<sup>4</sup> ECRE Policy Paper: "[Border Procedures: Not a Panacea](#)" which notes that "Where border procedures are in place, applicants in need of special procedural or reception needs should be exempt as a matter of law. States must establish systematic screening of all applicants arriving at the border to identify vulnerable persons". [UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation](#), p. 36 "Given the systematic use of detention, and the character of border procedures that may make the provision of full procedural safeguards practically difficult, border procedures should not be applied to children."

*deciding to return an unaccompanied minor, and in accordance with Article 12(2) of the Convention on the Rights of the Child (1), the minors concerned must be heard, either directly or through a representative or an appropriate body, and an assessment of the best interests of the child shall always be carried out on an individual basis, including on the particular needs, on the current situation in the family and on the situation and reception conditions in the country of return. Such assessment should systematically look at whether return to the country of origin, including reunification with the family, is in the minor's best interests."*