

**EXPERT MEETING: RETURNS AND TRANSFERS:
INTERNATIONAL EUROPEAN STANDARDS, PROCEDURES
AND SAFEGUARDS FOR CHILDREN**



COUNCIL OF THE BALTIC SEA STATES, MAY 2014

Rebecca O Donnell, Child Circle

I have been asked to set the scene on the framework and issues that are concerned by the EU Dublin rules.

A few words of introduction on my perspectives and Child Circle

I am an Irish lawyer, involved in EU law in Brussels for over 20 years; the last 7 years I have been practising in the field of child rights and child protection, with a particular focus on asylum and migration issues. I spent nearly 6 years with Save the Children EU Office and in that capacity was involved in contributing to the recast of the EU asylum instruments, including the Dublin Regulation.

I am currently working on a range of EU focussed issues and projects with organisations in Brussels and nationally. In particular, one of these projects, CONNECT, looks at the actors engaged in the situation of unaccompanied children. A range of partners, including Save the Children, Nidos and UNHCR who are at this seminar today, are involved. One of the project products will be an EU Reference Document which compiles all of the relevant EU law and policy relating to unaccompanied children. It should be of interest to this project.

I am a co-founder of Child Circle, which is a recently established Brussels based NGO, focussing on strengthening child protection systems in Europe, primarily through contributing to and commenting on EU law and policy and its implementation nationally. We are looking forward to the publication by the European Commission of EU Guidance on integrated child protection systems in the autumn. One of the aims of Child Circle is to help connect national experiences to the regional agenda and vice versa.

Introduction to this presentation

My approach today will be to explore some key issues that we, together as practitioners, lawyers, policymakers, need to think about – and act upon - in relation to the Dublin Regulation.

This presentation will not involve a detailed technical description of the Dublin rules.

In a nutshell, the Dublin rules establish which Member State should examine the asylum claim of an applicant who has arrived in Europe, and who may indeed have moved within Europe. The Dublin rules take the approach of setting out criteria which identify a national jurisdiction responsible for taking a decision. They involve transferring the asylum seeker to that jurisdiction. We know that transferring children from one country to another country can entail real risks to the child, whether they are separated from their family or within families. So the key question is: are these risks properly identified and addressed in the Dublin rules and what else needs to be done? That's what we should think about today.

As a side note, let us remember that there is an ongoing broader debate on how construct the common European asylum systems. Some suggest that to avoid asylum seekers having to "shop between jurisdictions", what is needed is joint EU-level

processing of asylum claims, or, in the alternative, mutual recognition of refugee status which would allow a refugee to travel around Europe once he or she has received a positive decision from a Member State. These might lead to dramatic alternatives to the Dublin system. But let's here focus on the Dublin system as it works today.

Again as a preliminary word, let me emphasise that we should think about both unaccompanied children and children within families. Both can be in very precarious positions and risk exploitation. Both can have been trafficked or be vulnerable to traffickers.

Let me start with the state of play in the evolution of this Dublin system (Part I), followed by consideration of key features of the Dublin system (Part II), and an examination of central provisions of the new Dublin III (Part III).

PART I: State of Play

The Dublin system involves a complex set of rules which are currently evolving; more work lies ahead. They take the form of an EU regulation which contain the general rule, as well as an implementing regulation which contains more detailed "operational" provisions on implementing the rules.

It sometimes seems that the Dublin legislation created a labyrinth, rather than a clear system. And indeed it can in particular be the case in relation to child asylum seekers; the original rules were not very clear and sometimes created difficulties, rather than solutions.

But these measures are currently under renegotiation: where are we now?

A so-called recast Regulation (Dublin III) and amended implementing regulation have recently been renegotiated.

Some major improvements were introduced in the new measures as regards children and we will come back to these. In short they include the fact that:

- Dublin III is now much clearer that the best interests of children are taken into account across all actions under the rules;
- There are improved provisions on informing and assisting unaccompanied children in relation to the rules; and
- It enhances the possibilities for transfers of children for reunification with family members or being transferred to the care of relatives.

So things are moving forward.

As negotiations were taking place on the recast provision, a case was heard before the European Court of Justice in Luxembourg on the application of one of the most sensitive and contested provisions under negotiation, Article 8, the rule concerning which Member State should hear the case of an unaccompanied child for whom no family member or relative within Europe has been identified.

The judgement in Case C-648/11, MA and Others v UK was delivered in June 2013, just before the scheduled adoption of the Dublin III Regulation, and not only the adoption of the Dublin III Regulation but also the recast Asylum Procedures Directive. Rather than take the risk of reopening difficult negotiations on this package, the European Parliament and Council agreed basically to go ahead with the adoption of the rules already on the table and take any necessary action to amend the specific provisions on unaccompanied children without family members in line with the judgement of the European Court of Justice afterwards.

We can expect the Commission to publish a proposal to amend the recast Dublin III Regulation and in particular Article 8 shortly. It will need to be agreed by the European Parliament and the Council. In fact, we have seen countries have interpreted the ECJ judgment in a variety of different way, so care will be needed in negotiations.

In the meantime, the Dublin III implementing rules have also been amended and they set out an information leaflet for unaccompanied minors and standard forms which can be drawn on by Member States when identifying whether family or relatives are in other countries and indicating means of proving, and the degree to which such means are reliable.

The next step is the adoption of so-called delegated rules by the Commission, in close consultation with the European Parliament and Council. These will be obligatory rules and address the arrangements by which countries should identify family members and relatives, the proof they should accept, how they will address whether relatives can take care of the child. The Commission has begun consultations on these issues, but the process will take some time.

So there is still an opportunity to shape the rules and their application.

II. Key features of the Dublin system which affect how it works

There are some important features to consider in relation to the Dublin system, namely the fact that it concerns both asylum and child protection laws, its transnational character and the fact that it involves difficult and sometimes "hidden" issues for children.

1. Dublin III rules for unaccompanied children involved the intersection of asylum and migration control and child protection laws: How to reconcile a range of responsibilities and goals?

The rules on who should decide on the asylum claim are there to enhance clarity, ensure efficient administrative action. The rules also clearly need to ensure that children are not exposed to risks. And being at an intersection of these different responsibilities means that it not always clear how the various priorities are reconciled, what guiding principles apply, who has the right of way.

For example, different actors may be responsible for different goals, with immigration officials concerned with the asylum regime and child services involved in protecting children. So when two responsibilities "meet", which actors take the lead in deciding what needs to happen and have they the right mandates to do so? Or how do these actors cooperate in this field?

The recast Dublin III rules bring some progress in this regard, requiring the involvement of trained officials and giving a stronger role to guardians of unaccompanied children. Let's build on this progress.

2. The transnational character of these rules: Dublin III involves cross border arrangements which of their nature raise the risk of significant differences in approach: so are the necessary forms of cooperation in place and understandable?

Dublin III requires countries to examine and reach decisions on the situation of a child that may be of concern to a number of countries either because the child is or has been in that country, or they have family members or relatives in that country. Consequently, different pieces of the puzzle are in different countries and they should be brought together.

More specifically, this involves countries working together on issues such as:

- Identifying where a child or their family has been;
- Identifying where family members or relatives are located
- Establishing ability to take care of child
- Establishing best interests of child
- Establishing arrangements for transfers

We need to be sure that is clear which tasks are for each Member State, and which actors are involved. It needs to be clear who is responsible for gathering information, who is responsible for assessing the information. These decisions may be influenced by different approaches and cost concerns.

3. Particularly sensitive and difficult issues when children are involved but they are not always really identified when countries are applying the rules, let alone addressed.

We need to avoid potential “black holes” in the rules or their application. Here are just some of them:

- *Invisible children*: Children are often treated almost like passive objects attached to adults. Will the circumstances of the child within a family be examined before a transfer decision is taken?
- *Case closed*: what happens when a child is in one country and a decision has been made already in another country when they moved, even where a decision on his or her application has been made in his or her absence? In some cases, the child might not even know an application was made on their behalf when they entered Europe.
- *Child or adult*: Should a child be transferred back to a country without a firm agreement on the child’s age between Member States? It has happened that a person considered and supported as a child crosses a border between two Member States, only to “transform” into an adult who is not entitled to any special protection or assistance.
- *Assumptions*: although decisions may refer to the best interests of the child, decision makers sometimes seem simply play lip service to this principle of best interests, acting on assumptions rather than examining individual circumstances. Failing to investigate may mean that risks are ignored, including the risk of someone being in the hands of traffickers.

PART III: PRINCIPLES AND PROCEDURES

A word on the central changes in the Dublin III regulation for children.

Best interests’ principle

It is now clear that the best interests’ principle applies in relation to all actions under the Regulation and must be considered by reference to a list of factors, inspired by General Comment No 6 of the UN Committee on the Rights of the Child on unaccompanied and separated children outside their country of origin. However there is not yet a clear indication of what process leads to decision making on the best interests, nor who is involved.

The principle should also guide decision-making in relation to the transfers of children within families. This should be considered more systematically.

More options under Dublin III for unaccompanied children

There is now an enhanced opportunity for reunification with family members as well as with relatives, subject to an individual examination.

Improved Engagement with, and support for, the child

Engagement with and support for the child is enhanced by information requirements, and the development of a specific information leaflet for children. There is also provision made for the involvement of a representative in the interview with the child and in the examination of the situation of the child. The Dublin III representation provisions also provide clearer indications of the role of the representative to safeguard the best interests of the child and the qualifications needed to act as a representative. More generally, actors addressing children are subject to training requirements.

Ongoing challenges in focus

We need to think carefully about the real challenge of efficient decision making and the more complex process of examining the circumstances of individual children, or the safeguards in how to do it. It is very welcome that the European Court of Justice clearly acknowledged that the best interests' principle is central to decision-making in relation to children. However, it also appeared to establish a general rule which equates the best interests of the child with staying in the Member State in which they were found. In this regard, it can be contrasted with the earlier opinion of the Advocate General which posited a similar ruling but specifically noted the need in exceptional circumstances to allow for the transfer of a child to another country if her/his best interests so required. In the new rules, there need to be safeguards that the individual circumstances of the child will be considered. One possibility is involving guardians more closely in the process, which would require ensuring that the guardians are adequately equipped to do so and acknowledging that timing under Dublin is quite tight.

Assessing the care of the child by a relative in another country is another sensitive issue and we need to think carefully about it. What does care mean? Is it clearly defined? Who and how is the capacity assessed?

Take one concrete question: Does care concern day to day care? Or does it involve playing the role that a guardian does? This is relevant to whether a guardian is appointed to an unaccompanied child transferred to Sweden to the care of an aunt. If the aunt is considered to be the adult responsible for the child, the child may not be entitled to the assistance of a guardian. So when the care by the aunt is assessed it needs to take into account these factors.

As a more general point on the application of the Dublin III rules, we must remember that they are one part of the overall picture. From a child protection perspective, arguably, we should never be applying these asylum rules in isolation. The broader obligation for Member States when addressing the situation of an unaccompanied child is finding a durable solution for the child, asylum is a part of this picture. We must consider the application of other relevant measures. For example, the interaction of the EU Trafficking Directive with the Dublin III rules may require consideration of how much time should be allowed for decisions on transfers.

Looking to the Future

From these reflections on Dublin III, which are by no means comprehensive, let's turn to the future. What avenues are open to addressing these issues? These include contributing to the negotiations of new amending Regulation and delegated rules. It

should be recalled that this is not just a Brussels advocacy exercise before the Brussels based actors, it involves national advocacy before Member States. Secondly, is the important exercise of contributing to how member states implement the rules. The Commission hosts so-called "contact committees" of national representatives on the implementation of the rules and these meetings sometimes include the contributions of experts in the field. Some organisations here today may have particular expertise on cross border assessment of care for example.

There are also a number of ongoing practical projects that can be undertaken to create better approaches. Some projects are already underway, including one led by the Dutch guardianship authority, Nidos and another led by IOM with the involvement of Save the Children. Further EU measures of support could be adopted, including development of training, guidance on promoting a multi-disciplinary approach, promoting inter-agency cooperation.

In conclusion, the challenge (and opportunity) before actors is how best to play a role in the collective work of effective and efficient cross border cooperation on child protection. Thank you to the Council of the Baltic Sea States for the opportunity to contribute through this seminar.