

2. TYPES OF EU LEGISLATIVE PROVISIONS RELEVANT TO CHILD FRIENDLY JUSTICE

We will now review the kinds of provisions that are contained in EU legislative instruments that directly concern child friendly justice.

This recent wave of legislation from the EU on matters including asylum, trafficking, child sexual abuse and exploitation and victim's rights all contain specific safeguards particularly relevant to children falling within the procedures concerned. The following examples illustrate the range of mechanisms deployed.

DEFINITION OF CHILD & OFFENCES AGAINST CHILDREN/CHILD SPECIFIC GROUNDS FOR INTERNATIONAL PROTECTION

Better definitions to inform the application of the law

- Introduction of a definition of a minor: The introduction of a definition of a minor in the international protection measures, in line with the UN CRC, as a person under 18 years of age, ensures clarity and the general application of safeguards for children to all persons under 18.

Provisions recognising the need for age assessment procedures:

- The EU Asylum Procedures Directive introduces a measure on age assessment procedure. As noted before, determining age can trigger the application of specific safeguards for children, including representation.
- The EU trafficking Directive also contains a provision providing for the application of the benefit of doubt in favour of the individual where age is uncertain:
Member States shall ensure that, where the age of a person subject to trafficking in human beings is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with Articles 14 and 15.

Definitions of offences relating to children/grounds for child claims

- The EU Anti-Trafficking Directive contains a specific definition of child trafficking which contrasts with that of adults. More specifically it provides that:
The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.
A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved.
Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.
The consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 has been used.
When the conduct referred to in paragraph 1 involves a child, it shall be a punishable offence of trafficking in human beings even if none of the means set forth in paragraph 1 has been used.
- The Sexual Abuse Directive harmonises around twenty criminal offences against children.
- In the context of international protection, the Asylum Qualifications Directive speaks of acts of persecution as including acts of a child specific nature. In line with the UNHCR Child Asylum

Claims Guidelines, this means that decision-makers should both so-called “child-related manifestations of persecution”. This refers to actions or threats that might not reach the threshold of persecution in the case of an adult may amount to persecution in the case of a child because of the mere fact that s/he is a child. It also means that decision makers need to take into account that children may also be subjected to specific forms of persecution that are influenced by their age, lack of maturity or vulnerability (“child specific persecution”). The fact that the refugee claimant is a child may be a central factor in the harm inflicted or feared. This may be because the alleged persecution only applies to, or disproportionately affects, children or because specific child rights may be infringed. This may include under-age recruitment, child trafficking and female genital mutilation.

BEST INTERESTS’ PRINCIPLE

Factors To Be Assessed

- The “first generation” of legislative instruments contained references to the application of the best interests’ principle, but often appeared to be paying lip service to the principle (through a short reference, sometimes in the recitals).
- More recent EU instruments, including the recast EU Asylum Reception and Procedures instruments, are notable for the fact that they indicate the factors which should be taken into account when assessing the best interests of the child.

Outcomes Which Are Specifically Relevant For Children Taking Into Account Their Best Interests

- Although the EU Trafficking Directive was not generally intended to deal with the immigration status of trafficked persons, in relation to unaccompanied trafficked children, it did establish provisions in relation to more long term solutions for the situation of unaccompanied children.
- More specifically, it addresses durable solutions, noting in the recitals that *“a decision on the future of each unaccompanied child victim should be taken within the shortest possible period of time with a view to finding durable solutions based on an individual assessment of the best interests of the child, which should be a primary consideration. A durable solution could be return and reintegration into the country of origin or the country of return, integration into the host society, granting of international protection status or granting of other status in accordance with national law of the Member States.”* The Directive obliges Member States to establish measures for identifying durable solutions.

RIGHT TO INFORMATION & RIGHT TO BE HEARD

Child specific information:

- An example of new information requirements is the information leaflet for children that should be provided to explain in which country their asylum claim will be heard. (Dublin Regulation)

Access by children to procedures

- Ensuring children have better access to proceedings is a precondition to child friendly justice and the new provisions in the EU Asylum Procedures Directive have been introduced to address when and how children can make applications. This compares well with the original Asylum Procedures Directive in which children were virtually invisible, except for some provisions on unaccompanied children.

Right of child to be heard

- Special interview procedures are contained in the Trafficking Directive, the Sexual Abuse Directive and the Directive on victims. These recognise that great care needs to be paid to how information is elicited from children and evaluated.
- Under the Brussels IIa Regulation, failure to respect a child's right to be heard is a ground for not recognising judgements in matters of parental responsibility.

Access to redress

- The Victim's Directive contains the provision that a victim is entitled to obtain a decision on compensation by the offender within a reasonable time in the course of criminal proceedings, except where national law provides for such a decision to be made in other legal proceedings. Member States are also asked to encourage offenders to pay compensation to victims.

ACTORS INVOLVED

Guardianship/Representation for children

- Both the recast EU asylum instruments and the EU Trafficking Directive contain provisions on guardianship/representation although they allow Member States considerable discretion in their implementation, for example, the Trafficking Directive which allows States to provide unaccompanied children who have been victims of trafficking with guardians, "where necessary". Nonetheless, the instruments nonetheless provide valuable recognition to this vital safeguard and the European Court may be the ultimate arbiter of when the appointment of guardians is necessary.

Legal assistance

- Legal assistance is made available to children in a variety of forms in the new legislation.

Training of professionals engaged with children

- Provisions in the recast EU Asylum Reception Directive provides that those working with unaccompanied children shall have had and shall continue to receive appropriate training concerning their needs, and shall be bound by the confidentiality rules provided for in national law, in relation to any information they obtain in the course of their work.

CHILDREN'S RIGHTS TO PROTECTION

Assistance to children who have been sexually abused, trafficked or otherwise the victim of crime

- Individual assessment of special needs of children, and provision of services

Specially Adapted Procedures

- Provisions to ensure children do not have to confront defendants in court; avoiding visual contact, ensuring that the victim may be heard in the courtroom without being present, avoiding unnecessary questioning about the victim's private life unrelated to the criminal offence; recording interviews;

Protection of Privacy

- In the interests of child victims, the Victim's Directive provides that authorities must prevent information that could lead to their identification being publicly disseminated.

Non prosecution and non-punishment provisions

- Both the Trafficking Directive and the Sexual Abuse Directive contain provisions of these kind for children who have been trafficked.

Detention

- The EU International Protection instruments contain provisions relating to the detention of children within families and children travelling alone or separated from adults who are primarily responsible for their care.

Cross border procedures

- EU law is uniquely positioned to create jurisdictional rules between Member States on cases concerning children which it has done in the case of matters of parental responsibility (Brussels IIa) and in matters of allocating responsibility for determining asylum claims, where an asylum applicant travels within the EU (Dublin II regulation). Information exchange between jurisdictions is also established.