# Comments of the Federal Association for Unaccompanied Refugee Minors (B-umF) on the Reform of the Common European Asylum System

The Member States of the European Union are currently negotiating about a reform of the Common European Asylum System (CEAS). Fundamental changes in the existing regulations and directives may be expected. Since the reform plans were published in spring 2016, the Council and European Parliament have already amended a number of points. The proposals of the European Commission are mainly aimed at preventing the secondary migration of asylum seekers within the EU, so that asylum seekers stay in the Member State that is first responsible for them. According to the Commission, secondary migration is one of the main reasons for the crisis in the Dublin system and the disagreement between the EU Member States about the common refugee and asylum policy. The reform proposals have already been criticised by a broad civil society coalition.[1] The central criticism is that the CEAS reform misses the point of its problems. B-umF completely agrees with this.

So far, however, there has been no analysis and critique specifically concerned with how the Commission proposals could change the situation of unaccompanied refugee minors and refugee families. According to the assessment of B-UMF, the reform will have distinct impacts on their access to the asylum process and appropriate protection for them. It will also impact on the living conditions and future prospects of unaccompanied minors and refugee families, as well as on intra-European family reunification. The particularly serious thing about the reform proposals is that, if they are implemented in their present form, they will reverse the standard of protection for minors achieved in the EU in the last few years and largely undermine the case law of the Court of Justice of the European Union (CJEU).

B-umF's general criticism is that the minors and their families will bear the brunt of the current disagreement among the EU states on refugee questions. At the same time, their basic right to asylum and their right to a life with dignity will be put at risk.

[1] Refugee Policy in Europe – No to this Dublin Regulation!
https://www.proasyl.de/wp-content/uploads/2015/12/No-to-this-Dublin-Regulation;
Pro Asyl, Statement by PRO ASYL on the planned EU asylum package, of 22.11.2016, accessible at: https://www.proasyl.de/wp-content/uploads/2015/12/Kommentar_Asylpaket-EU-PRO-ASYL.pdf [1.12.2017]; DAV (German Bar Association), Statement 67/2016;
Caritas Germany, Comments on the Dublin-IV-Regulation, May 4th 2017., accessible at: https://www.caritas.de/cms/contents/caritas.de/medien/dokumente/stellungnahmen/stellungnahme-zur-du/nc11_2017_doku_dublin-iv-verordnung_v2.pdf [1.12.2017].



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# Summary: Impact of CEAS reform on unaccompanied refugee minors (pp.4-11)

## Transfers of unaccompanied minors to become possible in order to prevent secondary migration (Art. 10 Dublin Regulation (recast) – here 'Dublin IV')

Dublin transfers of unaccompanied minors that are not for the purpose of family reunification and do not consider the children's interests are contrary to European law and children's rights. Moreover, they do not serve the purpose of preventing secondary migration. It is to be feared that, time and again, minors will set out on their own to go where they want to go. The consequences will be that they lack protection and are 'illegalised'. Article 10(5) Dublin IV must therefore be amended to ensure that where unaccompanied refugee minors have no family members in the Dublin area,[2] the place of their current presence, or that of the last submitted request for asylum, is the basis for deciding on the country responsible. Moreover, the reversal of the burden of proof must be deleted.

## Legal representation (here: Asylum Procedures Regulation (proposal), Reception Conditions Directive (proposal), Dublin IV [proposal])

It must be guaranteed that as long as minors have no legal capacity and no legal representation, acts or steps that would be legally disadvantageous have no effect; any duties connected with their application can only arise once legal representation has been appointed. Only then can e.g. time periods for lodging legal remedies begin to run. This issue is not adequately guaranteed in the current drafts.

## Age assessment (Art. 24 Asylum Procedures Regulation [proposal])

All methods incompatible with human dignity, particularly genital examinations, must be expressly excluded. In order to safeguard the child's best interests it is necessary to establish legal protection against age assessment more clearly, and to guarantee binding procedural standards. Furthermore, the medical procedure to assess age must be clearly termed a last resort.

## Asylum applications for unaccompanied minors (Art. 32 Asylum Procedures Regulation [proposal])

A 10-day period is foreseen for filing applications for international protection (asylum applications).[3] B-umF recommends dropping this deadline in order to be able to consider child-specific grounds for fleeing and to find a child-friendly procedure. Depending on national law, there must also be an opportunity to weigh up when an asylum procedure can be initiated for every child and young person, or when another form of securing the residence better serves their best interests.

## Special procedure (Art. 40, 41 Asylum Procedures Regulation [proposal])

Minors must be exempted from accelerated procedures and border procedures. In addition, the detaining of minors must be expressly prohibited in the CEAS. The procedures set out in these articles are under no circumstances compatible with children's rights.

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[2] This covers the EU Member States plus Norway, Iceland, Switzerland and Liechtenstein.

[3] The application for international protection is equated here with an asylum application. The expression is only used to make the point more clearly.

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# Summary: Impact on refugee families (pp. 11-14)

## Insufficient extension of the concept of family (Art. 2(g) Dublin IV [proposal])

B-umF welcomes the planned widening of the concept of family. In order to reflect the real experiences of young refugees, the reunification must, however, refrain from focusing on reuniting certain family members and include persons close to the child.

## Preliminary examination before an application for asylum (Art. 3(3) Dublin IV [proposal])

In future the substantive examination of an application for asylum is to include an obligatory admissibility procedure. Asylum applications from persons from 'safe countries of origin' are accordingly to undergo an accelerated examination as soon as they arrive in the state of entry. This country, which is generally one of the already completely overburdened EU border states, is then to remain permanently responsible. Asylum applications from persons coming from a safe third country are to be directly rejected as inadmissible. That implies a risk to a large number of refugee families that their need for protection will not be examined, family reunification will be hindered and the access to appropriate services will be considerably restricted.

## Family reunification in the Dublin procedure (Dublin IV [proposal])

Failed and prevented or impossible reunification of family members already in the Dublin system are one of the main reasons for secondary migration. Nevertheless, the current proposals for reforming Dublin IV do not make the reunification of family members living inside Europe any easier.

## Exclusion of sovereignty clause (Art. 19 Dublin IV [proposal])

So far families have been able to live together at the same place and undergo an asylum procedure there. This was thanks to the Member State that was not responsible for the case exercising its right to declare itself competent. Now this is excluded for the close family members. It must become possible to declare competence without any conditions, in order to balance out the lack of flexibility within the Dublin system and enable the Member States to declare exceptions for humanitarian or integration policy reasons.

## Refugee families in orbit (Art. 30 Dublin IV in connection with Art. 5(3) and 17(a) Reception Conditions Directive [proposal])

Owing to the abolition of deadlines, the Member State of first entry will in future remain permanently responsible for the asylum procedure, also for asylum seekers who have migrated further. Their access to social rights and medical care will be considerably restricted. Poverty and homelessness of families with children, rising crime, powerlessness and a lack of perspective of whole generations would be the result. Children will be affected, as well as their parents. They will become "families in orbit".

## Transfers in spite of unsuitable reception conditions (Art. 26 Dublin IV [proposal])

The receiving state is only to be informed of an imminent transfer by the transferring state. It will no long need to agree to this. Individual reception and care guarantees for families to be transferred will not need to be given or made a precondition. Refugee families will then be threatened with transfer to states in which dignified treatment is not guaranteed.

## Preliminary comment: The concept of the child's best interests

The concept of child welfare is not defined by law at the national or international level. After all, how the child's best interests are fostered is generally decided by the parents or guardian. The right can, moreover, not define with universal validity what only takes tangible form in the individuality of the child's development, family relations and parental care. Last but not least, another relevant factor here is that the idea of what corresponds to a child's best interests is subject to constant societal change and varies according to the family's regional, social and cultural background.[4]

Ascertaining a child's best interests can therefore only be a matter of approximation. **The central point of departure** must therefore always be the perspective and opinion of the child, which is also set forth in European primary law pursuant to Article 24(1) Charter of Fundamental Rights of the European Union (CFREU).

The involvement of minors and the consideration of their opinion in the procedures concerning them is therefore a *conditio sine qua non* for the effectiveness of the legal acts and legislation affecting them.

In particular, that means guaranteeing that

- The minors are accompanied from the start by a qualified legal representative who is also responsible for their care,
- They are informed at every stage in the proceedings about the state of their case in a language they understand,
- They are put in a position to tackle all decisions affecting them with the assistance of their legal representative, and
- There is a special obligation to give reasons if a decision does not give priority to the welfare of the child.

Giving primary consideration to the child's best interests no nationality, it applies to all children.[5] The following statement is not a final consideration of the CEAS reform project. Rather, the points described concentrate rather what we see as the particularly serious efforts to change the situation for unaccompanied refugee minors and refugee families in the proposals for the Dublin IV Regulation,[6] the Asylum Procedure Regulation[7] and the Reception Condition Directive.[8]

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[4] On the concept of the child's best interests in the national and European Fcontext and under international law, see Meysen, T./González Méndez de Vigo, N. 2013, Kindeswohlvorrang nach Art. 3 Abs. 1 KRK und unbegleitete minderjährige Flüchtlinge, Forum Jugendhilfe, pp. 24-32.

[5] The concepts of 'child' and 'minor' are used as alternatives and mean here persons under 18 years of age.

[6] COM(2016) 270 final 2016/0133 (COD) Proposal for a Regulation of the European Parliament and the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (recast), 4 May 2016).

[7] COM(2016) 467 final 2016/0224(COD) Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

[8] In the following, the text always refers to the proposals for amending the legal acts.

# 1. Impact of the CEAS Reform on unaccompanied refugee minors

## 1.1. Transfer of unaccompanied refugee minors

The Commission proposal in the Dublin IV Regulation relative to unaccompanied minors has the prime aim to prevent their secondary migration within Europe.[9] In order to achieve this, the new Dublin system wants unaccompanied minors who have moved to another EU Member State to be transferred back to the one where they first applied for asylum, unless this is contrary to their best interests (Art. 10(5) Dublin IV). The Commission justifies the assumption that children's best interests are best safeguarded in the state of first responsibility by speeding up their procedures in the country of first entry and thereby achieving a quicker access to protection.

Appealing against CJEU case law

With the same argumentation, the CJEU in 2013[10] came to a completely different conclusion. Differently from the case of adults, the key issue for gaining rapid access to protection need not be that the child is in the country where they first entered or made an application and that this is the essential ground for responsibility. Rather, the place where the last application for asylum was filed is the essential factor, assuming the child is actually present there. After all, quicker access to protection and services is only guaranteed if the material examination of the request for protection is not preceded by long-drawn-out examination of responsibility with a possible transfer procedure, and if access to protection is guaranteed at the place of actual whereabouts – independently of the first state of entry. This systematic thinking is not new – on the contrary: most rules seeking the protection or welfare of minors link the competence of the authorities/offices addressed with the actual presence as an easily examinable criterion of responsibility that is most likely to guarantee rapid and effective protection. Examples are Article 6 Hague Convention of 1996[11] and Article 13 Brussels II.[12]

The primary legal validity of the Charter of Fundamental Rights means that this CJEU case law must also be taken into account with the recasting of the Dublin Regulation. Moreover, Germany's Federal Administrative Court[13] has endorsed the case law of the CJEU.

By contrast, the Commission argues, it is only on grounds of the permanent responsibility of the country of first entry/application and of the assumed best interests of the child in this country that an accelerated examination of responsibility can be carried out and minors thus receive the

[9] Op.cit in footnote 6, recital 20

[10] In its judgment M.A. and others v. SSHD (CJEU C-648/11 of 6 June 2013) the CJEU noted, based on the idea of the child's best interests under Art. 24(2) CFREU:
"Since unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State (para. 55)."

[11] Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (Hague Convention of 1996).

[12] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

[13] BVerwG 1 C 4.15 of 16 November 2015. At the same time, the court decided that the provisions on competence for asylum applications of unaccompanied refugee minors have the character of individual protection and consequently give those concerned a subjective right (ibid., marginal comment 25), that they can use to protest against a forced distribution.

due protection more quickly. This argumentation is inconsistent, however, and does not reflect the reality of the young refugees. It presupposes that the examination of responsibility takes place **before** the minor has left the country of first application and travelled on to another country. Only in such a case can this examination of responsibility lead to an accelerated access to protection. The question of responsibility only arises, however, when the young person is no longer in the country of first entry and has migrated further. In these cases, the settling of which state is responsible only prolongs the proceedings and additional obstacles are placed in the way of access to protection.

Reversal of the burden of proof under Article 10(5) Dublin IV is incompatible with the primacy of the child's best interests

Moreover, it is also unclear whether and how the children have to prove that it reflects their best interests to stay in the country they are currently in as against being returned. Reversing the burden of proof as the Commission seems to propose in Art. 10(5) Dublin IV contradicts the principle of the primacy of children's best interests enshrined in the Charter of Fundamental Rights, which constitutes binding primary law for the Commission. The young person does not have to prove that an action serves their well-being; rather, it is up to the public authority concerned to give "primary consideration" to the mandate of the child's best interests (Art. 24(2) CFREU).

Besides the considerable legal doubts about the mooted reversal of the burden of proof, the proof that Article 10(5) Dublin IV requires children to bring will hardly be feasible. Through their legal "representatives/guardians" or "temporary representatives/guardians" they have to give grounds for why, contrary to supposition by the law, the competence of the country of first entry, and thus being returned to it, does not correspond to their best interests. Firstly, it will hardly be possible, in such a short time, to enable an adequate examination of the child's best interests, particularly one taking account of the complex international context. Secondly, the representatives themselves often do not have the necessary specialist knowledge and background information about the children. Acting at the local level, they often also find it difficult to obtain sufficient information about the structural services in the state of destination. Furthermore, many Member States have no experience with the appropriate reception of unaccompanied refugee minors; they lack the institutions, trained personnel and educational and social programmes corresponding to the interests and life reality of unaccompanied minors. This was documented extensively by, e.g. the Hungarian Helsinki Committee in a report on the situation of refugee children in Hungary.[14] The CEAS system provides few incentives to creating appropriate structures.

In practice, the reversal of the burden of proof would mean that careful examinations would no longer be undertaken and the obligation under Articles 8(3) and (4) Dublin IV would not be upheld. Ultimately, the Member States concerned decide on the basis of their own burden of the cost involved in examining the child's best interests and they will therefore have an interest in being able to transfer the children concerned under Art. 10(5) Dublin IV. It is, moreover, to be feared that children who are transferred without consideration of their special need for protection will time and again set out by themselves in order to reach their desired destination. The consequences would be a lack of protection and the children would place themselves in an illegal situation.

This being so, the reversal of the burden of proof must be abolished.

[14] Hungarian Helsinki Committee, Best Interest Out of Sight - The Treatment of Asylum Seeking Children in Hungary, Budapest 2017, accessible at http://www.helsinki.hu/wp-content/uploads/Bestinterestoutofsight.pdf [31.08.2017].

In addition, the B-umF calls for the full implementation of CJEU case law from its judgment M.A. and others v. SSHD, CJEU C-648/11 of 6 June 2013. In order to protect under-18-year-olds from dangers and actually guarantee the rapid access to protection and support, the responsibility for conducting the asylum procedure under the new Dublin IV Regulation must be based on the actual presence of the unaccompanied children, or alternatively depend on where they filed their last application for asylum.

## 1.2. Representation of unaccompanied refugee minors

Legal representation ('guardian') and care for the young person

In the negotiations about the CEAS and in the Member States themselves there is disagreement about how to organise the legal representation of the unaccompanied minors in the context of reforming the CEAS. The practice is that an important reason for secondary migration of unaccompanied minors is the lack of suitable contact persons after their arrival in Europe. In the EU Member States there are different models and institutions for the care, accompaniment and representation of the unaccompanied minors. The disparate systems function with varying degrees of efficiency.[15]

With the goal of improving and unifying the protection of children and avoiding child trafficking, the EU Agency of Fundamental Rights (FRA) (inter alia) has found out in a comparative study, that not only legal representation – e.g. in the asylum procedure – must be guaranteed (a "representative"). The person accompanying an unaccompanied minor "[…] safeguards the child's best interests and general well-being, and to this effect complements the limited legal capacity of the child, when necessary, in the same way that parents do".[16] The FRA understands this description of tasks to cover the concept of guardian. The Commission referred to this[17] and uses the term 'guardian' inter alia in Asylum Procedure Regulation and Reception Conditions Directive, outlining the areas of activity more clearly. This was regarded as a step in the direction of improving the protection of minors.[18] According to the current negotiating paper[19] this step has, however, been taken back for now, which is regrettable. Now the term 'representative'[20] is to be used again, which, as has been shown in the past, is more likely to be mistaken for a purely

[15] For a certain overview see Agency for Fundamental Rights (FRA), Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking, p. 21 ff.
[16] Agency for Fundamental Rights (FRA), Guardianship for children deprived of parental care – A handbook to reinforce guardianship systems to cater for the specific needs of child victims of trafficking, p. 22, accessible at http://fra.europa.eu/en/publication/2015/guardianship-children-deprived-parental-care [31.08.2017].
[17] COM(2016) 467 final 2016/0224(COD) Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, Introduction, p. 14.
[18] Also UNHCR, 12/2016, Comments on the European Commission proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) – COM (2016) 270, p. 35, accessible at http://www.refworld.org/pdfid/585cdb094.pdf [1.12.2017].
[19] Council of the European Union, Presidency, Theme: "Guarantees for those with special needs" of 09.02.2017, accessible at http://statewatch.org/news/2017/feb/eu-council-asylum-procedures-guarantees-special-needs-5939-17.pdf [31.08.2017].
[20] 'Representative' is defined as follows in Art. 2 (k) Dublin IV: "'representative' means a person or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures provided for in this Regulation with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary.[…]"

legal representative, who - as frequently seen in practice in many Member States - does not look after the child's best interests.[21]

Quite apart from CEAS terminology and requirements, the Dublin signatory states still have obligations on the basis of international law on the rights of the child. These obligations remain, independently of whether an unaccompanied minor has filed an asylum application or not. The authorities which are objectively competent under Brussels IIa and the 1996 Hague Convention, internationally and under national law (GERMANY: youth welfare offices and family courts), are therefore obliged to take the necessary decisions and measures in respect to parental care and the protection of minors.[22]

Protecting minors calls for them to be represented and for child/youth-friendly reception from the start

In the Commission's original version, Article 8(2) of the Dublin Regulation provided for the appointment of a 'representative' for the child only in the responsible Member State. By contrast, the child was not to be appointed a legal representative in the state of his or her actual whereabouts. We welcome the fact that the current proposals on Article 8(2) Dublin IV deviate from this intention.[23] Such an arrangement would be manifestly contrary to children's rights and illogical. The examination of responsibility and transfer under Article 8 in connection with Article 10 Dublin IV is untenable under the rule of law without a legal representative (violation of effective legal protection under Article 19(4) GG – German Basic Law) and likewise violates Article 12(2) of the UN Convention on the Rights of the Child (UN CRC), which provides for obligatory representation of the interests of vulnerable children.[24]

And yet the present CEAS proposal also contains a (legal) gap in protection: according to the present proposals for Article 22 Asylum Procedure Regulation[25] and Article 23 Reception Conditions Directive,[26] unaccompanied minors are to receive an initially provisional 'representative' only after 48 hours. Before this point in time, they will be unprotected and it is unclear what will - or may - happen to them. If there is no access to protection, there is a particularly high risk of their falling into smuggler or human trafficker networks right after they arrive in a new country.

Against this background, we cannot insist enough that the initial responsibility for receiving, accommodating and deciding the age of all unaccompanied minors – including the over 16-year-olds – lies from the start with the authorities responsible for child safeguarding. They alone, or their professional staff, have the necessary expertise to identify such threats, receive the children appropriately and estimate their age in a way geared to their best interests (on this term see I.3.

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[21] Also according to the UNHCR, 12/2016, on the European Commission proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the member
state responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) – COM (2016) 270, p. 35, accessible at http://www.refworld.org/pdfid/585cdb094.pdf [31.08.2017].
[22] Art. 8/13, 20 Brüssel IIa-VO, Art. 5/6 HCCH.
[23] Council of the European Union, Presidency, Theme: 'Guarantees for those with special needs' of 9 February 2017, p. 20, accessible at http://statewatch.org/news/2017/feb/eu-council-asylum-procedures-guarantees-special-needs-5939-17.pdf [2.12.2017].
[24] Quoted in DAV, Statement N°.: 67/2016, p. 9.
[25] Council of the European Union, Presidency, Theme: 'Guarantees for those with special needs' of 10 April 2017, p. 2, accessible at http://www.statewatch.org/news/2017/apr/eu-council-asylum-vulnerable-8043-17.pdf [2.12.2017].
[26] Ibid.

below).[27] There is no objectively justifiable reason – certainly not from the angle of children's rights – to distinguish between under- and over-16-year-olds. Minors as holders of children's rights are defined both in the CEAS system and under the UN CRC as persons under 18 years of age.[28] Article 23(2) sentence 2 Reception Conditions Directive allows Member States to accommodate over-16-year-olds in adult accommodation and this provision must therefore be deleted.

Furthermore, according to the general principles of protection of minors, no legally effective decisions can be taken vis-à-vis them. Emergency situations are a different case, i.e. imminent danger that calls for averting acute danger to children's best interests or taking steps to protect them.

Assurance must therefore be given that – as long as no legal representation has been arranged for minors without legal capacity – they can be neither obliged to take legal actions nor may any such actions be taken in respect of them. The latter can only take place on the instruction of the legal representative when the decision is also delivered to the 'guardian' with an appropriate period of notice in due form enabling recourse to legal remedies.

## 1.3. How to "determine the age of unaccompanied minors" (Art. 24 Asylum Procedure Regulation)

Order of criteria for examination

Regrettably the Commission proposal again stipulates medical procedures to assess age instead of excluding them. Medical procedures suggest an apparent objectivity to produce allegedly valid data, which do not correspond to reality. There is so far no scientifically recognised procedure to assess a person's actual age, as has been shown by the European Asylum Support Office (EASO).[29]

This must also be reflected in the corresponding standards. For this reason, the Asylum Procedures Regulation must contain a clear exclusion of medical procedures to assess age. At least it must be made clear that even a medical procedure is ultimately only an age assessment. At present this is not the case, since the results of a medical examination are in principle binding on another Member State: medical examinations therefore take on great importance. Considering the priority of the child's best interests, and the opinion of the minors in all matters affecting them, a clear order of criteria for examination must be established in this regard. It must give prime consideration to the statements and viewpoint of the child, lay down a procedure for so doing (Art. 24(1) sentence 3, (2) CFREU) and clearly name medical methods as *ultima ratio*. At the same time, this means that a medical examination must never be the sole basis for decision. Rather, EASO recommends guaranteeing and using a "multidisciplinary and holistic approach".[30]

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[27] E.g. Dublin iv, Art. 1; CRC Art. 1.
[28] Art. 1 UN Convention on the Rights of the Child; Art. 2 i DublinVO-E; Art. 2 i Regulation (EU) 604/2013 (Dublin-III-VO).
[29] EASO, Age assessment practice in Europe, 2013, Chapter 3, p. 24, https://www.easo.europa.eu/sites/default/files/public/EASO-Age-assessment-practice-in-Europe1.pdf, [2.12.2017].
[30] Ibid.; UNHCR/UNICEF, 06/2016, Safe & Sound: Welche Maßnahmen Staaten ergreifen können, um das Kindeswohl von unbegleiteten Kindern in Europa zu gewährleisten, p. 34 ff., accessible at https://www.unicef.de/informieren/materialien/leitfaden-safe-and-sound/113624 [2.12.2017]; ECRE, Comments on the Commission Proposal für an Asylum Procedures Regulation, p. 26, accessible at https://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf [2.12.2017].

Any methods incompatible with human dignity must be expressly ruled out, particularly the examination of genitals.

Procedural rights and effective legal protection

Something else that is completely lacking in the existing proposal is an explicit description of children's procedural rights. It should contain detailed, binding procedural standards under positive law. B-umF has already explained this in detail.[31]

Accordingly, the Member States must be obliged to give appropriate consideration to the children's social, traumatic and physical experiences. In addition, a procedure for estimating age must not be initiated if no legal representation has been arranged yet, as proposed in Article 24(2) Asylum Procedures Regulation for the medical procedure (on the representation of unaccompanied refugee minors see 1.2 below). Furthermore, the age assessment process must be carried out by professionals with pedagogical training, or the competence for it must lie with the authorities responsible for child safeguarding. It must therefore be guaranteed that they are the ones with prime responsibility for identifying and taking charge of unaccompanied minors. There must be guarantees that the children are heard at every point in the proceedings and that their views are appropriately taken into consideration in matters which concern them (Art. 24 CFREU). Likewise, at all stages in the age assessment process, the minors must be kept informed of their individual options; the assessed age must be communicated not just orally but also in writing, in a form suited to an appeal against it (see p. 4 on the concept of the child's best interests).

In addition, there should be a rule to clarify how to deal with further doubts. Protecting minors means giving them the benefit of the doubt on the age question. This needs to be stipulated under positive law for the sake of legal certainty.

In order to safeguard the best interests of the child and the rule of law, it is also necessary to ensure that legal protection against an age assessment is unequivocal. The present draft lacks information about a possible legal remedy against the decision by the authorities, in form and content, about arrangements for deadlines for appeals and competent authorities with which they can be lodged. If an authority assumes that the person has reached majority, this decision must be substantiated both formally and materially in such a way as to be open to appeal. In order to oppose an age decision that wrongly assumes majority, under-18-year-olds need to have partial procedural capacity since they cannot oppose the decision otherwise. There would not be a legal representative as the authority assumed the young person had come of age.

If a Member State infringes the formal and material preconditions of the procedure the deadlines for legal protection must be extended. Likewise the consequence of the legal remedy must be named, e.g. whether the legal remedy has a suspensive effect if young persons are assessed as adults.

Since the Commission proposal as a whole is silent on the form of these procedural rights, violations of the children's best interests are to be expected regarding their age assessment. This being so, the mutual recognition of age assessment decisions by the EU Member States should also be viewed critically (Art. 24(6) Asylum Procedures Regulation). For an age assessment to be binding, clear procedural standards are necessary, that apply in all Member States and must be verifiable in each one.

[31] http://www.b-umFumF.de/images/alterseinschtzung_2015.pdf [2.12.2017].

In addition, the fact that only results based on medical examinations fall under this provision is also to be rejected. As described above, the results of medical age assessments are also open to error and should therefore not be considered by themselves. That would, moreover, go against the goal of Article 24(1) Asylum Procedures Regulation to regard medical age assessment as a last resort.

## 1.4. Lodging an asylum application for an unaccompanied minor (Art. 32 Asylum Procedures Regulation)

A 10-day period is provided for the lodging of asylum applications. This also applies generally to unaccompanied minors and has already been sharply criticised by various organisations, particularly as the deadline does not leave time for a child-friendly clearing and examination of the child-specific grounds for fleeing.[32] From the angle of B-umF and in view of our many years of experience in this context, lodging an asylum application in the case of young minors should not be bound by any deadline at all. Many children/young people arriving alone are under serious strain and first need psychosocial support. Or they simply need to first build up trust to their respective reference person before they can state their request for protection and handle the asylum interview. Concerns regarding the child's best interests, plus the question of whether there are family members around with whom the minor would like to be reunited, would have to be put aside in order to meet such a deadline.

In addition, the asylum application should not be the only way to attain legal residence.
If all minors were forced to file an asylum application, that could harm their best interests and ultimately lead to a risk. After all, to go through with an asylum procedure applicants need to provide proof of persecution. This is hard enough for adults. Depending on their age and maturity, it may not be possible for children and young people to grasp the scope of the situation and thus be able to credibly describe their persecution. In addition, the rendering of a history of persecution is a greater strain on children and young people than on adults, and this may lead to mental strain. Therefore the Asylum Procedures Regulation must also guarantee that alternative ways of obtaining residence remain available under national law and can continue to be applied.

<u>Unaccompanied minors in special proceedings (Art. 40, 41 Asylum Procedures Regulation)</u>

It is regrettable that unaccompanied minors are not spared the now obligatory accelerated procedure under Article 40 and border procedure under Article 41 Asylum Procedures Regulation. That means that they are also affected by detention in border procedures (Art. 41(4) Asylum Procedure Regulation). Applying these obligatory procedures to unaccompanied minors disregards their special vulnerability and prevents their being identified as unaccompanied and minor, which at the same time hinders their access to protection. The provisions contradict both the case law[33] of the ECtHR, which has several times stated that such procedures contradict the best interests of children, and the country practice in Italy, Belgium and Germany, which make exceptions for unaccompanied minors due to the harmful effect of such procedures for the best interests of the minors.[34]

The Asylum Procedures Regulation must therefore clearly state that unaccompanied minors, who are considered particularly vulnerable persons, must always lodge their application for asylum in proceedings that take account of their special situation and can give them the protection and support they need.

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[32] ECRE, Comments on the proposal for an Asylum Procedures Regulation, 11/2016, p. 49 ff, https://www.ecre.org/ecre-comments-on-the-proposal-for-an-asylum-procedures-regulation/ [4.12.2017].
[33] Ibid.
[34] Ibid; see also BT-Drucksache 18/7538, Begründung zu Nr. 6, p.16 (debates of the German Bundestag).

B-umF speaks out strongly against the detention of minors, both accompanied and unaccompanied. Detention can never be in harmony with the best interests of a child. In the context of the CEAS there are also no visible cases and situations which would take precedence over the child's best interests and which would then justify detaining minors. This being so, unaccompanied minors are not only to be taken out of provisions regarding special procedures – applying these procedures to minors, whether unaccompanied or accompanied, must be expressly prohibited.[35] In addition, B-umF also calls for the deletion of Article 11 of the Reception Conditions Directive, which provides for the possibility of detaining unaccompanied minors.[36]

## 2. Repercussions of CEAS reform on refugee families

With the amendments under consideration, families are exposed to tougher restrictions and threats for their well-being. Amongst other things, the following must be stressed.

### 2.1. Inappropriate widening of the concept of family (Art. 2 (g) Dublin IV)

The widening of the concept of family under Article 2(g) Dublin IV is welcome within the CEAS reform. The definition of family members in the Dublin system who are e.g. entitled to family reunification is extended by two groups: in future siblings are to fall under the heading of family as well as families formed only in the transit countries.

Yet the extension of the concept does not go far enough, in the view of B-umF. Despite the recast, many family members and *de facto* life partnerships remain excluded from reunification (e.g. over 18-year-olds, the parents of 18-year-olds or non-marital partnerships). Especially in connection with unaccompanied minors it is, moreover, not appropriate to restrict family reunification only to family members and relatives. Many young refugees no longer have any family members. When fleeing, they have got to know other persons of trust /significant others, who are essential importance for their arrival in the new host society. In order to correspond to the real experiences of refugees, reunification should relax the focus on family members and also include trusted persons.

The concept of family must therefore be widened in the Dublin IV Regulation.

### 2.2. Preliminary examination before an asylum application

The Commission plan is that the Member States should always precede the existing Dublin procedure with a preliminary examination (Art. 3(3) Dublin IV). It sole objective is to check whether the applicants can file an admissible application at all. If they come from a safe third country (Art. 45 Asylum Procedures Regulation), their application will per se be rejected so that they will have to be immediately returned to that country. In this context no substantive grounds for fleeing their home country will be examined, nor will the list of criteria be checked according to the Dublin Regulation. For refugee families this means that the criterion of family members already living in the EU will not be checked in a large number of the asylum applications.
If they come from a safe country of origin – and that classification is in future to be done centrally by the EU (Art. 47 Asylum Procedures Regulation) – their asylum application will be examined in accelerated procedure (Art. 3(3) (b) Dublin IV). The effect is that, firstly, their fate will be decided directly in the country of entry. But such countries of first entry are often completely overtaxed and do not have facilities with child-friendly standards, in which families can live in decent

[35] Also ECRE, ibid.
[36] Following from COM(2016)0465 – C8-0323/2016 – 2016/0222(COD), Report on the proposal for a directive of the European Parliament and the Council laying down standards for the reception of applicants for protection (recast) of 10 May 2017, p. 42 ff.

conditions. Secondly, it establishes a permanent responsibility, which makes family reunification in the context of the Dublin procedure impossible (Art. 3(4) and (5) Dublin IV). Through limiting access by asylum seekers to the family reunification procedure under the Dublin Regulation, the extension of the concept of family proves pointless. Furthermore, the prior inadmissibility procedure undermines the right of those concerned to the protection of family life under Art. 7 CFREU and Art. 8(1) European Convention on Human Rights (ECHR).

Instead of accelerating procedures, they are only prolonged through the prior inadmissibility procedure and made more bureaucratic. In particular, it will undermine the fundamental right to asylum protected by Article 18 CFREU. Consequently, B-umF calls for the cancellation of the admissibility procedure, to be replaced by the guarantee of a rapid, effective access to the actual asylum procedure.

## 2.3. Family reunification in the Dublin procedure

Professionals who seek advice from B-umF report that one of the main reasons for secondary migration is the long-drawn-out - and therefore the sometimes impossible - reunification of family members already resident within the Dublin system. These problems will not be eliminated by the current draft reform of Dublin IV.

Already many family members have no access to procedures for intra-European family reunification as they have no opportunity to file an application for asylum.

In the Dublin reform, the whole transfer procedure for family reunification must become simpler and more flexible for those concerned and also for Dublin Units within the national competent authorities.

The legal remedy that can be used under Article 28(5) Dublin IV to claim a transfer for the purpose of family reunification is to be welcomed in this context. For it to be effective in practice, however, the procedure must be described in more detail and it must also be guaranteed that the legal remedy is effective in all Member States, in other words, that legal recourse is guaranteed.

## 2.4. Exclusion of the sovereignty clause

A Member State not responsible for an asylum case has hitherto been able to declare itself responsible, inter alia on the basis of family constellations, thus including parents, spouses and children. This right is now excluded under Article 2(g) Dublin IV. Only “third-party nationals or stateless persons” are to be able to apply “based on family reasons not related to Article 2(g) Dublin IV” and benefit from the provision within a limited period (Art. 19 Dublin IV).

Hitherto families have been able - via the exercise of the sovereignty clause by a non-responsible Member State – to live together at the same place and go through an asylum procedure. Now this is ruled out for close relatives. Here the Commission seems to assume that the rules on family reunification for family members under Article 2(g) Dublin IV are sufficient to ensure that families can live together and jointly go through an asylum procedure. This is not the case. As described under 2.3., there are considerable deficiencies with the Dublin family reunification procedure. The sovereignty clause is therefore an important instrument for bringing relatives in the ‘core family’ together again. The sovereignty clause is, moreover, a central instrument for balancing out the lack of flexibility within the Dublin system and enabling Member States to declare that it will take charge of refugees on humanitarian grounds or for reasons of integration policy.

B-umF therefore urges that it should remain possible to unconditionally declare competence.[37]

## 2.5. Refugee families 'in orbit'

In the view of the European Commission the Dublin procedure is to be handled quickly in future; under Article 30(1) Dublin IV a decision on transfer is to be taken within a week. Likewise, the plan is to abolish the existing deadlines, which in the Dublin III system foresee that responsibility for the asylum procedure after a certain time goes over to the state of actual presence (Art. 15, 26, 30 Dublin IV). The Member States of the first asylum application therefore remain permanently responsible and the asylum seeker who have migrated on, e.g. because they would not otherwise have reached their relatives, have no way of consolidating their situation in the state of their actual whereabouts.

The provisions completely disregard the reality, namely that people keep moving if at a place they see no prospects for themselves and their children. The planned provisions will mean, in practice, that more people, including many families with children, will have to be transferred, or rather deported to other Dublin states, or at least be permanently in fear of deportation.

In cases in which no Dublin state regards itself as responsible for the persons, or in which EU states do not want to receive the refugees for sundry reasons, the new Dublin procedure also contains the danger of making refugees, and in particular, refugee families, into 'refugees in orbit'. This although the point of the Dublin system used to be preventing the phenomenon of refugees in orbit, i.e. that undignified situation, in which asylum seekers are pushed back and forth between Member States without access to a procedure and to protection.

The provisions described go hand in hand with a considerably restricted access to social rights and to medical care. Only emergency medical care is guaranteed, along with a "dignified standard of living" and "access to suitable educational activities" (Art. 5(3) Dublin IV in connection with Art. 17a Reception Conditions Directive).[38] The kind of care covered by this remains unclear. At any rate, there is every reason to fear that the interests of order and financial policy will take precedence over the protection of the family, the best interests of children, and the right to a life with dignity.

For families these changes mean that they would be kept in an imponderable situation for an unlimited period. This would have considerable impacts on the mental and physical state of the persons concerned, with the simultaneous exclusion of appropriate medical care and the permission to work or undergo training. The consequence would be poverty and homelessness of families with children, growing crime, anger and powerlessness, and a lack of prospects for whole generations.

In addition, the provisions prevent an effective reunification of family members within Europe. B-umF calls for families with children to have comprehensive access to social rights at the place where they actually live and for the prerequisites to be created for that country to take on Dublin responsibility. Their concerns must be considered sufficiently in the respective procedures. In particular, the possibility of family reunification must be always examined and enabled.

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[37] On the question of an unconditional sovereignty clause see Caritas Germany, Comments on the Dublin-IV-Regulation, May 4th 2017, accessible at https://www.caritas.de/fuerprofis/presse/stellungnahmen/05-04-2017-mitgliedstaaten-der-eu-muessen-gemeinsam-die-verantwortung- [4.12.2017].

[38] B-umF shares the criticism of UNHCR, 12/2016, Comments on the European Commission proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) – COM (2016) 270, p. 12, accessible at http://www.refworld.org/pdfid/585cdb094.pdf [4.12.2017].

## 2.6. Returning families is possible despite unsuitable reception conditions

The proposals to reform Dublin IV provide that the Member State responsible is only informed before a transfer, but no longer has to consent to taking the refugees back (Art. 26(3) Dublin IV). This planned change amounts to undermining the Tarakhel case law[39] of the European Court of Justice (CJEU). In this decision the CJEU stated that returning families with children to Italy violates Article 3 ECHR (which bans inhuman and degrading treatment) as long as the transferring state does not make sure that suitable reception conditions are guaranteed for the family in the country of destination. It follows from the decision that the receiving state must give guarantees in the case of returning families that, in an individual case, a possible violation of Article 3 ECHR is indeed ruled out. Stipulating this and thereby taking account of the ECtHR case law would have been a task of the Dublin reform. Instead, the receiving state must now only be informed about the transfer. This will mean that it can make no individual guarantees for the families to be taken back and the preconditions will not exist at all.

Accordingly, refugee families risk being returned to states in which dignified treatment is not guaranteed.

B-umF therefore calls for this provision to be changed. The procedure for returning families must guarantee that they are transferred to a state in which the reception conditions are particularly suitable for families and they have access to the asylum procedure and to services meeting basic needs. Any violation of Article 3 ECHR must be excluded from the start. Legal recourse against such a decision must likewise be guaranteed.

Berlin, 13th of September 2017

[39] ECHR Tarakhel v. Switzerland, No 29217/12 of 4 November 2014.