

Brussels,  
June 22, 2010

**Submissions on the Proposal for an EU Directive on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA**

Save the Children and the Separated Children in Europe Programme (SCEP) welcome the Commission's proposal for an EU Directive on combating trafficking in human beings, and in particular, the objective of significantly improving the protection and assistance to victims, in recognition that this is "an obligation under human rights standards". Carrying forward from the 2009 Proposal for a revised Framework Decision, the Directive addresses not only "combating trafficking", but also "prevention" and "protection of victims' rights". The adoption of this integrated and holistic approach is of great importance to ensuring that States address the human rights violations caused by trafficking. In relation to trafficked children, the Commission has proposed distinct provisions relating to their special protection. If adopted, the Directive would represent a clear and necessary progress in EU law.

Save the Children and SCEP encourage the European Parliament and the Member States strongly to support the Commission Proposal, whilst promoting some continuing progress as outlined below. We also refer to a joint NGO Statement to the European Parliament on June 10, 2010.

**Executive Summary – Key Submissions**

- A key goal of the proposed Directive is to: (i) identify the core principles for respecting the rights of trafficked persons and (ii) indicate the relationship of these principles with other dimensions of the trafficked person's situation, for example, the fact that they are a third country national or a child. As a consequence:
  - The Directive should contain the express recognition that all victims should receive the support and assistance that is their right, regardless of their migration status.
  - The Directive should recognize that the specific actions to assist, support and protect trafficked children should be integrated into general child protection systems, as they exist at national level.
- The implementation of the Directive should go hand in hand with a full implementation of the EU Action Plan on unaccompanied minors. In the context of the Action Plan, the EU should actively explore the adoption of more comprehensive measures addressing all unaccompanied and separated children. This would ensure a greater likelihood of trafficked children receiving adequate assistance and of children at risk of trafficking being protected.
- Where trafficked children are separated from their families or where there is a conflict of interest between the family and the child, the Directive should provide for the appointment of an independent, qualified guardian who will act in the child's best interests, rather than providing for the appointment of a "special representative". Parliament and Council should consider adopting provisions on guardians similar to those set out in the recent proposal for a recast of the Asylum Procedures Directive.
- Additional measures to ensure full respect for the rights of children should be added, including as regards principles on information, participation and protection in criminal investigations and proceedings. We also call for improvements to some general provisions, including the early identification provisions, mechanisms and resources for the protection of those who are victims but not witnesses, non-criminalisation, compensation, extra-territoriality, prevention, national rapporteurs and data collection.

## ***1. Coherence in EU Measures Against Trafficking***

There are a wide range of EU instruments and policies which affect the situation of a trafficked person in the EU, including the EU Action Plan on Trafficking, EC Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings and the EU Action Plan on Unaccompanied Minors. It is essential to make sure that there is coherence between these measures in order to avoid gaps in the protection of trafficked persons.

The proposed Directive should serve as the key instrument for (i) setting out the core principles for respecting the rights of trafficked persons and (ii) indicating the relationship of these principles with other dimensions of the situation of the trafficked person, for example, the fact that they are a third country national or a child. As a consequence, we make the following recommendations in relation to migration status and child protection below. We also address the broader EU policy framework for unaccompanied and separated children of which the proposed directive forms a part.

### ***1.1 Migration status***

It is significant that the proposal specifically requires Member States to ensure that assistance and support for a victim are *not* made dependent on the victim's willingness to act as a witness. This represents good and necessary progress to bring EU law in line with international law.

However, what is less certain is whether trafficked persons from third countries have a guarantee of accessing support and assistance under the proposed Directive. Indeed the Recitals to the Proposal specifically indicate that the Directive will not deal with conditions of residence as the 2004 Directive does. The Recitals refer to the fact that assistance should be provided unconditionally at least until the competent authorities have taken a final decision with regard to the reflection period and the residence permit or otherwise acknowledge the person is a victim of trafficking in human beings. However, the operative part of the Directive does not address the issue expressly.

This is something on which the Parliament and Member States should reflect. The EU Returns Directive, which requires Member States to deport illegally staying third country nationals, does not provide any exception for trafficked persons. This means that, without other EU or national provisions, trafficked persons may be deported without regard to whether they have received proper support and assistance for recovery. The 2004 Directive providing for short term residence permits for trafficked persons is limited to those who cooperate with criminal proceedings. We are aware that the 2004 Directive may be reviewed and revised in due course. However, the entry into force of the Lisbon Treaty allows for a more integrated approach to the protection and migration issues that may arise in relation to trafficked persons of third country origin.

***The operative part of the Directive should contain the express recognition that all victims immediately receive the support and assistance that is their right, regardless of their migration status. Such support and assistance should be granted as soon as there is an indication that the person might have been subjected to an offence referred to in Articles 2 and 3, regardless of whether a criminal investigation or proceedings have been instituted or not.***

### ***1.2 Child Protection Systems***

In relation to children, the proposal requires Member States to provide trafficked children with assistance, support and protection to child victims of trafficking taking into account the best interests of the child. It obliges Member States to take specific actions to assist and support trafficked children, in the short and long term, in their physical and psycho-social recovery in the short and long term and taking due account of the child's views, needs and

concerns.<sup>1</sup> These provisions should be implemented in the spirit of the Recitals which refer to the need for durable solutions and reintegration into society. This is very welcome.

We recommend that the Directive also recognise that specific support for trafficked children should be integrated into existing national child protection systems. Child protection systems are made up of a set of components that, when properly coordinated, work together to strengthen the protective environment around each child. This includes, for example, multi-sectoral coordination, child-friendly preventive and responsive services, a child protection workforce and oversight and regulation.

We emphasise that this does not mean that the Directive would in any way regulate general national child protection systems. Rather, the aim of the Directive would be to ensure that specific actions required under EU law for trafficked children are not taken in isolation from whatever local child protection system exists. This is important, particularly in situations where it can be difficult ultimately to determine whether there has been trafficking but there may be very immediate child protection concerns (for example, children trafficked into begging situations). It would also ensure that the child protection system is properly oriented towards the prevention and identification of trafficking and to providing an immediate response to harm.

***Article 12 of the Directive should require that the specific actions to assist and support trafficked children be coordinated with national child care services and integrated into local child protection systems as they exist at national level.***

### ***1.3 General EU Policy on Separated and Unaccompanied Children***

We welcome the adoption of the EU Action Plan on Unaccompanied Minors which combines measures on prevention of unsafe migration and trafficking, protection and durable solutions, placing the UN Convention on the Rights of the Child at the heart of any action concerning unaccompanied children. The Action Plan notes that the EU “should adopt higher standards of protection ... by adopting more comprehensive legislation on trafficking in human beings and sexual exploitation of children.” It also notes that the EU and Member States should reinforce actions regarding child victims of trafficking by assisting and protecting these children at the very earliest stage, by referring them to specific services in the country where they are found.

The Action Plan underlines a number of key principles which must guide all EU action in relation to unaccompanied children, including those who children have been trafficked. These principles should inform the implementation of the Directive and the broader framework within which it will operate. They include:

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<sup>1</sup> We note that specific assistance and support for trafficked children is essential because of the fact that: (a) they are children, and many do not have the physical or mental maturity to defend themselves against harm; (b) during the processes of withdrawal, recovery, repatriation and integration, they often undergo frequent changes of venue, multiple interviews, and frequent changes of caregiver, all of which open many possibilities for further abuse or harm; (c) they may have been in the control of criminal groups or individuals who will readily use force to harm or abduct the child, as well as harm the caregivers. This is of particular concern if the children are giving evidence for prosecution; (d) trafficked children may suffer physical or psychological problems, including trauma, lack of self-confidence, a tendency to attempt self-inflicted injury or suicide, sexualized behaviours, violent behaviours and reduced ability to communicate with others, all of which make them vulnerable to abuse and harm; (e) children who have been forced into prostitution bear the social stigma of having been a prostitute. This stigma can result in malpractice, sexual abuse, harassment and exclusion by caregivers, service providers, police and others; and (f) child victims of trafficking, abuse and exploitation, particularly those who have been trafficked for prostitution, frequently attract the attention of the media, who may abuse their rights to privacy and confidentiality by exposing their identities through names or photographs. This can result in stigma, exclusion or harm both from traffickers and from their family and community after integration.

- “It is fundamental to ensure that any child needing protection receives it and that, regardless of their immigration status, citizenship or background, that children are treated as children first and foremost.”
- “Reception measures and access to relevant procedural guarantees should apply from the moment an unaccompanied minor is detected at external borders or on EU territory, until a durable solution is found.”
- “Durable solutions should be based on the individual assessment of the best interests of the child and shall consist either of return and reintegration in the country of origin, granting of international protection status or other legal status allowing members to successfully integrate in the Member State of residence and resettlement.”
- “The common approach should be based on the respect for the rights of the child as set out in the EU Charter of Fundamental Rights and the UNCRC, in particular the principle of the best interests of the child which must be the primary consideration in all action related to children taken by public authorities.”

The Action Plan also envisages a wide range of concrete measures which will have an impact on the situation of trafficked children, including, for example, the gathering of more comprehensive data, measures to prevent unsafe migration and trafficking, exchange of experiences and the promotion of best practices to counter disappearances, the development of guidelines on age assessment and family tracing, review mechanisms of guardians, support for training.

Finally, the Action Plan proposes that the Commission evaluate whether it is necessary to introduce targeted amendments to existing legislation or a “specific instrument setting down common standards on reception and assistance for all unaccompanied minors regarding guardianship, legal representation, access to accommodation and care, initial interviews, education etc”.

***The implementation of the Directive should go hand in hand with a full implementation of the EU Action Plan on unaccompanied minors. In the context of the Action Plan, the EU should actively explore the adoption of more comprehensive measures addressing all unaccompanied and separated children, necessary to ensuring that there is a greater likelihood of trafficked children receiving adequate assistance and of children at risk of trafficking being protected.***

## **2. Specific Provisions Relating to Children in the Directive**

### **2.1 Article 12 – Best Interests**

We welcome the inclusion of the best interests of the child in the operative part of the Directive and would recommend that the phrase in Article 12 “taking into account the best interests of the child” be modified to indicate “***taking the best interests of the child as a primary consideration in all actions***”, to bring it in line with the UN Convention on the Rights of the Child. This would be consistent with other EU measures, including for example, Article 18 of the Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers which provide that “the best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors.”

### **2.2 Representatives - Guardians**

Where children are separated from their families or where there is a conflict of interest between the family and the child, the proposal provides for “a special representative”, but there is no further definition of its role or

qualifications. We would suggest that this be replaced by the appointment of an independent guardian who will act in the child's best interests. The guardian should have appropriate expertise in childcare so as to ensure that the interests of the child are safeguarded and that the child's legal, social, health, psychological, material and educational needs are appropriately covered. The recently adopted EU Action Plan on Unaccompanied Minors recognizes the crucial role played by guardians. The Parliament and Council should consider including provisions on guardians similar to those proposed in the recast Asylum Procedures Proposal.

***Relevant provisions of the Recast Proposal include the following: "representative" means a person appointed by the competent authorities to act as a legal guardian in order to assist and represent an unaccompanied minor with a view to ensuring the child's best interests and exercising legal capacity for the minor where necessary." The Proposal also notes that "the representative shall be impartial and have the necessary expertise in the field of childcare".***

**We note that agencies or individuals whose interests could potentially be in conflict with those of the child's should not be eligible for guardianship.**

**It is important that the role of the guardian should relate to ensuring the child's best interests *as regards measures under both Article 13 and 14.***

## 2.2 *Legal Representation*

We strongly support the provision of Article 14 (2), that a legal representative should be appointed to advise the child, including for the purpose of claiming compensation. This legal representation should also be provided outside of the framework of criminal investigations and proceedings. In the absence of a legal representative, the child's situation will remain very fragile. The legal representation should have the necessary training to work with children.

## 2.3 *Language and Participation*

Article 13 of the Directive should contain an express obligation to ensure that a trafficked child is informed - in a language understood by the child, corresponding to the child's maturity - on his/her situation, rights and services available. This would greatly help in ensuring the child can make their views known and that due account can be taken of them.

## 2.4 *Information for Family Members*

Given the importance of providing assistance and support, and information to the family of a trafficked child, Article 13 (2) should note that "in particular, Member States shall, where appropriate and possible, apply Article 4 of Council Framework Decision 2001/220/JHA to the family, ***regardless of whether a criminal investigation or proceedings have been instituted.***"

## 2.5 *Consulting with Children*

As EU policy in the area develops further, Save the Children encourages the EU to ensure adequate consultation with children allows their views to inform and shape effective responses to their situation.<sup>2</sup>

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<sup>2</sup> As background, it should be noted that children can take on an active role in their own protection. Building children's awareness and ability to protect themselves not only reinforces the safety and protection measures of the caregivers, but provides them with greater security when they are on their own after integration. Children's self-protection can be developed in the following ways:

## 2.6 *General Principles Concerning Children in Criminal Investigations and Proceedings*

We would suggest the inclusion in Article 11 of the following general principles, contained in the Council of Europe Convention on Actions Against Trafficking in Human Beings concerning trafficked children in criminal investigations and proceedings.

***Member States shall take the necessary legislative or other measures to ensure that investigations and criminal proceedings are carried out in the best interests and respecting the rights of the child.***

***Member States shall adopt a protective approach towards victims, ensuring that the investigations and criminal proceedings do not aggravate the trauma experienced by the child and that the criminal justice response is followed by assistance, where appropriate.***

## 2.7 *Mutual Recognition of Child Protection Measures Across the EU*

The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children will likely be ratified by the EU shortly. Parliament and Council might consider whether, in line with the Convention, the Directive might provide that relevant child protection measures which have been taken in one Member State for a child victim of trafficking should be recognised and taken over by another EU Member State or Member State of the Hague Convention in the event that the child changes residence to another State.

## 3. **Additional General Amendments**

We would encourage the Council and Parliament to include some additional improvements to general provisions relating to early identification, mechanisms and resources for the protection of those who are victims but not witnesses, non-criminalisation, the right to compensation, extra-territoriality, prevention, national rapporteurs and data.

### 3.1 *Early identification of trafficked persons*

Article 10 (4) “Appropriate measures mechanisms aimed at early identification” should be further clarified. It could be recommended to Member States to establish national referral mechanisms as described in the Handbook National Referral Mechanisms Joining Efforts to Protect the Rights of Trafficked Persons (ODIHR, 2004). We would also recommend the development of indicators and express reference to the promotion of multi-disciplinary teams (including NGOs) in identification mechanisms. At another level, identification might also take place through the exchange on information in databases of trafficked, missing and kidnapped children with strict confidentiality measures in place.

### 3.2 *Mechanisms and resources for the protection of those who are victims but not witnesses*

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(a) make children aware of risks, harms and protection issues. This can be done through group discussions and through participatory exercises such as mapping harms in an environment such as a shelter or village; (b) provide children with practical knowledge of their rights according to the UN Convention on the Rights of the Child. Children can better protect themselves if they are aware of their rights and know that they can assert them; (c) encourage children’s participation in all activities, including decision-making about their own care and protection. Children should contribute their views to all case planning decisions made on their behalf; (d) provide children with life skills to cope with peers and adults. Protective life skills include assertiveness training, ‘saying no’, assessing the intentions of strangers, choosing friends and self-protection from abuse; (e) establish mechanisms for children to safely and confidentially report physical and sexual abuse by staff, peers, visitors and others; and (f) train children in first aid. First aid skills can be taught to all older children, and are a practical protection tool as well as valuable in giving children self-confidence.

Article 11(4) While we appreciate the introduction of the notion of an individual risk assessment as a guiding principle of protection, the vast majority of victims may not have access to witness protection programmes, as such programmes are extremely resource-intensive and limited in scope. Moreover, a more specific obligation to provide mechanisms and resources for the protection of those who are victims, but not witnesses, would in our view be essential. For the same reason, we believe Article 10(2) should be amended to read: “Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have an indication that the person may have been subjected to an offence referred to in Articles 2 and 3, **and regardless of whether criminal proceedings have been instituted.**”

### 3.3 *Non-punishment and non-detention of trafficked persons*

The improvement envisaged under Article 7 - non application of sanctions to trafficked persons - is very welcome. However, the current wording of Article 7 still leaves the non-punishment of trafficked persons to the discretion of Member States, in spite of the fact that non punishment of the victim is a well- recognised principle. We would therefore suggest that, Article 7 should read: “Member States *shall not prosecute* or impose sanctions on victims for...” We would also suggest that the scope of the Article be broadened to include both criminal and *unlawful* activities. We would strongly recommend that the Directive, or the recitals to the Directive, expressly note that trafficked persons should not be detained.

### 3.4 *Compensation*

Article 11 (2): The right to compensation can be of great importance to the recovery for trafficked persons. However, not all compensation claims are made within the course of criminal procedures against the trafficker and confiscation of assets is not always possible. Therefore, trafficked persons also need legal assistance and legal representation to claim compensation through other channels, such as compensation funds or labour laws.

### 3.5 *Extra Territoriality*

Articles 8 and 9: We welcome that the draft directive aims at expanding the jurisdiction of Member States for trafficking crimes beyond their borders in order to ensure investigation and prosecution of trafficking crimes. However, it remains unclear whether indeed this Directive goes beyond previous instruments in practice. It is unfortunate that Article 9.2 allows for Member States to opt out of the provisions on extraterritorial jurisdiction.

While it is very welcome that Article 8.2 seeks to ensure that trafficking crimes may be prosecuted after a victim has reached the age of majority, it is regrettable that the directive does not address the statutes of limitations of all trafficking crimes. According to the practice of international courts and tribunals statutes of limitations for human rights violations should either be removed altogether or be proportionate to the gravity of the crime. The EU should seek to ensure that statutes of limitations for trafficking crimes in Member States are either removed or sufficiently long to ensure that suspects are brought to justice and victims receive redress and compensation.

### 3.6 *Prevention*

Article 15 (2): we welcome the provision in the proposal for information and awareness raising campaigns and education programmes, but warn against the use of stereotyped images and messages as it is proven that those campaigns can have negative impact on trafficked persons and affected groups. (These forms of campaign should go beyond the national level and really target the local communities with appropriate and tailor made messages which are relevant in the context of the given locality and target/risk groups.)

We recommend Member States to focus on the development of preventative measures aimed at groups vulnerable to trafficking and exploitation such as migrant workers. Specific information that provides these groups with knowledge about their rights and possibilities and information on where to turn to if those rights are violated are essential to empower people and groups vulnerable to exploitation and abuse.

We note that, as regards prevention, the Directive does not contain provisions to address the root causes of trafficking, such as poverty, gender inequality and discrimination. However we encourage the EU, throughout the range of its policies, including development cooperation, to focus on this goal.

Article 15 (4): With regard to the criminalisation of the use of services of trafficked persons, in cases of a trafficked child, current international and national law already foresees for such a criminalisation.

As for adult trafficked persons, although we welcome any serious attempt to dissuade demand for exploitative labour, we are aware that criminalisation could have potential unintended negative effects for the trafficked person. Therefore any legislation should be preceded by an in depth study of the various mechanisms and preconditions of demand in all areas of exploitation.

### 3.7 *National Rapporteurs or equivalent measures*

Article 16: we recommend that the Directive make it explicit that the National Rapporteurs or other equivalent mechanisms need to be independent bodies (as stated in the the Hague Declaration, 1997) so as to guarantee independent and comparable monitoring of results of anti trafficking actions. In this monitoring, the unforeseen or even negative effects of anti trafficking measures should also be measured and reported.

More generally, the creation of a European anti-trafficking coordinator may prove an important step to integrating coordination mechanisms to fight trafficking and protect victims.

The newly created coordination and monitoring mechanisms between authorities should also ensure regular multi-disciplinary collaboration with civil society organisations, not only within the investigation and prosecution phases but also in measures of prevention, protection of the rights of and assistance and support for trafficked persons.

### 3.8 *Data Collection*

Requirements to establish better and fuller data collection and reporting mechanisms should be included in the Directive. As noted in respect to unaccompanied children in the EU Action Plan on Unaccompanied Minors, “the situation cannot be properly assessed, nor solutions found, without a clear evaluation based on comprehensive, reliable and comparable data.”

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