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Committee of Experts on the rights and the best interests of the child in parental separation and in care proceedings (CJ/ENF-ISE)

Agenda Item 5. Protection of the best interests of the child in domestic law proceedings by public authorities to limit parental responsibilities or place a child in care

Preliminary annotated outline of a draft feasibility study

Prepared by Ms Daja Wenke

Consultant to the CJ/ENF-ISE
Independent Researcher and Policy Analyst –
The Rights of the Child and Implementation of International Standards

enf-ise@coe.int
www.coe.int/enf-ise

Table of Contents

1. Executive Summary	3
2. Key terms and concepts.....	3
3. Methodology	3
4. The best interests of the child in care proceedings: A transdisciplinary review of meaning and scope in Council of Europe member states	3
4.1. The best interests of the child as a general principle of the UN Convention on the Rights of the Child: Historical overview and recent developments	3
4.2. The best interests of the child in the context of childcare and family policy: Socio-political interpretations from different perspectives and disciplines	4
5. International and European standards relevant to the best interests of the child in care proceedings.....	4
5.1. The best interests of the child in international and European standards	4
5.2. Human rights principles and fundamental freedoms.....	4
5.3. Procedural safeguards reflecting principles of rule of law and due process	5
5.4. Principles emerging from the case law of the European Court of Human Rights	5
6. Implementation measures and methods of governance.....	5
6.1. The best interests of the child: Relevance for child protection and childcare systems	5
6.2. Implementation measures in Council of Europe member states: Examples from policy and practice	5
7. Working methods and tools for the best interests determination	7
7.1. Best interests assessment	7
7.2. Best interests determination.....	7
7.3. Best interests assessments and determinations in childcare, family support and care proceedings: Examples of practice from Council of Europe member states	8
8. Proposals for policy instruments and practice-oriented tools	9
8.1. Policy instrument: Committee of Ministers Recommendation, Guidelines or other policy instrument to give guidance to member states and other stakeholders in this area.....	9
8.2. A handbook for officials and practitioners	9
8.3. Child-friendly materials.....	10
8.4. Research strategy: Towards an implementation science for the best interests of the child	10
9. References	10
10. Annex: Preliminary outline of the feasibility study	10

1. Executive Summary

1. Introduction to the feasibility study and executive summary of the scope and approach, methodology, findings and conclusions.
2. Clarification of the possible connections between care proceedings and proceedings concerning parental separation and the implications of these linkages for the work of the Committee of Experts. *[During the drafting of the feasibility study and the consultation process led by the Committee of Experts, these connections would need to be addressed, as appropriate.]*

2. Key terms and concepts

3. Overview of definitions, key terms and concepts deriving from international and European standards, guidelines and recommendations. The overview aims to clarify, where consensus has been reached on specific terms and definitions, and where a shared understanding of terms and definitions is still missing.

3. Methodology

4. A brief explanation of the methodology of the feasibility study as a multi-step process of research, analysis, consultation and review: Literature review; analysis of international and European standards; analysis of questionnaires compiled by member states; case studies (optional); consultation of national and international key stakeholders; review by the Committee of Experts.
5. If a decision is taken to conduct case studies, the methodology chapter will explain the case study methodology.
6. At this preliminary stage, the following stakeholders are considered for consultation:
 - Government officials, policy makers and civil servants: Public officials from national ministries and institutions, from the national, regional and local levels of government and administration.
 - Members of national Parliaments and Parliamentary Commissions, Council of Europe Parliamentary Assembly.
 - Academia: Universities, academic institutes, research institutes and knowledge centres.
 - Ombudspersons for children and other national human rights structures.
 - Professional groups and service providers: Social workers and service providers in child protection and youth work; judges and other employees of the judiciary; law enforcement officers and prosecution services; lawyers; guardians; health care professionals, including paediatrics, child psychologists and psychiatrists; professionals preparing expert opinions for childcare and family proceedings; professional caregivers; teachers, educators and pedagogues; immigration officials; staff of childcare institutions and reception centres.
 - Civil society: Children, parents, foster parents, and their associations.
 - International and national NGOs and private service providers.

4. The best interests of the child in care proceedings: A transdisciplinary review of meaning and scope in Council of Europe member states

- 4.1. The best interests of the child as a general principle of the UN Convention on the Rights of the Child: Historical overview and recent developments
7. Introduction and brief historical overview of the concept of the best interests of the child and its relevance as one of the general principles of the UN Convention on the Rights of the Child.

4.2. The best interests of the child in the context of childcare and family policy: Socio-political interpretations from different perspectives and disciplines

8. Discussion of the best interests of the child as a child rights principle and how it relates to all the other human rights of the child, as afforded under the UN Convention on the Rights of the Child and other international and European standards, such as the Council of Europe Recommendation CM/Rec(2011)12 on children's rights and social services friendly to children and families. This broad perspective on the best interests of the child is substantiated through tangible examples from the context of care proceedings. It aims to explore the meaning of a child rights-based approach for questions concerning the limitation of parental responsibility and the placement of a child in alternative care.

9. A concise overview of socio-political interpretations of the concept of the best interests of the child in the context of childcare and family policy, as well as current trends in this field. The overview aims to cover a diversity of perspectives ranging from the relevance of the concept as a human rights principle and its interpretation in light of the CRC Committee General Comment No. 14; the role of Council of Europe standards and monitoring bodies such as GREVIO and GRETA in the evolving interpretation of the concept; specific interpretations of the concept for different groups of children and from different disciplines; new dimensions of the concept in relation to the evolving composition of families; different national, social and cultural perspectives on the concept of the best interests of the child; as well as politicised and ideological interpretations. The overview aspires to sensitise to the diverse and sometimes contentious interpretations of the concept, which need to be borne in mind for the development of a policy instrument and practical tool in this field.

5. International and European standards relevant to the best interests of the child in care proceedings

5.1. The best interests of the child in international and European standards

10. Mapping and review of the main international and European standards relevant to the best interests of the child in care proceedings: Conventions, recommendations, guidelines and other relevant documents issued by the Council of Europe, the United Nations, the Hague Conference on Private International Law, the European Union, and other relevant bodies.

11. The most pertinent legal and policy documents will relate, as a minimum, to the following fields:

- Human rights,
- Rights of the child,
- Rights of women,
- Rights of persons with disabilities,
- Rights of persons belonging to minority groups,
- Rights of migrants and asylum seekers, including children and families.

12. The mapping and review of relevant legal and policy standards presented in this chapter provides the reference framework for the drafting of the policy instrument and practical guidance. In particular, it informs the drafting of the following sections of the policy instrument and practical guidance:

5.2. Human rights principles and fundamental freedoms

- Inviolability of human dignity
- Prevention of discrimination
- The right of the child to life, survival and development

- Respect for the evolving capacities of the child
- Right of the child to be heard and to have their views taken into account
- Right to be protected against all forms of neglect, violence and exploitation
- Right to be cared for by the parents
- Right to maintain contact with the family of origin
- Right of the child to preserve his or her identity
- Right to protection from use of force or restraint
- Right to healthcare, education and welfare
- Protection of personal data and privacy

5.3. Procedural safeguards reflecting principles of rule of law and due process

13. Procedural safeguards are applicable to best interests determinations in the context of any administrative or judicial proceeding,

- Child-friendly information in a language that the child understands
- The right of the child to express his or her views and to have them taken into account with due weight (including quality interpretation and cultural mediation, where applicable)
- Guardianship and representation of the views of the child and legal representation
- Establishment of facts
- Necessity and proportionality
- Transparency and documentation
- Legal reasoning
- Timeliness of the procedure, the decision-making and follow-up
- Notification
- Mechanisms to review or revise decisions, right to appeal and access to legal remedies

14. In relation to child-friendly information, the feasibility study would aim to map existing material that conveys information to children involved in care proceedings. The objective is to assess the need for further child-friendly material or a child-friendly version of the policy instrument to be developed.

5.4. Principles emerging from the case law of the European Court of Human Rights

15. Principles identified from the ECtHR jurisprudence.

6. Implementation measures and methods of governance

6.1. The best interests of the child: Relevance for child protection and childcare systems

16. The feasibility study would take into account international guidance on the development of national “child protection systems” and “childcare systems” and explore the role of the best interests principle for the broader efforts of European States and civil society partners to promote a “systemic approach” in this field.

6.2. Implementation measures in Council of Europe member states: Examples from policy and practice

17. A discussion of the implementation measures and governance methods employed in Council of Europe member states to promote the implementation of the best interests of the child in the context of care proceedings. The chapter draws on examples from Council of Europe members states. It analyses two main questions: In which principle ways do implementation measures and governance

methods promote the application of the best interests principle in care proceedings? How do weak implementation measures create obstacles to the full application of the principle and are there examples from member states in how such obstacles could be overcome?

18. The chapter aspires to identify solution-oriented propositions to strengthen implementation measures, as well as methods of governance in this field, in light of examples of practice from Council of Europe member states.

19. The review and analysis in this chapter are guided by the general measures of implementation proposed by the Committee on the Rights of the Child in its General Comment No. 5, as well as state of the art knowledge from implementation research, systems research and public sector innovation research in the child rights field.

20. General measures of implementation¹:

- Law reform
- National strategies or action plans
- Coordination across sectors of government and ministry departments
- Devolution of competences in federal states and decentralised state administrations
- Monitoring and oversight (including child impact assessments and evaluations)
- Independent human rights institutions and structures
- Independent judiciary
- Research, data collection, analysis and development of indicators
- Budget allocation
- Training of officials and professionals and capacity strengthening
- Cooperation with civil society, including children and families, child and youth-led organisations, communities, NGOs and CBOs
- Dissemination of information on the rights of the child
- International cooperation

21. The preliminary review conducted thus far has revealed that some groups of children and families are affected by specific forms of marginalisation and exclusion in the context of care proceedings. In some contexts, these situations amount to structural discrimination. Children and parents with disabilities or chronic diseases, children and parents belonging to minority groups, living in poverty, migrant and asylum seeking children, and transgender children are particularly at risk of discrimination. Care proceedings initiated due to poverty have also been identified as a potential case of structural discrimination. In situations where discrimination is determined by weak structural factors, such as discriminatory legislation or budget allocation, the issues might be addressed in the context of this chapter.

22. The feasibility study should aim to gain an overview of the groups of children and families that are particularly at risk of marginalisation and discrimination in Council of Europe member States and analyse the causes and contributing factors. The study should aim further to propose a meaningful way to address the situation of particularly marginalised and vulnerable groups in the context of a policy instrument and practical guidance.

¹ Committee on the Rights of the Child: General Comment No.5 (2003): General Measures of Implementation for the Convention on the Rights of the Child. CRC/GC/2003/5. 3 October 2003.

7. Working methods and tools for the best interests determination

23. This section would discuss the best interests determination as a formal procedure. In accordance with existing international guidance in this field, a best interests determination is understood as a formal two-step procedure that consists of a comprehensive case assessment (best interests assessment) and a formal decision-making process (best interests determination).²

24. The feasibility study should depart from the assumption that this understanding of a best interests determination procedure is meaningful and applicable to the context of care proceedings in Council of Europe member states. This basic assumption will be tested and verified or revisited in light of the findings from the research and consultation process.

7.1. Best interests assessment

25. A formalised process to gather and verify data and information about the child's situation.

26. The best interests assessment is a consolidated case assessment process. It includes the following assessments, which represent a non-exhaustive list that the feasibility study will test and verify or refine for the context of care proceedings:

- Hearing the child
- Assessment of the child's situation, background and needs
- Social inquiry and family assessment
- Gathering evidence, for instance through forensic examinations and interview
- Risk and security assessment
- Mapping sources of support, skills and resources for empowerment
- Continued assessments and monitoring during follow-up services to enable an adjustment of service provision in light of the child's evolving situation

7.2. Best interests determination

27. A formal decision-making process led by public authorities and professional decision makers, which is informed by the previous best interests assessment and aims to reach a decision on the best interests of the child. The best interests determination, as a formal decision-making process, is protected by procedural safeguards (*see above para. 13*).

28. Before, during and after care proceedings regarding the limitation of parental responsibilities and the placement of a child in alternative care, best interests assessments and determinations are typically conducted by social workers or child protection officials, as well as judges. They formalise the decision-making process in relation to a continuum of services, from the identification of families at risk, services for family strengthening, child protection and monitoring, the provision of mandatory services and limitation of parental responsibility, placement decisions, through to the periodic review of the situation of the child and the parents to consider family reunification.

29. The feasibility study would aim to embrace the continuity of assessments and decision-making processes along the continuity of services provided before, during and after the actual care proceedings. Rather than focusing on services for family support, childcare and placement, the

² See in particular: Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para. 1), [CRC/C/GC/14](#), 2013. United Nations High Commissioner for Refugees, United Nations Children's Fund, *Safe and Sound, What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, 2014. Council of the Baltic Sea States, [Guidelines on the Human Rights and Best Interests of the Child in Transnational Situations](#), Council of the Baltic Sea States Children's Unit and Expert Group for Cooperation on Children at Risk, 2015.

feasibility study would aim to focus on the formalised assessments and decision making processes determining these services in accordance with the principle of the best interests of the child and along the following continuity:

- Supporting and strengthening the family and safeguarding the child through specialised services of a voluntary or mandatory nature;
- Monitoring the child's situation;
- Limiting parental responsibilities;
- Placing the child in emergency, temporary, longer-term or permanent alternative care; and
- Periodically reviewing placement decisions over time in order to adjust service provision to the evolving capacities and needs of the child and to assess the possibility of family reunification.

30. The decision-making process in a best interests determination requires decision makers to assign weight to different rights, needs and legitimate interests identified during the case assessment. To facilitate this balancing of rights and interests, international guidance advises to make the following considerations, which the feasibility study would aim to verify or refine specifically for the context of care proceedings:

- The possibility of harm outweighs other factors,
- The child's right to be brought up by the parents and to maintain family contact is a fundamental principle,
- Matters related to health, education and vulnerability need to be assigned weight,
- Continuity and stability of the child's situation are important.³

7.3. Best interests assessments and determinations in childcare, family support and care proceedings: Examples of practice from Council of Europe member states

31. The feasibility study should aim to revisit and refine the existing guidance for the specific purpose of care proceedings in Council of Europe member States, and in light of national models and guides used by key stakeholders in Council of Europe members States.

32. The feasibility study should explore in which principle ways best interests determinations in the context of care proceedings take place as formalised procedures in Council of Europe member States. This includes a mapping of the competent authorities responsible for best interests assessments and determinations in this field and the key actors involved, as these might be considered as target groups for any practical guidance to be developed. The study aims to map positive examples of practice as well as gaps.

33. A preliminary review has shown that the competences of social workers, child protection officials, judges and courts responsible for these assessments and decisions differ from country to country. In light of this diversity, the feasibility study would aim to clarify the scope and meaning of "care proceedings" for the purpose of the policy instrument and practice-oriented tool. The objective is to ensure that the policy instrument and practical guidance to be developed respond to the diversity of competences and contexts in member states and embrace the continuity of formalised assessments and decision-making processes before, during and after care proceedings (*see also para. 29*).

34. In the context of care proceedings, important decisions depend on the quality of the assessments made, of the decision-making process, of the communication and interaction with the child and the

³ Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para. 1), [CRC/C/GC/14](#), 2013. United Nations High Commissioner for Refugees, United Nations Children's Fund, *Safe and Sound, What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, 2014.

family members, and the quality of collaboration and coordination of different service providers and state officials. All of these factors determine the sustainability and meaningfulness of the decisions made and the services provided as a result. The feasibility study should aspire to define in more detail the key determinants and quality standards in this field.

35. Considering the objective to develop practice-oriented guidance, the feasibility study should aim to identify relevant working methods and tools that state officials and service providers use in Council of Europe member states. The main objective is to identify evidence-based methods that are child-centred and sensitive to the needs of the individual child while supporting officials and professionals in gaining confidence in conducting best interests assessments and determinations. An additional objective is to map and review child-centred models for interagency and multidisciplinary cooperation in this field.

8. Proposals for policy instruments and practice-oriented tools

36. In light of the findings that will emerge from the analysis and review outlined above, the feasibility study should conclude with concrete proposals for a policy instrument and practice-oriented tools.

37. The preliminary review conducted thus far suggests that the complexity of the issues at stake, and their significance, might best be represented by a set of instruments:

8.1. Policy instrument: Committee of Ministers Recommendation, Guidelines or other policy instrument to give guidance to member states and other stakeholders in this area

38. A policy instrument appears to be particularly useful to systematise legal and policy standards relevant for the promotion of the best interests of the child in domestic care proceedings to limit parental responsibility and to place a child in care. Considering the fact that the concept of the best interests of the child is represented in numerous international, European and national legal instruments, while the wording typically remains vague and undefined, a clarification of its meaning from a child rights-based approach would be useful to promote further law and policy reform, policy planning and practice in this field. In addition, the consensus on human rights principles and procedural safeguards of a best interests determination as a formal procedure has the potential to significantly advance the progressive implementation of the rights of the child in this specific field, particularly if expressed by a Committee of Ministers Recommendation or Guideline.

8.2. A handbook for officials and practitioners

39. A handbook for officials and practitioners appears to be particularly meaningful in light of the complexity and significance of the issues at stake. Research shows that standardised procedures, systematic evidence-based methods and training in this field are not yet guaranteed. A handbook would be particularly useful to translate the policy instrument to practice-oriented guidance and propose a package of working methods and tools that are evidence-based, child-centred and sensitive to the needs of the child, while also strengthening the confidence, skills and techniques of officials and professionals working with and for children and families in the context of care proceedings. The handbook might include chapters that are specifically targeted to the different professional groups and disciplines, while also proposing practical guidance for interagency and multi-disciplinary cooperation.

40. The main target groups would be identified by the feasibility study and could include the following:

- Social workers and child protection officials conducting best interests assessments and determinations in the context of service provision for children, parents and families;
- Judges at family courts and other relevant judicial professionals involved in care proceedings;

- Lawyers, guardians and representatives supporting children and parents in the context of care proceedings;
- Other relevant professional groups that may be identified during the course of the research and consultation phase.

41. While targeting primarily the professional groups who are directly involved in service provision for children and families, alternative care, best interests determinations and care proceedings, the handbook provides also state of the art information and orientation for professionals involved in programming, advocacy and training.

42. In addition, the development of a chapter or stand-alone handbook for Parliamentarians might be considered, possibly in collaboration with the Council of Europe Parliamentary Assembly and with an associated training strategy for Parliamentarians on the best interests of the child.

8.3. Child-friendly materials

43. In accordance with the findings from the review of available child-friendly material conducted in the course of the feasibility study, the development of a child-friendly version of the policy instrument or related child-friendly material would be considered important. The objective of this document would be to strengthen the knowledge and awareness of children involved in care decision-making processes and related proceedings and to empower them to exercise and claim the respect of their rights in this context.

8.4. Research strategy: Towards an implementation science for the best interests of the child

44. A research strategy document for the principle of the best interests of the child in this field could also be considered, envisaging a partnership between the Council of Europe and national Governments, the academia, research and knowledge institutions, civil society organisations, and multi-lateral organisations. Such a document could analyse structural challenges in the implementation process, identify innovative solution-oriented propositions to redress these challenges and to safeguard the implementation process within the public administration.

9. References

The feasibility study would include a list of key reference documents that inform the review, including a list of relevant international and European standards, recommendations and guidance documents, as well as research and conference reports relevant for the field of study.

10. Annex: Preliminary outline of the feasibility study

1. Executive Summary

2. Key terms and concepts

3. Methodology

Literature review

Analysis of international and European standards

Analysis of questionnaires compiled by member states

Case studies (optional)

Consultation of national and international key stakeholders

Review by the Committee of Experts

4. The best interests of the child in care proceedings: A transdisciplinary review of meaning and scope in Council of Europe member States

- 4.1 The best interests of the child as a general principle of the UN Convention on the Rights of the Child: Historical overview and recent developments
- 4.2 The best interests of the child in the context of childcare and family policy: Socio-political interpretations from different perspectives and disciplines

5. International and European standards relevant to the best interests of the child in care proceedings

- 5.1 The best interests of the child in international and European standards
- 5.2. Human rights principles and fundamental freedoms
- 5.3. Procedural safeguards reflecting principles of rule of law and due process
- 5.4. Principles emerging from the case law of the European Court of Human Rights

6. Implementation measures and methods of governance

- 6.1. The best interests of the child: Relevance for child protection and childcare systems
- 6.2. Implementation measures from Council of Europe member states: Examples from policy and practice

7. Working methods and tools for the best interests determination

- 7.1. Best interests assessment
- 7.2. Best interests determination
- 7.3 Best interests assessments and determinations in childcare, family support and care proceedings: Examples from Council of Europe member states

8. Proposals for policy instruments and practice-oriented tools

- 8.1. Policy instrument: Committee of Ministers Recommendation, Guidelines or other policy instrument to give guidance to member States and other stakeholders in this area
- 8.2. A handbook for officials and practitioners
- 8.3. Child-friendly materials
- 8.4. Research strategy: Towards an implementation science for the best interests of the child

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