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LEGAL NOTE:

EU LAW PROTECTIONS FOR WOMEN ASYLUM SEEKERS

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EXECUTIVE SUMMARY

- The EU legal framework governing asylum claims and human trafficking generally takes into account the specific circumstances and special needs of vulnerable women.
- The EU has established common rules on protections for asylum seekers and for victims of human trafficking. These rules either apply directly or are transposed by EU Member States into their national laws.
- The EU requires Member States to have in place gender-sensitive procedures for asylum seekers and to offer gender-specific assistance to victims of human trafficking.
- Women who have been subjected (or who fear being subjected) to sexual and gender-based violence are entitled to apply for asylum.
- Some Member States recognise human trafficking as a specific ground on which a claim for asylum may be made pursuant to national law. The EU legal framework requires Member States to take this into account when considering an application by a third country national for asylum.
- In addition to the legal framework, there are EU mechanisms in place to monitor the treatment of and protect the rights of asylum seekers and victims of human trafficking, which include a complaints procedure.

BACKGROUND

1. As from 2014, as a result of the geopolitical situation in several of the EU's neighbouring countries, an unprecedented number of asylum seekers have entered the EU.¹ People of all ages and genders are fleeing armed conflict, extra-judicial killings, persecution and sexual and/or gender-based violence. By the end of November 2016, over 1 million asylum applications had been received by the 28 EU Member States during the past year; 33% of these applications were submitted by women.² For the period 2013 to 2014, over 76% of registered trafficking victims in the EU were women; of the total number of trafficking victims recorded for this period, 67% were trafficked for the purpose of sexual exploitation, a type of exploitation which predominantly affects women and girls, who made up 95% of the victims trafficked for this particular purpose.³ This note describes the principal protections afforded to female asylum seekers and trafficked women under the legal framework of the EU.⁴
2. The European Convention on Human Rights ("ECHR") is a second key legal regime within Europe,⁵ and while it is not the focus of this note, it bears mentioning that while the ECHR and the EU are separate legal regimes, they perform complementary roles. All EU Member States are parties to the ECHR and accept the jurisdiction of the European Court of Human Rights ("ECtHR"). While the EU's legal system itself is not currently bound by the ECHR,⁵ the European Court of Justice ("ECJ") regularly

cites ECtHR case law; the ECtHR has also made reference to the case law of the ECJ.⁶

THE EU AND THE RIGHTS OF ASYLUM SEEKERS

3. The EU is a political and economic union between 28 Member States.⁹ One of its founding treaties, the Treaty on the European Union ("TEU"), requires respect for the fundamental rights guaranteed by the ECHR.¹⁰ It also renders the Charter of Fundamental Rights of the EU¹¹ ("EU Charter") legally binding on EU institutions (and Member States, when they apply EU law).¹²
4. While certain rights under the EU Charter are restricted to EU citizens, others are granted to everyone regardless of nationality or status,¹³ including:
 - a) the right to asylum (which is guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951¹⁴ and the Protocol of 31 January 1967¹⁵ Relating to the Status of Refugees);¹⁶ and
 - b) the right to protection in the event of removal, expulsion or extradition, which (i) prohibits collective expulsions; and (ii) provides that people may not be removed, expelled or extradited to a State where there is a serious risk that he or she would be subject to the death penalty, torture or other inhuman or degrading treatment or punishment.¹⁷
5. Further, the Treaty on the Functioning of the EU ("TFEU") requires a common policy among Member States on asylum, immigration and external border control that is "fair" towards third-country nationals and stateless persons.¹⁸ The policy on asylum must comply with the

1951 Geneva Convention,¹⁹ the 1967 Protocol to the Convention Relating to the Status of Refugees and with the principle of *non-refoulement*.²⁰

6. The EU, generally the European Parliament and Council, adopts secondary legal instruments to address the issues of asylum and human trafficking, typically in the form of Directives which are instruments that set out the goals to be achieved, but allow Member States to devise their own laws to achieve these goals or Regulations which are binding on all Member States and directly transposed into their national laws without any legislative action needed.²¹

EU'S COMMON EUROPEAN ASYLUM SYSTEM

7. Through a series of Directives, the EU's Common European Asylum System provides common minimum standards for Member States regarding the treatment of all asylum seekers and applications.²² It consists of a legal framework covering the asylum process. In practice, however, the system remains characterised by differing treatment of asylum seekers²³ and varying recognition rates amongst EU Member States.²⁴

Which EU legal instruments apply to women asylum seekers?

8. There are four principal Directives setting out the required reception conditions for asylum seekers into the EU, each of which provide gender-based rights and procedures.²⁵

Qualification Directive²⁶

9. International Protection: The Qualification Directive sets the minimum standards for identifying people in need of international protection which encompasses both refugee status and subsidiary protection status.²⁷

a) Refugee status must be granted to a third-country national or stateless person who qualifies as a “refugee” in accordance with the Directive.²⁸ The definition of “refugee” under EU law reproduces almost word-for-word the definition in the 1951 Convention Relating to the Status of Refugees:

[A] third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it.²⁹

For the purpose of determining refugee status, it is necessary to show a well-founded fear of persecution and such persecution must be sufficiently serious or severe. Sufficiently serious or severe acts of persecution include (but are not limited to): discriminatory measures; physical or mental violence, including acts of sexual violence; and acts of a gender-specific nature.³⁰ The European Parliament considers female genital mutilation, domestic violence, honour killings and gender-

discriminatory laws (which, for example, prevent legal redress against gender-specific persecution) as grounds for persecution.³¹

b) Subsidiary protection must be granted to a third country national or stateless person who does not qualify for refugee status, but where there are substantial grounds for believing that that person would face a real risk of suffering serious harm if returned to his or her country of origin (or former habitual residence).³² Serious harm consists of either: the death penalty or execution; torture, inhuman or degrading treatment, or punishment in the country of origin; or serious and individual threat to a civilian’s life by reason of violence in situations of international or internal armed conflict.³³

10. An applicant’s gender must be taken into account in order to assess whether the acts to which the applicant has been or could be exposed would amount to “persecution” or “serious harm”.³⁴

11. There are circumstances in which a person may cease to be a refugee or a person eligible for subsidiary protection, for example, if he or she voluntarily re-establishes himself or herself in country previously fled owing to fear of persecution. A person may also be excluded from being a refugee, for example, if there are serious reasons for considering that he or she has committed a serious non-political crime outside the country of refuge.³⁵

Recast Reception Conditions Directive³⁶

12. The Recast Reception Conditions Directive sets minimum standards for Member States with regard to the

reception of those applying for international protection.³⁷

The following provisions are relevant to women:

- Member States must ensure that female applicants are detained in separate accommodation from men (unless they are family members and have all consented);³⁸
- Member States must take gender-specific concerns into consideration when housing applicants in reception and accommodation centres;³⁹
- Member States must take measures to prevent in reception and accommodation centres assault and gender-based violence, such as sexual assault and harassment;⁴⁰ and
- Member States must take into account the specific situation of vulnerable persons, including pregnant women, single parents with minor children, victims of human trafficking, and persons who have been subject to rape or other serious forms of psychological, sexual or physical violence (including female genital mutilation).⁴¹

Recast Common Procedures Directive⁴²

13. The Recast Common Procedures Directive creates procedures for the granting and withdrawal of international protection pursuant to the Qualification Directive, with a view to establishing a single common asylum procedure in the EU. It includes the following gender-related provisions:

- Member States are expected to recognise that applicants may be in need of special procedural guarantees based on their gender, gender-identity, or as victims of rape or other sexual violence, to identify

such applicants, and to provide them with adequate support to allow them to effectively access the common procedures and substantiate their application for international protection;⁴³

- Examination procedures should be gender-sensitive to ensure substantive equality between female and male applicants. Interviews should be organised such that both male and female applicants are able to speak about past experiences, in cases involving gender-based persecution;⁴⁴
- Member States must ensure that personnel examining applications and taking decisions are able to ask advice from experts on gender issues;⁴⁵
- Where an applicant has lodged an application on behalf of his or her dependants, Member States may only take a single decision covering all dependents where this would not lead to a disclosure that could jeopardise an applicant's interests, in particular, in cases involving gender-based persecution. In such cases, the Member State must issue a separate decision to the woman concerned;⁴⁶ and
- Interviewers should be competent to take account of an applicant's personal and general circumstances, including gender. Wherever possible, if the applicant so requests, the interviewer and/or interpreter should be a person of the same sex (unless the authority has reason to believe the request is based on grounds unrelated to the difficulties on the applicant's part to present his or her application in a comprehensive manner).⁴⁷

Returns Directive⁴⁸

14. The Returns Directive sets out common standards and procedures for the repatriation of third-country nationals staying in the EU illegally.⁴⁹ It provides that Member States must issue a “return decision” to any third-country national staying illegally on their territory. A State, however, may decide to offer a right to stay for compassionate, humanitarian reasons.⁵⁰ Unless there is a risk of the person concerned absconding, or a risk to public or national security, the return decision must provide for a period of voluntary departure between 7 and 30 days, or longer, if necessary, given the specific circumstances of the individual case.⁵¹
15. After a voluntary departure period has expired, or where no period has been granted, Member States must enforce the return decision. It may, however, postpone removal of the third-country national where this would violate the principle of *non-refoulement*.⁵²
16. The Returns Directive classifies certain people, including pregnant women, single parents with minor children and persons subjected to rape or other serious forms of psychological, physical or sexual violence, as “vulnerable persons”.⁵³ Member States must ensure that the special needs of vulnerable persons are taken into account during the period before voluntary departure or removal.⁵⁴ Where a vulnerable person is subject to detention – which is only permissible in order to prepare the return and/or carry out the removal process, especially where there is a risk of absconding – particular attention must

be paid to his or her situation, including the provision of emergency health care.⁵

Case Study: German Implementation of EU Protections for Women Asylum Seekers

In Germany, asylum claims are governed by the “Asylgesetz” (the Asylum Act). The Federal Ministry for Migration and Refugees is responsible for processing applications, while Germany’s Bundesländer (federal states) are responsible for providing accommodation and social services. Female asylum seekers enjoy specific procedural rights (pursuant to the administrative procedure set out in the Asylgesetz, which implements the Recast Common Procedures Directive), including access to a specifically trained decision-maker from the Federal Ministry, if the reasons for asylum are gender-based. In determining refugee status, the Asylgesetz affords greater protection to a woman who is a “member of a particular social group”, provided she can demonstrate that she has a well-founded fear she would be subject to an act of persecution. In Germany, women who have been subjected to gender-based violence are entitled to apply for “refugee status” (within the meaning of the Qualification Directive). Refugee status accords leave to remain for three years, a right to family unification, a work permit, and access to social- and healthcare. German legislation, however, takes a restrictive approach to “subsidiary protection” within the meaning of the Qualification Directive, only providing for a one-year leave to remain, a prolonged procedure for indefinite leave to remain, and no entitlement to family unification.

In Case 9 LB 20/14, the higher administrative court of Lüneburg considered a female Afghan asylum-seeker’s claim for refugee status. The applicant claimed that if she returned to her country of origin, her cousin, whom she had refused to marry, would subject her to physical

violence. A material fact in this case was that she had acquired a “westernised” identity. Having arrived in Germany at the age of 16 and lived there for several years, the court found she was part of a social “group of Afghan women whose identity has been westernised after a long residence in Europe”. It took into account the fact that the potential persecution would involve sexual and gender-based violence, and ruled that the act of persecution did not necessarily have to emanate from the Afghan State, but could emanate from private individuals if the State was unable or unwilling to provide protection. Having concluded that the applicant would likely suffer serious harm, the court found that she qualified for refugee status under the Qualification Directive.

Case Study: Italian Implementation of EU Protections for Women Asylum Seekers

The procedure for applying for international protection in Italy is set out in Legislative Decree No. 25 of 28 January 2008. Applications should be submitted to the border or local police office and subsequently processed by the Territorial Commissions for International Protection, under the Ministry of Internal Affairs. Local authorities, in collaboration with central government, are responsible for providing accommodation and social services. Law No. 46 of 13 April 2017 reformed judicial procedures concerning the granting of refugee status. The law has been criticised by NGOs and refugees advocacy groups for, inter alia, removing the possibility of challenging judgments of a lower tribunal before the Court of Appeal and for the applicant to intervene orally before the courts.

With regard to gender specific rights, Legislative Decree No. 142 of 18 August 2015 specifically recognises victims of female genital mutilation and human trafficking as “vulnerable persons” under the

framework of the Recast Reception Conditions Directive. The Territorial Commissions for International Protection gives priority to applications from vulnerable persons. There are also specific procedural practices in place for female asylum seekers who are victims of trafficking: e.g. during interviews, the interviewer and the interpreter are of the same gender as the applicant and the applicant can be accompanied by a specialised NGO.

On 23 November 2016, the Milan Tribunal reversed a decision of the Milan Territorial Commission refusing to grant international protection to a Cameroonian woman, who alleged she had been a victim of gender violence. The appellant claimed that she had been forced by her family into marriage when she was 18 years old, in return for a dowry-payment. Her husband was much older than her and was polygamous. She was constantly harassed and threatened by the other wives, including subjected to threats of physical violence and psychological harm (in the form of “magical curses”). She was also obliged to carry out diminishing tasks and was the only wife forced to take care of her husband when he became sick. When her husband died, she refused, contrary to prevailing tradition, to marry her brother-in-law, who then attempted to rape her. While defending herself, she accidentally killed him. She was subsequently isolated within her community and feared reprisals from her husband’s family. She therefore left Cameroon and reached Italy via Libya. The Milan Tribunal recognised that she had suffered harsh conditions (and would have been subject to physical harm and potentially even face death if she were returned to Cameroon). The harm that she had suffered (and could further suffer) amounted to gender-based persecution under the Qualification Directive. The Tribunal, in this finding, specifically quoted the “UNHCR Policy on Refugee Women and Guidelines on Their Protection: An Assessment of Ten Years of Implementation” to support its reasoning that refugee status can be granted on the basis of gender-based persecution.

On 27 November 2012, the Court of Appeal of Catania overturned the judgment of a lower tribunal not to grant refugee status to a victim of female genital mutilation, who had fled Nigeria. The Court of Appeal recognised the applicant as a refugee, focusing on the fact that this form of violence was widely accepted in the region of origin, and was a practice that specifically targeted women to seek to control their sexuality.

Italy has specifically recognised human trafficking victims as “vulnerable persons” and has been inclined to recognise refugee status on this basis. In February 2017, the Salerno Tribunal overturned a decision of the Territorial Commission refusing refugee status to a young Nigerian woman who had been trafficked, and who it considered particularly vulnerable on account of a severe heart condition requiring treatment. She had been coerced by her family and members of her village to leave the country, who, together with the smuggling network, subjected her to a voodoo ritual aimed at fully obliging her to repay the cost of her travel. After the voodoo ritual, the smuggling network brought the woman to Libya, where she was forced into prostitution. She reached Italy by sea, managing to escape the smugglers (who had threatened her and her family), and she applied for asylum. The Salerno Tribunal granted her refugee status. It noted that generally speaking smugglers use voodoo rituals to impress upon and to scare their victims in order to control them. The tribunal explicitly referred to the fact that abducted woman usually refuse to report instances of violence where they believe in and are afraid of the consequence of breaking the voodoo ritual.

EU RULES ON HUMAN TRAFFICKING

17. The EU Charter prohibits slavery and forced labour, including the trafficking of human beings.⁷⁹ The Human Trafficking Directive⁸⁰ establishes minimum rules

concerning the definition of criminal offences and sanctions for human trafficking.⁸¹ Taking a victim-orientated approach, it covers prosecution of offenders, victim support, victim rights in criminal proceedings and prevention policy.⁸² It recognises the gender-specific phenomenon of trafficking and the fact that women and men are often trafficked for different purposes, whereby “assistance and support should also be gender-oriented where appropriate”.⁸³

18. The Directive imposes on Member States an obligation to ensure that the following intentional acts are punishable:

The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.⁸⁴

19. For the purpose of the Directive, “exploitation” includes the exploitation of the prostitution of others or other forms of sexual exploitation.⁸⁵

20. The Directive further obliges Member States to ensure that their national authorities may not prosecute or impose penalties on victims for their involvement in criminal activities, which they have been compelled to commit as a direct consequence of being trafficked.⁸⁶

21. Member States must take the necessary measures to ensure a victim is provided with assistance and support as soon as the relevant national authority has reasonable grounds for believing that that person might have been the victim of human trafficking.⁸⁷ Such assistance should not be conditional on the victim's willingness to cooperate in the criminal investigation.⁸⁸ Assistance and support measures must include, at a minimum, standards of living capable of ensuring victims' subsistence, such as safe accommodation and medical treatment, including psychological assistance, counselling and other information (e.g., on the possibility of obtaining international protection, as refugee or otherwise) and translation/interpretation services where appropriate.⁸⁹ Member States are required to attend to victims with special needs, including those derived from pregnancy, or as a result of a serious form of psychological, physical or sexual violence.⁹⁰ Legal counselling and representation should also be made available to victims without delay, and free of charge where the victim does not have sufficient financial resources.⁹¹
22. The Directive also provides that victims of human trafficking must have access to existing schemes of compensation available to those who have suffered as a result of violent crimes of intent.⁹²

OTHER EU INITIATIVES & COMPLAINTS MECHANISMS

23. The European Border and Coast Guard Agency (often referred to as "Frontex") aims to "promote, coordinate

and develop European border management in line with the EU fundamental rights charter and the concept of Integrated Border Management".⁹³

24. Frontex's officials are often a first point of contact for third country nationals entering the EU. Its Code of Conduct requires officials to have special consideration to particularly vulnerable groups of people, which may include women and victims of exploitation or trafficking.⁹⁴ Its guidance on the asylum procedure takes a gender-sensitive approach, providing that:⁹⁵

Particular support should be given so that women and girls can speak with you privately, and that nobody intervenes and/or answers questions on their behalf. Information should also be provided directly to them so they are not deprived of vital information and the ability to take independent decisions, including to request international protection or other assistance. If possible, the presence of a female first-contact official and interpreter should be ensured. Women should not be urged to talk about incidents or crimes related to sexual violence. If appropriate, considering their age, women should be sensitively asked if they are pregnant and, if needed, be informed of available assistance.⁹⁶

25. In 2012, following a request from the European Ombudsman,⁹⁷ Frontex established a de facto complaint mechanism for refugees in the form of an independent Fundamental Rights Officer ("FRO").⁹⁸ Any person affected by the actions of Frontex staff and who considers his or her fundamental rights pursuant to the

EU Charter to be breached may submit a complaint to the FRO.⁹⁹

26. The European Ombudsman is responsible for investigating instances and complaints of maladministration in EU bodies and institutions.¹⁰⁰ In 2015, the Ombudsman completed an own-initiative inquiry into Frontex's fundamental rights obligations and subsequently set out proposals on how it could better ensure respect for fundamental rights of migrants subject to forced returns from the EU to their countries of origin, calling on the agency to ensure that families with children and pregnant women were seated separately from other returnees.¹⁰¹

CONCLUSION

27. Although the EU framework takes into account gender issues, reservations have been expressed about its transposition and implementation at national level, contributing to protection gaps for women and girls.¹⁰² There appear to be clear divergences between Member States as regards the integration of gender perspectives into their respective asylum policies and practices: some Member States fail to meet EU minimum standards and thus face Commission infringement proceedings.¹⁰³ An oft-cited solution would be the creation of EU gender guidelines on refugees to harmonise gender-sensitive asylum systems and to foster consistency across EU Member States.¹⁰⁴

REFERENCES

1. See further, European Parliament Research Service, *Migration and Asylum*, 10 May 2016, available at: <http://www.europarl.europa.eu/thinktank/infographics/migration/public/index.html?page=intro> (last accessed 3 October 2017). See also *Asylum Applications (non-EU) in the EU-28*, Eurostat, available at: [http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Asylum_applications_\(non-EU\)_in_the_EU-28_Member_States,_2006%E2%80%932016_\(thousands\)_YB17.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Asylum_applications_(non-EU)_in_the_EU-28_Member_States,_2006%E2%80%932016_(thousands)_YB17.png) (last accessed 3 October 2017).
2. European Commission, 2017 Report on Equality Between Women and Men in the EU, ISSN: 2443-5228, 2017, pp. 18-19.
3. European Commission, *Report from the Commission to the European Parliament and the Council on the Progress Made in the Fight against Human Trafficking*, SWD(2016) 159 final, 19 May 2016, pp. 4, 6, available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/organized-crime-and-human-trafficking/trafficking-in-human-beings/docs/commission_report_on_the_progress_made_in_the_fight_against_trafficking_in_human_beings_2016_en.pdf (last accessed on 3 October 2017).
4. Please note that this note does not address general international law protections, which are also applicable in Europe. Nor does it seek to address how individual Member States have applied certain EU laws and principles. Instead, this note provides an overview, supported by a selection of case studies, of the transposition and application of certain EU laws in certain individual Member States.
5. The European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 1950, ETS 5 (signed on 4 November 1950 and ratified and entered into force on 3 September 1953).
6. EU accession to the ECHR became a legal obligation pursuant to art. 6(2) of the Treaty of Lisbon ratified on 25 September 2009 and which entered into force on 1 December 2009. At the time of writing, accession has not yet taken place owing to the ECJ's negative *Opinion 2/13 of 18 December 2014 on the draft accession agreement*. The ECJ, among other things, found the draft to be incompatible with EU law because it would give an external body (the ECtHR) the power to review the application of EU law: the draft risked negatively affecting the special features and autonomy of EU law and had failed to address the relationship between the ECJ's preliminary ruling and the ECtHR's advisory opinion procedure (paras. 179-200).
7. F. G. Jacobs, *The European Convention on Human Rights, the EU Charter on fundamental rights and the European Court of Justice*, p. 292, available at: http://www.ecln.net/elements/conferences/book_berlin/jacobs.pdf (last accessed 3 October 2017). See also ECJ, Case 617/10, *Åkerberg Fransson*, preliminary ruling, 17 May 2013, para. 44.
8. *Supra* note 7, Jacobs, p. 292. For example, in ECtHR, *Christine Goodwin v. UK*, Application No. 28957/95, 1 December 1997, p. 6, the ECtHR referred to the ECJ, Case C-13/94 of *P v S and Cornwall County Council*, preliminary ruling, 30 April 1996.
9. Namely: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and (at the time of writing) the United Kingdom.
10. *Supra* note 6, Treaty of Lisbon, art. 6(3).
11. Charter of Fundamental Rights of the European Union, 2012, 2012/C 326/02 (entered into force 26 October 2012).
12. *Ibid.*, art. 51 of EU Charter. See also, *supra* note 10. For more information on the EU Charter, see: http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuld=FTU_1.1.6.html (last accessed 3 October 2017).
13. *Ibid.*, information on EU Charter.

14. Convention Relating to the Status of Refugees, United Nations, Treaty Series, vol. 189 (entered into force 28 July 1951) (the “Geneva Convention”).
15. Protocol Relating to the Status of Refugees, United Nations, Treaty Series, vol. 606 (entered into force 4 October 1967) (the “1967 Protocol”).
16. *Supra* note 11, EU Charter, art. 18.
17. *Ibid.*, art. 19.
18. Consolidated version of the Treaty on the Functioning of the European Union, 2007, 2008/ C 115/01 (entered into force 13 December 2007) (“TFEU”), art. 67(2). It should be noted that Denmark, Ireland and the UK have opt-outs from Title V of Part Three of the TFEU (area of freedom, security and justice) according to Protocols Nos. 21 and 22 of the Treaty of Lisbon. Ireland and the United Kingdom have a flexible opt-out from legislation adopted in this area, which allows them to opt in or out of legislation and legislative initiatives on a case-by-case basis (Protocol No 21 of the Treaty of Lisbon). In contrast, Denmark has a more rigid opt-out from the area of freedom, security and justice, which means that it does not take part at all in this policy. In the negotiations of the Treaty of Lisbon, Denmark obtained an option to convert its opt-out into a flexible opt-in modelled on the Irish and British opt-outs (Protocol No. 22). This note does not address the scope and application of such opt-outs/ opt-ins.
19. *Supra* note 14.
20. *Supra* notes 15 and 18 (art. 78(1) of the TFEU). The principle of non-refoulement is derived from the Geneva Convention 1951 (*supra* note 14), art 33. It seeks that refugees are not expelled or returned (“refouler”) to territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.
21. *Supra* note 18, these instruments are adopted pursuant to art. 288 TFEU.
22. See *European Commission Fact Sheet, The Common European Asylum System (CEAS)*, (undated), p. 1, available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160713/factsheet_the_common_european_asylum_system_en.pdf (last accessed on 3 October 2017).
23. Please note that for the purpose of this note, the term “asylum seeker” or “application for asylum” is intended to describe the situation whereby a third country national or stateless person has: (i) applied for international protection (refugee status or subsidiary protection as described in Section 3.1.1); and (ii) the outcome of their application remains pending.
24. *Supra* note 22, p.1.
25. Note that another instrument exists (Regulation 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining international protection lodged in one of the Member States by a third country national or stateless person (the “Dublin Regulation”). This Regulation does not contain any gender-specific provisions and as a result, is not a topic of this note.
26. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, 2011, OJ L 33/9-337/26 (the “Qualification Directive”). The Qualification Directive is binding on all EU Member States except for UK, Denmark and Ireland, who have opted out. See: <http://www.asylumlawdatabase.eu/en/content/european-parliament-and-council-qualification-directive-recast-transposition-deadline-21> (last accessed 3 October 2017). The UK and Ireland remain bound by the previous Directive 2004/83/EC of the Council of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. In the interest of brevity, this note does not address this 2004 Directive.
27. *Ibid.*, art. 2(a).
28. *Ibid.*, arts. 2(d) and 13.
29. *Ibid.*, art. 2(d). The circumstances in which a person may not qualify as a refugee are set out in art. 12 of the Qualification Directive.
30. *Ibid.*, arts. 9(1)(a) and (b) and 9(2)(a), (b) and (f).
31. See further European Parliament, DG for internal policies (Policy department C – Citizens’ rights and constitutional affairs), *Reception of female refugees and asylum seekers in the EU Case study Germany*, 2016, p. 10, available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536497/IPOL_STU\(2016\)536497_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536497/IPOL_STU(2016)536497_EN.pdf) (last accessed 3 October 2017). See also European Parliament Briefing, *Gender Aspects of migration and asylum in the EU*, March 2016, p. 2, available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/579072/EPRS_BRI\(2016\)579072_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/579072/EPRS_BRI(2016)579072_EN.pdf) (last accessed 3 October 2017).
32. *Supra* note 26, Qualification Directive, arts. 2(f) and 18.
33. *Ibid.*, art. 15.
34. *Ibid.*, art. 4(3)(c).
35. *Ibid.*, arts. 11 (Cessation) and 12 (Exclusion).
36. Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (the “Recast Reception Conditions Directive”).
37. *Ibid.*, art 3 of the Recast Reception Conditions Directive. Note that this Directive does not apply to the Schengen-associated States, or the UK, Ireland and Denmark, although the UK continues to apply the previous Directive 20003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (which in the interest of brevity this note does not address).
38. *Supra* note 36, art. 11(5).
39. *Ibid.*, art. 18(3). Note this Directive does not define “gender-specific”.
40. *Ibid.*, art. 18(4).
41. *Ibid.*, art. 21.
42. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (the “Recast Common Procedures Directive”).
43. *Ibid.*, recital 29.
44. *Ibid.*, recital 32. Note this Directive does not define “gender-sensitive”.
45. *Ibid.*, art. 10(3)(d).
46. *Ibid.*, arts. 7(2), 11(3).
47. *Ibid.*, arts. 15(3)(a)-(c).
48. Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals (the “Returns Directive”).
49. The UK and Ireland are not bound by the Returns Directive, due to a negotiated opt-out. Denmark chose to implement the Directive into national law. See http://europa.eu/rapid/press-release_IP-11-1097_en.htm?locale=en (last accessed 3 October 2017).
50. *Supra* note 48, art. 6(1).
51. *Ibid.*, art. 7. The Returns Directive allows Member States to legislate that a voluntary departure period will only be offered where a third-country national has applied for one.
52. *Ibid.*, arts. 8(1), 8(2), 9(1).
53. *Ibid.*, art. 3(9).
54. *Ibid.*, art. 14. Note that this Directive does not define “special needs”.
55. *Ibid.*, arts. 15(1), 16(3).
56. Asylgesetz, 1992, BGBl. I S. 2780 which entered into force on 26.06.1992 (“AsylG”).
57. *Ibid.*, paras. 44-54
58. Directorate General for International Policies, *Reception of female refugees and asylum seekers in the EU Case study Germany*, PE 536.497, February 2016, p. 19.
59. *Supra* note 56, para. 3b(1)(4)(b). The AsylG states specifically that being a member of a specific group can include instances that solely relate to gender or sexual identity.
60. *Supra* note 56, para. 25 of the AsylG.

61. *Ibid.*, para. 3(1).
62. *Supra* note 56, para. 28 of the AsylG. *Supra* note 58, European Parliament, *Reception of female refugees and asylum seekers in the EU Case study Germany*, p.19. While Germany has not formally transposed art. 10(3)(d) of Recast Common Procedures Directive into German statute, the provision has already been implemented by the Federal Ministry in its administrative practice, and the Ministry has published guidelines: http://www.fluechtlingsrat-thr.de/sites/fluechtlingsrat/files/pdf/gesetze_verordnungen/europa/Liefaden%20Umsetzung%20Verfahrensrichtlinie.pdf (only available in German) (last accessed 3 October 2017). An English summary of the Federal Ministry's guidelines can be found at: <http://www.bamf.de/EN/Fluechtlingschutz/Entscheider/entscheidungen-node.html> (last accessed 3 October 2017). Note that the European Commission has taken action against Germany for failure to communicate the transposition of the Recast Common Procedures Directive into national law. See http://europa.eu/rapid/press-release_IP-16-270_en.htm (last accessed 3 October 2017).
63. Aufenthaltsgesetz, 2004, BGBl. I S. 2780 which entered into force in 2004 (the "AufenthG"), para. 26(1).
64. Case 9 LB 20/14, available at: <http://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psm1?doc.id=MWRE150002838&st=null&showdoccase=1> (last accessed 3 October 2017).
65. *Ibid.*, para 25.
66. Legislative Decree No. 25 of 28 January 2008 implementing Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, art. 6. The Legislative Decree No. 25 has since been updated to reflect the Recast Common Procedures Directive and the Recast Reception Conditions Directive.
67. Legislative Decree No. 142 of 18 August 2015 implementing the Recast Common Procedures Directive and the Recast Reception Conditions Directive, art. 8.
68. For a more detailed account of criticisms on the reform see <http://openmigration.org/analisi/perche-la-nuova-legge-su-immigrazione-e-asilo-non-e-affa-tto-una-buona-notizia/> (only in Italian) (last accessed 3 October 2017).
69. *Supra* note 67, arts. 17(1)-(2).
70. *Supra* note 66, art 28.
71. See GRETA Report on Italy, GRETA (2016) 29, 30 January 2017, para. 27, available at <https://rm.coe.int/16806edf35> (last accessed 3 October 2017).
72. Tribunale di Milano, case N. R.G. 19031/2015, judgment of 23 November 2016, available at http://www.meltingpot.org/IMG/pdf/status_cittadina_camerunense_23.11.16.pdf (last accessed 19 November 2017).
73. Women's Commission for Refugee Women and Children, UNHCR Policy on Refugee Women and Guidelines on Their Protection: An Assessment of Ten Years of Implementation, 2002, available at <http://www.refworld.org/pdfid/48aa83220.pdf> (last accessed 19 November 2017).
74. Corte d'Appello di Catania, judgment of 27 November 2012, available at http://www.questionegiustizia.it/doc/Corte_Appello_Catania_sentenza_27_novembre_2012.pdf (only in Italian) (last accessed 3 October 2017).
75. *Ibid.*, pp. 4-5.
76. Tribunale di Salerno, case N. R.G. 9007/2015, judgment of 2 February 2017, available at: http://www.meltingpot.org/IMG/pdf/tribunale_di_salerno_2_febbraio_2017.pdf (only in Italian) (last accessed 22 November 2017).
77. *Ibid.*, p. 10. The Court of Appeal focused on two points: first, as a woman she had already been a victim of persecution in Nigeria and, secondly, the Nigerian judicial system did not have a sufficiently high standard of protection for human trafficking victims.
78. *Ibid.*, pp. 7-8.
79. *Supra* note 11, art. 5 of the EU Charter.
80. Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims ("Human Trafficking Directive").
81. *Ibid.*, recital 7.
82. European Commission, Press Release, *Trafficking in human beings: more victims in the EU but Member states are slow to respond*, 15 April 2013, available at http://europa.eu/rapid/press-release_IP-13-322_en.htm.
83. *Supra* note 80, recital 3.
84. *Ibid.*, art. 2(1).
85. *Ibid.*, art. 2(3).
86. *Ibid.*, art. 8.
87. *Ibid.*, art. 11 (2).
88. *Ibid.*, art. 11 (3).
89. *Ibid.*, art. 11 (5).
90. *Ibid.*, art 11 (7).
91. *Ibid.*, art 12 (2).
92. *Ibid.*, art. 17.
93. See further, <http://frontex.europa.eu/about-frontex/mission-and-tasks/> (last accessed 3 October 2017).
94. Frontex, *Code of Conduct Applicable to All Persons Participating in Frontex's Operational Activities*, arts. 1, 2 and 5, available at: http://frontex.europa.eu/assets/Publications/General/Code_of_Conduct_applicable_to_all_persons_participating_in_Frontex_operational_activities.pdf (last accessed 3 October 2017).
95. Frontex, *Practical Guide: Access to the Asylum Procedure*, ISBN 978-92-9243-679-7, pp. 9-11 and 21-24
96. *Ibid.*, p. 21.
97. European Ombudsman, Decision closing own-initiative inquiry OI/5/2012/BEH-MHZ concerning the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), available at: <https://www.ombudsman.europa.eu/en/cases/decision.faces/en/52477/html.bookmark> (last accessed 3 October 2017).
98. See further, <http://frontex.europa.eu/news/management-board-designates-fundamental-rights-officer-81K8lm> (last accessed 3 October 2017).
99. Complaint form available at http://frontex.europa.eu/assets/Complaint/Complaint_Form_English.pdf (last accessed 3 October 2017)
100. See further: <https://www.ombudsman.europa.eu/home.faces> (last accessed on 3 October 2017). Note that, to submit a complaint, it is necessary to be an EU citizen or a natural or legal person residing or having a registered office in the EU. Asylum seekers can therefore typically access the Ombudsman via NGOs based in the EU. The complaint form is available at <https://www.ombudsman.europa.eu/en/atyourservice/secured/complaintform.faces> (last accessed on 3 October 2017).
101. Available at: <https://www.ombudsman.europa.eu/press/release.faces/en/59744/html.bookmark> (last accessed 3 October 2017).
102. *Supra* note 31, European Parliament, *Gender Aspects of Migrations and Asylum in the EU: An Overview*, p. 1.
103. *Ibid.*, p. 9.
104. *Ibid.*, p. 10.

CONTACT INFORMATION

This briefing note is published to provide general information and not as legal advice. Please contact a member of the Accountability Unit Legal Team or Research Team if you would like to discuss the contents of this note.

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