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PROTECTING VICTIMS: AN ANALYSIS OF THE
ANTI-TRAFFICKING DIRECTIVE FROM THE
PERSPECTIVE OF A VICTIM OF GENDER-BASED
VIOLENCE

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Contents

Chapter 1: Introduction	7
1.1 Introduction	7
1.2 Methodology.....	8
Chapter 2: Legal and Policy Context	10
2.1 Trafficking for Sexual Exploitation and Forced Marriage on the Continuum of Violence against Women and Girls	10
2.2 Violence against Girls: Gender Perspective on Child Victims of Trafficking and the Girl-Child..	13
2.3 Legal Instruments Overview	14
2.3.1 EU Level.....	15
2.3.2 European Regional level.....	18
2.3.3 International Level	20
Conclusion.....	23
Chapter 3: Identification	23
3.1 Definition of ‘Victim’: Implications for Identification	24
Anti-Trafficking Directive	25
Victims’ Rights Directive	27
Conclusion.....	28
3.2 Evidentiary Standard.....	28
Anti-Trafficking Directive	29
Victims’ Rights Directive	30
Conclusion.....	30
3.3 Age	30
Anti-Trafficking Directive	30
Victims’ Rights Directive	31
Conclusion.....	32
3.4 Competent Authority	32
Anti-Trafficking Directive	32
Victims’ Rights Directive	33
Conclusion.....	34
3.5 Identification Interview.....	35
Anti-Trafficking Directive	35
Victims’ Rights Directive	35
Conclusion.....	36

3.6 National Referral Mechanism	36
Anti-Trafficking Directive	36
Victims’ Rights Directive	37
Conclusion.....	38
Chapter 4: Support and Assistance	38
4.1. Equal Treatment	38
Anti-Trafficking Directive	39
Victims’ Rights Directive	39
Conclusion.....	39
4.2 Access to Supports: Early Access	39
Anti-Trafficking Directive	40
Victims’ Rights Directive	40
Conclusion.....	41
4.3 Duration of Assistance	41
Anti-Trafficking Directive	41
Victims’ Rights Directive	42
Conclusion.....	42
4.4 Conditional Support	42
Anti-Trafficking Directive	42
Victims’ Rights Directive	43
Conclusion.....	43
4.5 Consent in Obtaining Services	43
Anti-Trafficking Directive	43
Victims’ Rights Directive	44
Conclusion.....	44
4.6 Needs Assessment	44
Anti-Trafficking Directive	44
Victims’ Rights Directive	45
Conclusion.....	45
4.7 Special Needs	45
Anti-Trafficking Directive	45
Victims’ Rights Directive	46
Conclusion.....	46
4.8 Support and Assistance to Children	46

4.8.1 Best Interests of the Child.....	46
Anti-Trafficking Directive	46
Victims’ Rights Directive	47
4.8.2 Guardianship.....	47
Anti-Trafficking Directive	47
Victims’ Rights Directive	48
4.8.3 Durable Solutions.....	48
Anti-Trafficking Directive	48
Victims’ Rights Directive	48
Conclusion.....	48
4.9 Service Providers.....	49
Anti-trafficking Directive	49
Victims’ Rights Directive	49
Conclusion.....	49
4.10 Integrated Support.....	50
Anti-Trafficking Directive	50
Victims’ Rights Directive	50
Conclusion.....	50
4.11 Accommodation.....	50
Anti-Trafficking Directive	51
Victims’ Rights Directive	51
Conclusion.....	52
4.12 Material Assistance [OPTIONAL SECTION, decision lies with the EIGE].....	52
Anti-trafficking Directive	52
Victims’ Rights Directive	52
Conclusion.....	53
4.13 Medical and Psychological Needs.....	53
Anti-Trafficking Directive	53
Victims’ Rights Directive	54
Conclusion.....	54
4.14 Interpretation and Translation Services	55
Anti-Trafficking Directive	55
Victims’ Rights Directive	55
Conclusion.....	55

Chapter 5: Access to Justice.....	56
5.1 Legal Assistance	56
Anti-Trafficking Directive	57
Victims’ Rights Directive	59
Conclusion.....	59
5.2 Protection of Victims during Criminal Investigation and Proceedings	60
5.2.1 Special Measures	61
Anti-Trafficking Directive	61
Victims’ Rights Directive	62
Conclusion.....	63
5.2.2 Protection of Children.....	64
Anti-Trafficking Directive	64
Victims’ Rights Directive	64
Conclusion.....	65
5.3 Compensation	65
Anti-Trafficking Directive	66
Victims’ Rights Directive	66
Conclusion.....	67
Chapter 6: General Conclusions and Recommendations	68
General Conclusions.....	68
Identification.....	69
Support and Assistance.....	70
Access to justice	71
Recommendations	71
6.1 Over-arching Recommendations	71
6.2 Identification.....	73
6.3 Assistance and Support.....	74
6.4 Access to Justice.....	75
6.5 Recommendations regarding Children in the Respective Areas of Identification Assistance and Support and Access to Justice.....	77
6.5.1 Identification.....	77
6.5.2 Assistance and Support.....	78
6.5.3 Access to Justice for Children.....	79
Chapter 7: Indicators.....	80

Bibliography 83

Chapter 1: Introduction

1.1 Introduction

Trafficking in human beings is a highly gendered phenomenon, which disproportionately affects women and girls. This is particularly so in the case of trafficking for sexual exploitation and/or forced marriage, where the overwhelming majority of victims are women and girls (Europol 2016). A combination of root causes including gender inequalities, women and **girls'** vulnerability to domestic violence, and the demand for sexual services, makes them particularly vulnerable to trafficking (EPRS 2016). The Eurostat figures highlight the gendered nature of trafficking in human beings, with women and girls comprising 80% of registered victims in the reporting period (Eurostat 2015). The gendered nature of trafficking for sexual exploitation and/or forced marriage, and that of the harms which arise as a result, place these crimes within the wider continuum of gender-based violence and violence against women which require a gender sensitive response.

The highly gendered nature of trafficking can be attributed in part to the 'push' and 'pull' factors driving trafficking in human beings into, and within, Europe. These include poverty, marginalisation, conflict, a lack of legal avenues for migration, ineffectual border controls, corruption, and ineffective criminal justice responses. Combined with a demand for low paid and disempowering work, particularly from the commercial sex industry, these factors have allowed trafficking into and around Europe to thrive (Akee et al 2012; Hernandez & Rudolph 2015; Cho 2015). Women and girls are significantly and disproportionately affected by these push and pull factors; the socio-economic disempowerment of women puts them at heightened risk of targeting. In the case of trafficking for sexual exploitation, 95% of identified victims are female (Eurostat 2015).

There is no precise statistical data on trafficking for forced marriage. Eurostat notes that in their category of **"other forms of exploitation"** (into which forced marriage falls), at a minimum, 52% of victims are female (Eurostat 2015). The actual figure is likely to be much higher. Although the issue of forced marriages is a relatively less researched phenomenon, according to the Fundamental Rights Agency (2014), it is clearly linked to human trafficking.

The gendered nature of trafficking in human beings for sexual exploitation and forced marriage is pre-determined by the gender-specific harms associated with each. A recent study by the European Commission exploring the gender dimensions of trafficking in human beings found that many of the harms arising from trafficking for sexual exploitation are gender-specific, including vaginal injuries, increased risk of sexually transmitted diseases and HIV, forced pregnancies, high rates of post-traumatic stress disorder, anxiety and depression. The rates of re-trafficking of those who manage to escape from a situation of exploitation are high, while the recovery from lasting damage is long and resource-intensive.

Gender-specific harms are experienced by all victims of trafficking who are sexually abused, including those exploited within forced marriages (EC 2016a). The above harms clearly demonstrate trafficking in human beings for sexual exploitation and forced marriage as types of sexual violence and clearly place them as forms of violence against women. The World Health Organisation explicitly lists both trafficking for sexual exploitation and forced marriage under the category of sexual violence (WHO Global Report, Chapter 6, 2002).

Similar to other forms of gender-based violence and violence against women, the specific harms arising in cases of trafficking for sexual exploitation and forced marriage give rise to gender-specific needs amongst victims. Consequently the Report adopts a gender perspective to analyse the Directives.

In the context of this report the gender perspective is determined, firstly, by the target group of victims that the report proposes to investigate, i.e. female victims of trafficking for sexual exploitation and/or forced marriage. The gender perspective used in this report can also be understood as an analytical framework within which every issue in question is examined from the *woman-centered* perspective. In other words, this report examines the provisions and obligations contained in the Anti-Trafficking Directive by asking how such provisions and obligations can be, are, and should be implemented specifically in relation to women and girl victims of trafficking, and, in particular, female victims of trafficking for the purposes of sexual exploitation and/or forced marriage.

The report seeks to establish:

- Whether Articles 11-17 of the Anti-Trafficking Directive, read in conjunction with **other provisions of Directive and the relevant provisions of the Victims' Rights Directive**, contain an exhaustive understanding of the female-specific risks and vulnerabilities to trafficking in human beings for sexual exploitation and forced marriage?
- Whether these Articles have the potential to fully protect, assist and rehabilitate all female victims of trafficking and what obstacles or adverse effects on female victims may arise in the process of their implementation?
- Whether these Articles are harmonised with other EU, regional and international instruments on trafficking in human beings, violence against women and gender equality?

1.2 Methodology

The report involves a combined analysis of the **Anti-Trafficking Directive and Victims' Rights Directive** *vis-à-vis* the identification, assistance and support, and access to justice, of women and girl victims of trafficking for sexual exploitation and/or forced marriage. While the former concept, trafficking for sexual exploitation, has been documented and defined in the past, the latter phenomenon has received less attention.

In defining trafficking for the purpose of forced marriage, the report is guided by the provisions of the Anti-Trafficking Directive and the approach adopted by the EU Fundamental Rights Agency (2014) in which forced marriage is defined as a situation where a marriage is entered into without the free and full consent of one or both of the parties because of threats, deceit or coercion. For the purposes of defining trafficking for forced marriage, this working definition is incorporated into the definition of trafficking contained in Article 2 of the Anti-Trafficking Directive. The approach followed here is based on Recital 11 of that Directive, which requires that the three constitutive elements of human trafficking must also be present in order for a situation of forced marriage to be considered trafficking for forced marriage. Thus circumstances can be defined as a situation of trafficking for forced marriage, where at least one party was recruited for the marriage by

means of deception or coercion for the purposes of exploitation (this is primarily sexual exploitation but in some cases will also include labour exploitation and/or domestic servitude) (HEUNI 2016).

For the purposes of the above definition, it is irrelevant if the marriage is based on false documents and thus constitutes a fake, false, bogus or fictitious marriage, as described by the European Commission handbook on marriages of convenience (COM 2014). If the marriage involves unwillingness by one of the parties and exploitation of that same party, the status of the documentation is irrelevant. Similarly, the above definition applies irrespective of whether the marriage represents a ‘sham marriage’ concluded between an EU and non-EU national for the purposes of advancing the residence rights of the latter, providing that the consent of one or both of the parties is obtained by deception and coercion for the purposes of exploitation within the marital setting (HEUNI 2016)(¹). Finally, the approach followed here also encompasses arranged marriages, i.e. where a third party (e.g. parents, guardians or traffickers) organises the marriage, specifically where it is a situation of forced marriage for one party, as an environment possibly (but not necessarily) leading to trafficking in human beings.

Building on the methodology employed in the European Institute for Gender Equality study **on the Victims’ Rights Directive** (EIGE 2016), this report undertakes a SWOT (Strengths, Weaknesses, Opportunities, and Threats) analysis of those Directives under three main headings: identification, assistance and support, and access to justice. This report adopts a thematic approach centred on these areas. The analysis concentrates on the wording of the Directives, but also focuses its SWOT analysis on the possibilities surrounding implementation **of the Directives’ provisions**. The report is centred on Articles 11-17 of the Anti-Trafficking Directive; these are specifically concerned with the identification, support and assistance, and access to justice of trafficking victims. Each of the measures found in those Articles is analysed under the above headings in order to determine the extent that they can be used to respond to the specific needs of women and girl victims of trafficking for sexual exploitation and/or forced marriage. **Where the Victims’ Rights Directive contains relevant provisions, these are encompassed within the analysis.**

Overall, the report conducts a legal analysis of both Directives from the perspective of **gender-based violence victims’ rights including victims of trafficking of human beings for sexual exploitation and/or forced marriage**. For this purpose, the report will have regard to relevant decisions of the European Court of Human Rights and CEDAW Committee. In order to provide a meaningful comparative analysis of two texts, international and regional standards regarding protecting and vindicating the rights of victims of gender-based violence will be used as the benchmark for comparison. The standards contained in the above will underpin the legal analysis. The report further adopts an intersectional approach. Recognising the overlapping vulnerabilities often found in trafficking victims, and their combined impact on **victims’ capacity to avail** of the assistance and protection afforded under the Directives, the report takes into account additional barriers intersecting with gender. Where relevant, the report considers how factors such as the residency status of victims; their belonging to a national minority; disabilities; language and literacy levels; and the maturity of victims, impacts on their capacity to benefit from the measures contained in the Directives.

It is academically established that the methodologies for studying intersectionality are underdeveloped, while conducting an analysis accounting for multiple variables can be very challenging. Intersectionality for the purposes of this analysis will be based on an intracategorical approach (Denis 2008), bearing in mind that it is an additional method to an already complex central method involving SWOT legal analysis. This approach centres on neglected points of intersection, such as those that **tend 'to reflect multiple subordinate locations as opposed to dominant or mixed locations', taking as a primary focus 'a single social group that is at the neglected intersection of master categories'** (Denis 2008:686). For the purposes of the analysis, the social group will comprise of women and girls trafficked for sexual exploitation and/or forced marriage, experiencing inequalities at the intersection with master categories of inequality such as disability, race, minority and others. This approach will be invoked where the analysis appears relevant and conducive to intersectional considerations, which will be determined in the course of the in-depth analysis.

The report is split into a number of sections. The first section explores the overall legal and policy context of trafficking for sexual exploitation and/or forced marriage. This is followed by an analysis of the extent that the **Anti-Trafficking Directive and Victims' Rights Directive** recognise the importance of gender in the overall assistance and protection of trafficking victims. The relevant provisions of the Directives are then analysed in detail in separate sections with sub-headings that fall within the three categories of study: identification, assistance and support, and access to justice. Drawing from the findings from this analysis, the concluding chapter contains a series of recommendations for a gender-specific implementation of Articles 11-17 of the Anti-Trafficking Directive, taking into account **relevant provisions of the Victims' Rights Directive**.

Chapter 2: Legal and Policy Context

The following chapter describes the overall legal and policy context of the Anti-Trafficking Directive. Prior to doing so, the chapter analyses trafficking for sexual exploitation and/or forced marriage from a perspective of gender-based violence and violence against women which, in turn, shapes the overall context in which the two Directives in focus are analysed in later chapters.

2.1 Trafficking for Sexual Exploitation and Forced Marriage on the Continuum of Violence against Women and Girls

Trafficking in women for sexual exploitation and/or forced marriage, as indicated in the term **"sexual", constitutes a form of *sexual violence*** and lies on the *continuum of violence and discrimination against women*ⁱ. This is recognised by international bodies such as the World Health Organisation, which explicitly lists both trafficking for sexual exploitation and forced marriage under the category of sexual violence (WHO Global Report, Chapter 6, 2002).

This positioning of these two forms of trafficking under the umbrella of *sexual violence*, and by extension, *violence against women and/or gender-based violence*, assists in the understanding of the sex and gender-based nature of these crimes as defined by the United Nations Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW).

Gender-based violence is defined in CEDAW General Recommendation 19 on Violence against Women, as updated by General Recommendation 35, and in the Istanbul Convention as a type of violence *directed against a woman because she is a woman*, i.e. motivated by her primary and secondary sex characteristics as well as by the gendered roles, assumptions and constructs derived from them. This serves as an entry point for the analysis of trafficking in women for purposes of sexual exploitation as well as forced marriage.

Women’s unique capacity for child-bearing, as determined by their biological sex, and the unique social status of a “reproductive asset” assigned to women based on this capacity, must be considered in any analysis that aims to address the problems of discrimination and violence against women and/or seeks solutions to remedy them. In this respect, the United Nations Population Council points out the female **“shorter biological childhood” and the social reality that “as early as the age of 10 female bodies become seen as assets that others use for work, sexuality and fertility”** (Bruce 2011).

Globally, the biological and social status of a female was historically, in practice and in law, instrumentalised to enable and justify unequal male-female power relations, gender roles and stereotypes. This instrumentalisation has formed the basis for discrimination and violence against women, also known as gender-based violence. Trafficking in women for forced marriage, prostitution and other forms of sexual and reproductive exploitation constitutes an intrinsic part of control over female sexual and reproductive capacities and “historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women” (Istanbul Convention, Preamble).

The vulnerability of women to sexual violence, sexual abuse and sexual exploitation is extensively documented as having global dimensions, with the roots and implications of such violence crosscutting ethnic, cultural and economic differences (WHO 2002; FRA 2014). A recognition of female-**specific vulnerability related to women’s unique sexual and reproductive functions**, although not always expressly articulated in legal texts, has **informed the core provisions of many international and regional women’s rights instruments**, in particular those concerning sexual violence, including CEDAW, its body of General Recommendations, the Beijing Declaration for Platform for Action, and, most recently, the Istanbul Convention.

It should be recognised that, while trafficking for sexual exploitation and trafficking for forced marriage may be different in intent, purpose and the conditions of exploitation, both forms bear similarities and are intrinsically related through the unique sexual and reproductive status of a female. The control and exploitation of this biological and social vulnerability is, in both cases, used to justify the attack on dignity, integrity and the rights of female victims of trafficking for sexual exploitation and trafficking for forced marriage through acts of sexual(ised) violence and gendered power relations.

Unlike other forms of trafficking in women, such as for the purposes of labour exploitation or forced criminality, that might sometimes contain an element of sexual(ised) violence and/or exploitation, trafficking for sexual exploitation and trafficking for forced marriage have sexual and intimate violence as their *core constituents*, placing these two forms of trafficking firmly on the continuum of violence against women as opposed to other forms of violence and discrimination.

Another important distinction that places trafficking for sexual exploitation and trafficking for forced marriage apart from other forms of trafficking in women, and, even more so, from trafficking in men, is the difference in its root causes including the pull factor of demand generated in societies. The male demand for **access to women's bodies and sexuality that** shapes trafficking for sexual exploitation and trafficking for forced marriage, is inherently gendered, i.e. defined and enabled by the unequal distribution of power, resources and rights between men and women, which is also recognised by the Directive.

The users of victims of trafficking exploited in prostitution are overwhelmingly male, and their patterns of consumption are informed by their buying capacity (economic privilege) as well as their self-perceived rights to control, access and use female sexuality and women's bodies (this concept is defined in feminist research as 'male sexual entitlement' (Anderson & O'Connell Davidson 2003; Raymond et al 2002)). It is this self-perceived right to intimate sexual contact in the context of unequal gendered power relations, that links trafficking for sexual exploitation and trafficking for forced marriage and sets them apart from other forms of trafficking which may or may not contain the elements of intimate sexual(ised) violence.

The distinct role of violence enacted on the sexual body of a female in both forms of trafficking can be also traced in the progression of such violence in the cases of trafficking for forced marriage where, according to the available evidence (HEUNI 2016) sexual exploitation is often introduced gradually, as means of control of a 'spouse' forced into marriage and as a part of the 'marriage package' presumed to include the sexual 'relationship' between the spouses. There is sometimes an overlap between these two forms of trafficking, for example, there are identified cases of trafficking where the female victims have been trafficked into prostitution and subsequently also forced into a marriage, while being sexually exploited (Anti-Slavery International 2014).

This overlap in intimate sexual violence between the different forms of exploitation of women, and, in particular between sexual exploitation and forced marriage, though clearly identifiable, to date has only been to a very limited extent elaborated in international research. The lack of comprehensive analysis in this area is also compounded by the persistent lack of the overall data on sexual violence against women, crimes that remain under-reported and under-investigated globally (WHO 2002).

In addition to the above-listed factors that distinguish trafficking for sexual exploitation and trafficking for forced marriage from other types of trafficking it is important to note that recognising them as forms of violence against women and sexual violence enables identifying and addressing the consequences and psychological implications on the lives of the victims, which, in the case of sexual violence are often severe and qualitatively different from those arising from other forms of violence.

The Anti-Trafficking Directive itself recognises sexual violence as a "particularly grave offence" (Recital 12). Research on sexual violence, including on exploitation in the sex trade, prostitution, as well as harmful practices such as female genital mutilation (FGM), and forced and child marriage, highlight the similarities in the traumatic outcomes for victims. These include: sexual and reproductive dysfunctions, severe and complex post-traumatic stress disorder (CPTSD), suicidal tendencies and attempts, clinical depression, psychosis, loss of confidence and a reduction in professional and educational attainment. Victims are reported to have persistent feelings of shame and disgust, loss of sleep and psychological disassociation (WHO, 2002), as well as symptoms identical to those exhibited by the victims of torture and war (Valera & Berenbaum 2003).

In addition to the severe psychological consequences often experienced by victims of trafficking for sexual exploitation and trafficking for forced marriage, these victims are often also subjected to external pressures in the form of social, community and family stigma embedded in the cultural notions of female chastity, purity and feminine gender roles. Victims often face social exclusion and isolation, as well as, in extreme cases, re-victimisation, physical and sexual violence, including femicide, as forms of gender-based persecution and punishment (**Victims' Rights Directive, Recitals 17 and 57**).

Given the severe and complex impacts on the lives of the victims of these two forms of trafficking as a result of the sexual and gender-based violence to which they were subjected, gender-sensitive protection, assistance and rehabilitation measures can play a crucial role in **re-establishing victims' dignity and helping them overcome** the trauma associated with these forms of trafficking.

2.2 Violence against Girls: Gender Perspective on Child Victims of Trafficking and the Girl-Child

The cycle of violence against women has no age barrier. Very often, it begins at an early age and carries over into womanhood and across generations. Additionally, there are certain **periods in women's lives, when they find themselves especially vulnerable to certain types** of gender-based violence. Thus, according to the World Health Organisation, females aged 15-30 are particularly vulnerable to sexual violence and abuse (WHO 2002) indicating that this type of violence is directly related to female reproductive life-cycle.

In 1995 the Beijing Declaration and Platform for Action listed the *Girl-Child* among its 12 areas of concern, stating that **"the girl child is discriminated against from the earliest stages** of life, through her childhood and into adulthood." It concluded that **"adolescent girls are** both biologically and psychosocially more vulnerable than boys to sexual abuse, violence and prostitution." The July 2017 UN Secretary General Report on the Girl-Child also states **that "one in 10 girls under the age of 20 has been subjected to forced sexual intercourse or other forced sexual acts at some point in her life"** (para. 42) confirming that male sexual violence against girls, including first sexual contact through rape, is still a problem of global dimensions which not only inflicts severe and lasting trauma, but may lead to a reduced ability for a woman to see her sexuality as something over which she has control (WHO 2002). This may further expose girls to increased vulnerability to trafficking for sexual exploitation, as well as forced marriage.

It is of note that Article 3 of the Istanbul Convention specifically states that the term **"woman" also includes girls under the age of 18**. The recently adopted CEDAW General Recommendation No. 35 also specifically notes that all references to women include girls (Article 14). Thus both instruments emphasize the importance of extending all of their respective provisions to girls and young women.

The current humanitarian crisis, due to natural disasters and conflict in the Middle East and African countries (among other issues), has caused the rapid increase of refugees arriving in Europe **leaving girls and unaccompanied minors particularly vulnerable to trafficking**. Child trafficking is reported as one of the trends that is increasing most sharply in EU Member States. Statistical data for 2013-2014 shows that out of the 15,846 persons registered as victims of trafficking in the EU that year, at least 2,375 were children (EC, 2016f). In 2016, nearly 40% of all refugees arriving to Europe were children, including unaccompanied

minors (UN Data Portal); many of these were identified as victims of trafficking (FRA 2016). The UN Secretary General Report on the Girl-Child of July 2017 emphasizes that “girls are particularly at risk, facing unsafe transportation modes, abuse at the hands of smugglers and traffickers, forced labour, rape and sexual exploitation” (para. 51). In the last three years Italy alone has witnessed a six-fold increase in identified female victims of trafficking. Most are Nigerian girls aged 15-17 (IOM 2017).

Considering the child-centered approach required by the Anti-Trafficking Directive *vis-à-vis* its requirement for gender-sensitive responses to trafficking, the needs of these young it is important to recognize that young female victims of trafficking for sexual exploitation and/or forced marriage fall at the nexus of two legal frameworks (on children and on women).

2.3 Legal Instruments Overview

The Anti-Trafficking Directive explicitly acknowledges trafficking in human beings as a gendered crime, and one which requires gender-sensitive understanding and gender-responsive solutions to tackle it. In particular, it acknowledges the gendered differences between various forms of trafficking in human beings and their root causes stating that *women and men may be trafficked for different purposes* with the push and pull factors also **being gendered. While the Directive adopts a “broader concept”** of trafficking in order to encompass new and emerging forms of trafficking in human beings, it also makes concrete and explicit references to the better documented forms of trafficking, such as trafficking for sexual exploitation and forced labour. In relation to forced marriage, the Anti-Trafficking Directive acknowledges it as one of the potential purposes of trafficking (as long as it fulfills the constitutive elements of trafficking in human beings).

The understanding of the gendered nature of trafficking as well as its links to the sex trade, where, according to the available data in Europe, the majority of female trafficking victims are exploited (Eurostat, 2016), are clearly defined in the preamble of the Directive. This understanding of the intrinsic connections between the institutions of sexual exploitation, prostitution and the sex trade as both the *purpose* of trafficking for sexual exploitation in women and the *environment* in which trafficking for sexual exploitation occurs, is not unique to the Directive and it was recently emphasised by the European Commission (EC, 2016a). It forms part of a long-standing empirical analysis, which can be traced to the Council and Assembly of the League of Nations before the Second World War, which noted the links between prostitution, trafficking and violence against women (Marcovich 2012).

This gendered approach to trafficking that underlines the Anti-Trafficking Directive, and, in particular, the crimes of sexual exploitation of women, is also embedded in the international and European frameworks that deal in general terms with violence against women, gender-based violence, sexual violence, as well as, more specifically, with trafficking, sexual exploitation and forced marriage.

In addition to its clearly articulated view of the gendered nature of trafficking for sexual exploitation, the Anti-Trafficking Directive also makes reference to a number of other fundamental concepts including, ‘human dignity’ and ‘inhuman and degrading treatment’ (Recital 33), concepts that are entrenched in various international legal instruments such as the Universal Declaration of Human Rights, the Charter of the United Nations, CEDAW, the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, the Council of Europe Convention on Action against Trafficking in

Human Beings and the Charter of Fundamental Rights of the European Union. It also states that it ‘observes the principles recognized by the Charter’ and ‘seeks to ensure full respect of those rights’ (recognized by the Charter), one of them being the ‘Right to physical and mental integrity’ (EU Charter, Preamble, Article 1(1)).

2.3.1 EU Level

At the EU level, trafficking in human beings is considered a grave violation of human rights and a serious form of organised crime, explicitly prohibited by Article 5 of the EU Charter of Fundamental Rights and with treaty references in Article 83 (organised crime) and Article 79 (irregular migration) in the Treaty on the Functioning of the European Union (TFEU). **The EU Charter considers ‘human dignity’ as ‘inviolable’ and central to citizens’ rights by listing in Article 1 of the Charter. It also asserts the primacy of the ‘right to physical and mental integrity’ (EU Charter, Article 3,1). Both concepts, as mentioned earlier, are important in the context of trafficking for sexual exploitation and forced marriage, considering their severe traumatic psychological impact on the victims. The Anti-Trafficking Directive states that it ‘observes the principles recognized by the Charter’ and ‘seeks to ensure full respect of those rights’ (recognized by the Charter).**

Within these instruments, children and women are recognised as a group that is particularly vulnerable to trafficking both into and within the EU. Their vulnerability to re-trafficking and secondary victimisation is also recognised. The understanding of trafficking in human beings as a gendered crime is embedded in a number of EU documents on **women’s rights**, gender equality and violence and discrimination against women, at the legislative and policy level, discussed below. For example, Objective 8 of the EU Gender Action Plan 2016-2020 calls for “strong gender sensitive legislation against trafficking of human beings as well as investing in governmental and non-governmental services to survivors, for their empowerment, well-being and full reintegration into society”. **Similarly, the EU Strategic Engagement on Gender Equality 2016-2019 in its Objective 3.4 (‘Combating gender-based violence and protecting and supporting victims’) asks for the continuous monitoring of implementation of the Anti-Trafficking Directive by Member States, ensuring that gender-dimension is addressed.**

A number of European Parliament Resolutions have addressed trafficking in human beings from a gender perspective. In particular, the Parliament report on sexual exploitation and prostitution and its impact on gender equality of 26 February 2014. This report reaffirms the links between trafficking and prostitution and recognises that prostitution feeds the trafficking of vulnerable women and under-age females. It also stresses sexual exploitation as a form of violence against women and girls. In relation to the Anti-Trafficking Directive, it explicitly acknowledges that it establishes robust provisions on victims. The report calls for broad, gender-specific measures to combat trafficking for sexual exploitation, including preventive, educational, protection and assistance measures for victims, as well as punitive measures for perpetrators.

The 2016 European Parliament Report on the implementation of the Anti-Trafficking Directive (2015/2118(INI)) is a comprehensive document providing a detailed assessment of the Anti-Trafficking Directive and its implementation from a gender perspective. It strongly

emphasizes gendered vulnerabilities and stresses that the gender dimension of trafficking in human beings entails an obligation for Member States to address it as a form of violence against women and girls that must be also consistently monitored in the implementation of EU anti-trafficking legislation. The report also makes reference to trafficking for forced marriage (**as well as ‘sham marriage’**) **recognising it as a form of trafficking** in human being with both sexual and economic elements of exploitation, to which girls are particularly vulnerable.

In the 2017 Report on Equality Between Men and Women in the EU (EU 2017a), trafficking is addressed in Section 4, ‘Combating gender-based violence and protecting and supporting victims’. The European Parliament has recently held a number of hearings and debates on trafficking, including hearings to address the current refugee situation in Europe and the attendant increase in the sexual exploitation of minors and women.

A number of other EU legal instruments, particularly those concerned with the regulation of migration (both of third-country nationals and EU citizens), are of relevance to this report. These include instruments that address integration, asylum and refugee protection, employment, as well as the rights of children, of persons with disabilities and workers.

The Anti-Trafficking Directive explicitly calls for a holistic, integrated and human-centered approach to its implementation, taking into consideration Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking, as well as Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of irregular migrants. The former emphasizes the provision of adequate assistance, upon the granting of a residence permit to vulnerable persons, and, in particular to victims of sexual violence. Directive 2009/52/EC, in line with a victim-centered approach, demands that the burden of legal responsibility is shifted from the victim of exploitation. This is important from the perspective of women who may be potential victims of trafficking for labour exploitation, while simultaneously being victims of sexual exploitation and/or forced marriage.

Directive 2011/95/EU (on the standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection) specifies that, in relation to revocation of subsidiary protection status, the best interests of the child must be taken into account, as well as the needs of other vulnerable persons, such as victims of trafficking and victims of serious sexual, psychological and physical violence. Notably, this Directive includes female genital mutilation, forced sterilization and forced abortion (Recital 30), as **matters that ground a “well-founded fear for persecution”** (i.e. an essential element for the granting of international protection). However, it makes no explicit reference to either forced marriage or **gender-based persecution of victims of trafficking. When listing ‘acts of persecution,’ it does at least define acts of physical or mental violence to include acts of sexual violence, as well as “acts of a gender- and child-specific nature”**: Art 9(2)(f).

Additionally, Directives 2004/38/EU (on the free movement of European Union citizens and their members) and Directive 2005/85/EU (on minimum standards of procedures for granting and withdrawing refugee status) are also relevant to gendered provisions of victims’ assistance of the Anti-Trafficking Directive. The former is related to the status and

protection of victims of trafficking, most of who, according to the available evidence (FRA, 2014), are European Union female nationals trafficked within the EU. The Directive elaborates on the rights of European Union nationals to access independent residence status in situations of abuse in marriage as well as on the degrees of protection within a hosting state against expulsion. The latter, though explicitly gender-neutral, reiterates the non-refoulement principle of international law on refugees, as well as torture and degrading treatment as grounds for granting refugee status.

Of particular significance to the Anti-Trafficking Directive is the framework on the rights of the child, including the rights of migrant and refugee children, in particular girls, who, as discussed earlier, constitute the fastest growing group of identified trafficking victims in Europe. In this regard Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography is **described as “fully complimentary”** to the Anti-Trafficking Directive, as it recognises that *“some victims of human trafficking have also been child victims of sexual abuse or sexual exploitation”*. However, Directive 2011/92/EU is gender-neutral and makes no reference to any gender-specific vulnerabilities of potential victims and does not invoke the concept of girl-child as a category of victims of sexual exploitation. This decreases the relevance of this Directive to the analysis in question.

In the context of children and migration, the European Union has made some progress in building the foundations for a gender-sensitive policy framework on child victims of trafficking, sexual violence and exploitation. However, this progress – in the context of the current migrant crisis situation – can be considered insufficient in terms of meeting the needs of girl-child. For example, the EU Agenda for the Rights of the Child (2011) is notably gender neutral. Although this document notes that in the area of trafficking “it is important that specific needs of children are fully taken into account”, it makes no reference to gendered aspects of trafficking, nor the specific vulnerabilities of women victims.

Similarly, the Revised EU Guidelines on the Promotion and Protection of the Rights of the Child (EU 2016), despite acknowledging gender-specific vulnerabilities throughout the document, makes no specific recommendations on how to meet the needs of the girl-child affected by gender-based violence and exploitation. The Communication by the European Commission of 12 April 2017 on the Protection of Children in Migration (EC, 2017b) is a rare example of an EU policy document that explicitly recognises the need for urgent **improvement of “specialised services for refugee girls”, and “sex-disaggregated data collection on migrant children”**.

The EU Action Plan for the Integration of Third-Country Nationals and European Agenda on Migration refers to the gender dimension of migration, and to the situation of migrant and, particularly refugee women, noting that they face more serious challenges across all spheres of integration, including access to rights and protection. Both documents call for targeted, tailor-made initiatives to ensure equal access for these women to integration measures. Though neither document directly refers to the crime of trafficking, they are important from the perspective of assessing the vulnerability of migrant and refugee women, including those who have migrated as a result of the push factors of poverty, destitution, social exclusion and isolation as well as the violence, discrimination and risks to

life and limb that refugee women may have been subjected to before and/or during their migration to Europe.

The Common European Asylum System (CEAS) which provides for a unified asylum system across the EU, is currently being reformed (Proposal for a Regulation to reform the Dublin system, Proposal for a Regulation to amend Eurodac, Regulation to replace the Qualification Directive, Reform of the Reception Conditions Directive) with an understating of the considerable structural weakness in the design and the implementation of this system (EC Communication, 6 April 2016) as brought into sharp relief by the current migration crisis. In the EU asylum *acquis* victims of trafficking are understood to be a particularly vulnerable group, and the same approach is reflected in the reform package.

With regard to forced marriage the Council Directive 2003/86/EC on the right to family reunification is relevant to the legal EU level commitments on the rights of victims of forced marriage. However, the scope of its application to trafficking victims is limited, as it essentially provides for a minimum age (21 years) in order to (indirectly) prevent forced marriages and exploitation, as well as, more broadly, discrimination and violence against women. This Directive also establishes that Member States may reject an application for entry and residence for the purpose of family reunification, or withdraw or refuse to renew **the family member's residence permit, where it is shown that the marriage, partnership or adoption was contracted for the sole purpose of enabling the person concerned to enter or reside in a Member State.** It should be noted that forced marriage is criminalized in less than ten EU Member States and highlighting the lack of a coherent framework on forced marriage as well as trafficking for this purpose at the European level. There is also a documented need on better data collection and analysis on the prevalence of, and the links between, trafficking and forced marriage, including from a gender-sensitive and victim-centered perspective (FEMM 2016; FRA 2014).

Finally, the Directive was accompanied by an EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016 as a policy framework complementing the Anti-Trafficking Directive and the mandate of the EU Anti-Trafficking Coordinator. The aim of this Strategy was to support the transposition and implementation of the Anti-Trafficking Directive and complement the work done by governments, international organizations and civil society both within the EU and in third countries. The Strategy played an important role in developing the gender knowledge framework and implementing the gender dimension **of the Directive, including its provisions on victims' protection and assistance.** This included a number of important studies undertaken by the European Commission, including the one on the Gender Dimension of trafficking in human beings (EC, 2016) as well as the EU Victims of Trafficking Rights Overview Brochure. As the Anti-Trafficking Directive is still relatively new to Member States, a rigorous follow-up is required in order to ensure its correct and full implementation from a gender perspective.

2.3.2 European Regional level

At the regional level the Anti-Trafficking Directive is harmonised with the European Convention on Human Rights which, in itself, does not refer to trafficking crimes, however, in several articles contains positive obligations of European states to protect the rights of

trafficking victims, e.g. Article 2 (right to life), Article 3 (prohibition of inhuman and degrading treatment) and Article 4 (prohibition of slavery and forced labour).

Of particular importance in relation to the gender-sensitive provisions of the Directive at the European level, is the Istanbul Convention. This entered into force on 1 August 2014 and the European Union (EU) is in the process of ratification at present. The Istanbul Convention is important for several reasons, and is regarded as the most comprehensive European instrument concerning violence against women (World Future Council 2015). It treats the problem of violence against women holistically and introduces a legally binding framework to eliminate it.

The Istanbul Convention takes a multi-faceted approach, covering the areas of integrated policies and data collection, prevention, protection and support, substantive law, investigation, prosecution, as well as procedural law and protective measures, migration and asylum, and international cooperation (EC 2016a). It also provides a number of definitions, including on gender-based violence and violence against women, which are similarly applicable to the Anti-Trafficking Directive. The Istanbul Convention also explicitly recognises that women and girls are exposed to a higher risk of gender-based violence than men.

Although the Istanbul Convention does not deal with trafficking for sexual exploitation *per se*, it does so indirectly through its provisions concerning physical, psychological and sexual violence. **In particular, Article 33 (psychological violence), Article 34 (stalking), Article 35 (physical violence), Article 36 (sexual violence), Article 40 (sexual harassment) and Article 41 (aiding or abetting and attempt) concretely elaborate the different types of offences, which, to varied degrees, can also be identified as constitutive elements of trafficking for sexual exploitation, specifically, in its *means* and *purposes*.** The Convention also recognises that ***psychological integrity* can be seriously impaired through coercion and/or threats (Article 33) which has significance in the context of trafficking, its severe psychological impact on victims and their needs for recovery and rehabilitation, discussed earlier. Similarly, physical and sexual violence, harassment and stalking, when viewed in the context of trafficking for sexual exploitation, must be seen as part of the continuum of violence against women, where different forms of abuse of women may form a chain of elements eventually amounting to a case of trafficking.** In relation to forced marriage, the Istanbul Convention recognises it as a serious form of violence against women. It makes provision for the criminalisation of forced marriage as intentional conduct (Article 37) and mandates measures for the facilitated dissolution of such marriages (Article 32). It offers practical assistance to victims of this crime through its provisions for an autonomous residence permit or via the restoration of residence rights lost as a result of the crime (Article 59).

Another regional instrument that can be considered complementary to the gender-sensitive approach taken by the Anti-Trafficking Directive is the Council of Europe Convention on Action against Trafficking in Human Beings (2005). This Convention, in common with the Anti-Trafficking Directive, calls on each State Party to aim to promote gender equality and use gender mainstreaming in its implementation. Essential protection, from the child perspective, is also provided by the 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, **also known as “the Lanzarote Convention”.** This Convention mandates the criminalisation of various kinds of

sexual offences against children, ensuring contracting States adopt specific legislation and take measures to prevent sexual violence, to protect child victims and to prosecute perpetrators.

It should be noted, however, that the Lanzarote Convention is gender-neutral and does not acknowledge either sex- or gender-based vulnerabilities of the girl-child in relation to sexual violence or exploitation, and makes only very sporadic references to trafficking. In this sense, it does not complement the **Anti-Trafficking Directive in the latter's gender-sensitive approach to trafficking, including victim assistance** ⁽ⁱⁱⁱ⁾.

Trafficking in women for sexual exploitation has also received attention from the European Court of Human Rights (ECtHR) that, on several occasions, has elaborated on the obligations of state authorities to meet the needs of the female victims trafficked into the sex trade arising from Article 2 (right to life), Article 3 (prohibition of inhuman and degrading treatment) and Article 4 (prohibition of slavery and forced labour) of the **European Convention on Human Rights. The Court's case law will be discussed throughout.**

2.3.3 International Level

The Anti-Trafficking Directive should be viewed in the context of the body of international human rights instruments that are concerned with the fundamental rights and freedoms of women and girls. Primarily, from the gender perspective, it should be read together with the United Nations Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW), **considered an 'international bill for women's human rights' that provides 'a gender-sensitive interpretation of human rights law and protects women from sex- and gender-based discrimination with regard to all the human rights contained in the Universal Declaration of Human Rights and other human rights instruments'** (CEDAW General Recommendation 19).

Article 6 of CEDAW specifically refers to **trafficking, stipulating that "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."**

The Anti-Trafficking Directive should also be read with **CEDAW's Optional Protocol (1999)** as well as a number of its general recommendations, including General Recommendation No. 19 on Violence against Women, No. 30 on Women in conflict prevention, conflict and post-conflict situations and No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women. CEDAW General Recommendation No. 35 adopted in July 2017.

CEDAW General Recommendation No. 32 recognises both trafficking in women and forced marriage as "gender-related forms of persecution" constituting legitimate grounds for **international protection in law and practice. It reiterates CEDAW's general position on a disaggregated approach to gender-based violence, and, in the context of migration and asylum is considered along with Guideline No. 7 of the UNHCR (Guidelines on International Protection: the application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked).**

As mentioned earlier in reference to the 'girl-child', the 1995 Beijing Declaration and Platform for Action is another important framework that elaborates in detail the sex- and gender-based nature of discrimination against women and girls, including different forms

of sexual violence, trafficking and exploitation. The Declaration pays specific attention to **forced and early marriage, as an abuse of women's child-bearing and child-rearing capacities**, as well as their unequal access to resources and capital. It also provides a comprehensive roadmap for eradicating different forms of gender inequality and violence against women, including educational, capacity-building, funding and assistance measures – all relevant to the gender informed provisions of the Anti-Trafficking Directive and, in particular, its measures on victim protection and assistance.

In the context of sexual-reproductive health and rights (SRHR) and related female vulnerability to trafficking for sexual exploitation and/or forced marriage and its severe traumatic consequences, discussed earlier (section 2.1), General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health, by the Committee on Economic, Social and Cultural Rights, emphasizes that the sexual and reproductive health of trafficked and sexually exploited women and girls is **"at great risk"** (Article 30) and it asks the state parties **"to focus on ensuring that all individuals and groups are effectively enjoying their right to sexual and reproductive health on a substantively equal basis"** (Article 36). The General Comment also reiterates the states' core obligations in relation to sexual-reproductive health and rights, (Article 49), particularly important for the rights of the victims of trafficking for sexual exploitation and forced marriage.

In addition to this, the two core international instruments on the rights of the child – the United Nations Convention on the Rights of the Child 1989 and its Optional Protocol on the sale of children, child prostitution and child pornography 2000 – are also relevant to the child and gender provisions of the Anti-Trafficking Directive. In particular the Optional Protocol recognises girl-children as a particularly vulnerable group that is **"disproportionately represented among the sexually exploited"** as well as the fact that gender discrimination and harmful traditional practices (of which forced marriage is one) are among the root causes for sexual exploitation.

Further to these general frameworks on children and women's rights, other international law instruments have been designed specifically to address trafficking in a concrete way. Among them, notably, is the above-mentioned UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 1949^{iv}, which establishes explicit links between sexual exploitation, prostitution and trafficking and recognised the incompatibility of trafficking, sexual exploitation and prostitution with the fundamental principles of human dignity and equal treatment. It also acknowledges the status of victims exploited in prostitution explicitly prohibiting their penalisation, instead, **advocating the punishment for those who "procure, entice or lead" others into prostitution.**

The 1949 Convention was taken as the normative basis in 1979 for the drafting of Article 6 of CEDAW, as well as the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, **supplementing the Convention Against Transnational Organized Crime**, also known as Palermo Protocol (Marcovich 2012, UNODC, 2006)). The latter was signed by the European Community in 2000 and ratified in 2006. **Ratified by 117 states**, the Palermo Protocol, **together with the Convention and its Interpretative Notes (Travaux Préparatoires)** can be considered as the most widely used international reference in the anti-trafficking framework currently in force. In the EU, the Palermo Protocol applies to the territories in which the Treaty establishing the European Community is applied and under the conditions laid down in that Treaty, in particular Article 299 thereof and the Protocols annexed to it.

The Palermo Protocol reaffirms the recognition that trafficking cannot be dissociated from the exploitation of prostitution, stating that the consent of the victim to the intended exploitation is irrelevant, recognizing that the victim of trafficking should not bear the burden of proof, and providing protection measures for victims. As an international legally binding instrument the Protocol was designed to jumpstart national laws, promote cross-border judiciary and police cooperation and to harmonise regional legislation against trafficking in women of which the Anti-Trafficking Directive is a part. **From the victims' rights perspective, the Protocol emphasized the human rights dimension necessary for the protection of victims of trafficking as well the need for a comprehensive approach that should combine protection and assistance to victims with effective prevention, prosecution and judicial cooperation. At the same time, the Protocol omits to define the "exploitation of the prostitution of others" and "other forms of sexual exploitation" (UNODC, 2006), adding to the potential difficulty in identifying and assisting victims. However the Guidelines to the Protocol (UNESCO, 2002) list "the primacy of the human rights" as the first principle in addressing trafficking, further specifying that no protection measures should have an adverse effect on the rights and dignity of the victims (Guideline 1) and that the prevention measures should firstly address demand as the root cause for trafficking (Recommended Principle 4) rather than target its potential victims.**

In the international context, the Anti-Trafficking Directive can also be viewed in relation to the framework that deals with issues such as migration, asylum and refugee laws, that, in varied and indirect ways, also attempt to address the gender specific factors leading to trafficking, sexual exploitation and sexual violence. Thus the Anti-Trafficking Directive clearly interacts with the Convention Relating to the Status of Refugees and/or its Protocol relating to the Status of Refugees as well as such core international human instruments as the Geneva Convention and its Optional Protocol. In particular, these Conventions affirm the principle of *non-refoulement* ensuring that nobody is sent back to persecution, including the gender-based persecution that female victims of trafficking may be subjected to upon return, as mentioned earlier.

Additionally, the Sustainable Development Goals (SDG), which came into force in January 2016 in the frame of 2030 Agenda for Sustainable Development, also list several objectives relevant to the provisions of the Anti-Trafficking Directive for female victims of trafficking for sexual exploitation and forced marriage. In particular, Goal 5.2 asks to eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation; Goal 8.7 - to take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms; Goal 16.2 - to end abuse, exploitation, trafficking and all forms of violence against and torture of children. Additionally, preventing and combating trafficking in human beings and protecting its victims is mentioned in relation to Goal 16.1 – to significantly reduce all forms of violence and related death rates everywhere.

Finally, in relation to the forced marriage the Universal Declaration of Human Rights, 1948, Article 16 provides for equality within and upon dissolution of marriage as well as for marriage to be entered into only upon consent of both parties. CEDAW attributes forced marriage to the range of gender-based violence that maintains women in subordinate roles and contributes to lower level of education and work opportunities (General

Recommendation No. 19, and No. 21). The International Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages treats forced marriage as a violation of fundamental human rights (Article 1). In addition to this, the crime of forced marriage has been recognised as amounting to sexual slavery in some instances. Thus the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery categorises **forced marriage as a “practice similar to slavery”** (Section I, Article 1(c)). This understanding of forced marriage has been reiterated in recent years through international case law, which has also recognised the aggravated harms inflicted upon the victim through forced conjugal association, leading to severe mental suffering and social stigma, and has recognised the relationship between the perpetrator and the victim of forced marriage as that of ownership.^v

Conclusion

Overall, the international and European legal environment within which the Anti-Trafficking Directive is situated is somewhat uneven in respect of addressing the gender-specific needs of female victims of trafficking for sexual exploitation and/or forced marriage. The strongest and most elaborate framework is found in the laws and policies concerning violence against women and girls, gender-based violence and, more broadly, discrimination against women. The legal framework concerning the rights of women appears to most adequately reflect **the needs of both adult and child female victims, whereas the legal framework on children’s rights overlooks the gender-specific vulnerabilities and needs of girls.**

In the context of trafficking for sexual exploitation, as well as for forced marriage, one instrument that presents unique added value to the Anti-Trafficking Directive is the Istanbul Convention. This provides a comprehensive framework on violence against women directly relevant to the provisions on victim protection and assistance of the Anti-Trafficking Directive. In particular, the obligations listed in the Protection and Support provisions of the Istanbul Convention (Chapter IV, Article 18) emphasize the contextual factors that have to be taken into account when protecting and assisting victims. In the context of trafficking, victims’ psychological and economic lack of independence is often used by the exploiting party to maintain the situation of exploitation. In this regard, the Convention’s “integrated approach”, which recognizes the complex relationship “between victims, perpetrators, children and their wider social environment” (Chapter IV, Article 18(3)), can serve as a useful framework for developing the protection and assistance measures in the Anti-Trafficking Directive. The Istanbul Convention, however, does not fully address the issue of organized exploitation of female sexual and reproductive capacities, which the system of prostitution and trafficking for sexual exploitation are predicated upon. It can be concluded therefore, that more specific legal provisions addressing the root causes and support schemes against sexual exploitation of females, positioned firmly in the frameworks of laws and policies on gender equality, are desirable in order for the Anti-Trafficking Directive to explore its full potential for assisting the female victims of trafficking for sexual exploitation and forced marriage.

Chapter 3: Identification

Identification is central to the ability of trafficking victims to benefit from the assistance, support, and protection measures contained in Articles 11-17 of the Anti-Trafficking Directive. In practice, however, there are a number of barriers to trafficking victims being identified as such, which will be explored below in the specific context of women and girls

trafficked for the purpose of sexual exploitation and/or forced marriage. When such difficulties are taken into account, the issue of identification takes on a heightened importance. For the purpose of this analysis it is necessary to question how victims come to be defined as such for the purposes of assistance and support measures, how this process can be adapted to suit their needs, and the extent to which this can be achieved in the implementation of the Anti-Trafficking Directive as complemented by the provisions of the **Victims' Rights Directive**.

Women and girl victims of trafficking for sexual exploitation and/or forced marriage face specific barriers related to the nature of these crimes. According to the European Commission Study on the Gender Dimension of Trafficking in Human Beings (EC 2016a), victims of trafficking for the purposes of sexual exploitation can be difficult to identify in mixed populations of women in prostitution, which include those that are independent as well as those that are coerced. These victims may also fall within the wider population of migrants and thus may be fearful of both traffickers and authorities (EC 2016a). Such fears may not be irrational ones: victims of trafficking are sometimes treated as criminal offenders themselves when encountered by the authorities.

For victims of forced marriage, factors including exploitation in a private home, the involvement of family members, cultural practices, and the possible threat of honour-based violence, make identification difficult, and can preclude victims from self-identifying. The above conditions make it less likely that victims will come to the notice of those who may be able to assist them and increase the likelihood that, when victims do come into contact with authorities, they are overlooked or misidentified.

Additional barriers can arise for victims lacking legal status. Such victims are often dealt with by the authorities as immigration offenders / irregular migrants. In these circumstances, the lack of legal status can be used as a control mechanism by who are exploiting them. Victims are more vulnerable without immigration status, and as a result much less likely to flee and/or approach the authorities for help. The fact that such victims are unlawfully present **in a Member State can give rise to a 'culture of disbelief' on the part of the State's authorities**, who sometimes assume that an individual is lying to secure an immigration advantage e.g. a residence permit ^(vi) or the right to reside as an asylum seeker (if the person also makes this kind of claim ^(vii)). Communication between victims and authorities can be further hampered by language barriers which can **inhibit the former's ability to communicate the true nature of their situation**.

Because of these and other issues in practice the identification of victims of trafficking for sexual exploitation and forced marriage is difficult. In order to increase identification of such victims, different measures are necessary. These will be discussed below along with an analysis of the extent to which they can be achieved in the implementation of the Directives.

3.1 Definition of 'Victim': Implications for Identification

An important issue which arises when attempting to identify victims is the understanding of **'victim' contained in** the Directive. Below, we look at how this definition applies in practice, and the barriers which may arise when identifying victimisation, in the specific context of women and girl victims of trafficking for sexual exploitation and forced marriage.

Anti-Trafficking Directive

The Anti-Trafficking Directive defines the offence of trafficking in Article 2. A victim, for the purposes of support and assistance measures, is someone for whom a competent authority **finds ‘reasonable grounds’ to believe they have been subjected to a trafficking offence:** Article 11(4). Consequently, in order to understand and analyse the approach to trafficking victims, as enshrined in the Directive, it is important to first look at how the offence of trafficking itself is defined.

The offence of trafficking as defined in the **Anti-Trafficking Directive involves** “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.” **This understanding is identical to that found in the international legal framework on trafficking, including the Palermo Protocol and Council of Europe Trafficking Convention.** Based on this definition, the offence can be divided into three components consisting of an act, the means, and purpose. The ‘act’ is the different actions involved in moving a person, whether into the EU, into another Member State, or within a single Member State. The ‘purpose’ is the reason for that movement, i.e. exploitation of the person. The ‘means’ are the different control mechanisms used to gain the consent or force the compliance of the person for their movement and exploitation. It is a strength of the Directive that it recognises subtle forms of control, such as abuse of power or abuse of a position of vulnerability, which can widen the scope of victims able to benefit from the assistance and protection provisions. There have been reported difficulties, however, in ensuring that all victims can access such assistance, owing to Member States adopting a restrictive understanding of trafficking, and investigating trafficking offences under different criminal legislation (Eurojust 2012).

Returning to the means of control, this aspect highlights the relationship between the offence of trafficking in human beings and the overall area of gender based violence and violence against women. Similar to other forms of violence against women, these trafficking crimes are based on unequal power relations and thus require a gendered response. Furthermore, in common with violence against women and gender based violence more generally, the issue of consent is linked to being identified as a victim in the Anti-Trafficking Directive. The importance of consent is also a feature of the Istanbul Convention provisions that concern sexual violence (see, e.g., Article 36). An over-emphasis on this particular factor can, however, create problems. For example, rape victims are put in a position where they must prove that they did not give consent. Similarly, victims of trafficking must show that they did not consent to their movement and exploitation. This can be difficult for victims of trafficking for sexual exploitation, particularly those who are perceived to have willingly entered prostitution who, similar to victims of rape and other forms of sexual violence, can face victim blaming attitudes, including within the criminal justice system (European Parliament 2016a). Where a victim is viewed as having consented to their exploitation, it will often be necessary to show exploitation was extreme prior to them being viewed as a victim of trafficking (**Case No. B 1689-12 (Sweden)**).

Based on a reading of the Directive, however, this should not be necessary. The different means identified above, vitiate any apparent consent given by the victim. At the same time,

in cases involving girl victims, consent is entirely irrelevant: it is presumed in the text of the Directive that children cannot consent to their exploitation. While this expansive understanding of consent is a strength of the Directive, Elliott (2015) has pointed out that there is a grey area between more subtle forms of coercion and deceit and consent, while **the UNODC (2012) has highlighted the complexity of the term ‘abuse of a position of vulnerability’**. As seen above, it is in these cases where Member States have difficulties implementing the Directive which can limit certain victims’ access to assistance and support. Taking into account such nuances and intricacies, it is crucial that those responsible for identifying victims are adequately trained. This can help avoid any potentially harmful myths surrounding the issue of trafficking, such as that victims of trafficking for sexual exploitation must have been forced or coerced into the commercial sex industry for them to be identified as victims.

The approach in the Anti-Trafficking Directive *vis-à-vis* recognition of victimisation further looks to ensure that any intersectional concerns, such as the nationality of a victim, should not prevent their identification. Recital 33 of the Directive states that it respects the rights and principles enshrined in the European Union Charter on Fundamental Rights, which prohibits discrimination on a number of grounds. The need to disconnect recognition of victimisation and the support of victims, from specific characteristics of the victim has similarly been recognised in the Istanbul Convention, which requires that Member States secure the rights of victims without discrimination on any ground, including membership of a national minority, migrant or refugee status (Article 4). There are additional, specific measures in the Anti-Trafficking Directive applicable to third country nationals, who represent a significant proportion of victims who have been trafficked for the purpose of sexual exploitation. Article 11(3) of the Anti-Trafficking Directive recommends that Member States do not make the provision of support and assistance (and therefore identification) **contingent on the cooperation of victims in criminal proceedings. This Article is ‘without prejudice’ to Directive 2004/81/EC which concerns residency permits for third country nationals who are victims of trafficking.** The latter requires that Member States identify and provide all victims of trafficking with a short term residency permit (Article 6), while simultaneously allowing Member States to restrict medium term permits and thus support and assistance for a longer duration to victims who are cooperating with authorities (Article 8). This, however, should not act as a barrier to the identification of victims; rather, it is linked to the duration of time for which they receive support.

In spite of these provisions, it would appear that it is more difficult for women and girl victims who are third country nationals to be identified as victims of trafficking. Experience would also suggest that Member States have difficulties identifying victims of sexual exploitation as trafficking victims – due to their involvement in the commercial sex industry and likely owing to a perception that they have consented to engaging in prostitution, as evidenced in the below case.

Case Study

In *Rantsev v Cyprus and Russia* (Application no. 25965/04) the Cypriot police failed to identify or investigate a situation of trafficking, leading to the death of a young Russian woman. The Cypriot legal regime, at that time, permitted the entry of migrant women on **temporary ‘artiste’ visas to work in cabaret clubs**. Those entering on this visa were rendered dependent on their employer for their immigration status. At the time it was

known that many of those entering Cyprus on such visas were engaged in prostitution and faced harsh conditions and exploitation at the hands of their employers. The Cypriot police overlooked obvious indicators of trafficking when a woman was brought to the police station by her employer, who requested her deportation on the grounds that she had left her place of employment. Not only was the woman not identified as a potential victim of trafficking, she was sent away with her employer. Not long afterwards she was found dead, having fallen while attempting to escape from a fifth floor apartment.

Difficulties can also emerge in identifying national minorities who have been victims of trafficking for forced marriage. In the case of *M and Others v Italy and Bulgaria* (Application no. 40020/03) the European Court of Human Rights was critical of the Italian police's handling of a case of forced marriage, which the Court accepted could have amounted to human trafficking. In finding a violation of Article 3 of the European Convention on Human Rights, the Court found that the Italian authorities had not instigated a thorough investigation on the basis that they had mischaracterised the situation as a traditional 'Roma marriage'. This case highlights the difficulties faced by women from certain backgrounds, such as those from the Roma community, when attempting to access justice as existing prejudices and stereotypes can act as an obstacle.

Such difficulties cannot necessarily be attributed to the Anti-Trafficking Directive but highlight the issues which can be faced when attempting to implement its substantive provisions relating to the identification of victims. In order to determine how these can be addressed in practice, it is necessary to consider *inter alia* the relevant evidentiary standards, those involved in the victim identification process, the availability of appropriate training, and so forth.

Victims' Rights Directive

The question of who constitutes a victim is dealt with directly in the provisions of the Victims' Rights Directive, in contrast to the Anti-Trafficking Directive. In both Directives, identification of victims is linked to particular obligations for Member States: i.e. the provision of support and assistance to victims.

Article 1 of the **Victims' Rights Directive** obliges Member States to ensure that victims are recognised as such and provided with appropriate information, support and protection. **Article 2 defines a victim as "a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was caused directly by a criminal offence". In the context of women and girls trafficked for the purpose of sexual exploitation and/or forced marriage, this broad approach to identification represents a strength of the Directive, specifically when considered in conjunction with the more onerous understanding of victimhood contained in the Anti-Trafficking Directive.**

It is generally recognised that the offence of trafficking is difficult to establish in the criminal courts. In common with victims of rape and sexual assault, women and girl victims of trafficking for sexual exploitation and/or forced marriage often face negative attitudes and victim blaming when attempting to establish victimisation (European Parliament, 2016a). In the case of trafficking victims, these difficulties extend to their initial identification as a victim for the purpose of receiving assistance and protection. This is not the case for other victims of crime, where there generally exists no formal mechanism for establishing

victimisation at this early stage. Yet, victims of trafficking are also commonly victims of other crimes, including physical and sexual violence. As such, this group may be more easily **identified as ‘victims’ for the purposes of the Victims’ Rights Directive, which may provide a faster route to a particular victim support measure. Importantly, the Victims’ Rights Directive recognises the need for specific, targeted and integrated support for victims of gender-based violence: Article 9(3)(b).**

Recital 19 of the Preamble to the Directive recommends that a person should be considered a victim irrespective of whether an offender is identified, apprehended, prosecuted or convicted, and regardless of the familial relationship between them. Furthermore, the principle of non-discrimination, as explicitly enshrined in Article 1 of the Directive, can assist in addressing the intersectional issues previously described which may present barriers to the identification of certain categories of women and girl victims. Given the link between support and identification, it is important to consider Recital 10 of the Directive, which asks that Member States provide support to victims irrespective of their nationality or residence **status. The Victims’ Rights Directive does not, however, provide a legal basis for the residency of third country nationals so that they can receive such support.** In spite of this obvious weakness, the above provisions complement the terms of the Anti-Trafficking Directive and could provide victims with access to supports prior to it being established that they are a victim of trafficking.

Conclusion

Read in conjunction, the understanding of the term ‘victim’ as found in the Anti-Trafficking Directive and Victims’ Rights Directive represent a strength of the Directives. This is based on the relationship between victimisation and the availability of supports and assistance to victims. Although the identification of trafficking victims can be a protracted and difficult process, which is compounded by issues surrounding the understanding of the definition of trafficking in the Directive and treatment of victims in the criminal justice system, their identification for the purpose of receiving supports, as per the Victims’ Rights Directive, can be less onerous and ensure their prompt access to assistance. There is the threat, however, that this may not be possible for all victims, particularly those lacking legal status in a Member State. While the Victims’ Rights Directive recommends that Member States grant support to all victims, irrespective of their residency status, the Directive does not provide a basis for residency. In order to ensure that all victims can benefit from identification, it will be important that all relevant authorities receive appropriate training and possess the required expertise so that all victims can be identified, including third country nationals exploited in prostitution and national minorities exploited in situations of forced marriage.

3.2 Evidentiary Standard

In order to best ensure the early identification of victims, it is important that there is a low threshold *vis-à-vis* the evidentiary standard used for their identification. To achieve this in practice, the identification process should be divided into two stages ^(viii). Thus as soon as evidence exists to suggest a person has been trafficked, they should be identified as a potential victim. They should begin to receive assistance at this stage (Okech, Morreau and Benson, 2012). Confirmation of their victim status should occur at a later stage. Adopting this approach is particularly important in the case of victims trafficked for the purpose of sexual exploitation and/or forced marriage as it can ensure they are removed from harm at

the earliest possible juncture. In order to support the application of a low evidentiary standard, it is crucial that authorities receive appropriate training and employ indicators during the identification process.

Anti-Trafficking Directive

The evidentiary standard required for the preliminary identification of trafficking victims found in the **Anti-Trafficking Directive** is a **'reasonable grounds indication'**. The purpose of this approach is to enshrine a low threshold for the identification of victims. In principle, this approach represents a strength of the Directive and can protect women and girl victims from secondary victimisation, which can emerge where victims of gender-based violence meet disbelief on behalf of investigating authorities (Council of Europe 2016). This includes during participation in any national procedures for establishing whether a person is a victim (EIGE 2016:22). The protection offered by this low standard, however, depends on how the threshold is implemented in practice.

Although the above approach enshrines a low threshold for the identification of victims in the Directive, it has been criticised as being a vague term that will depend on the perception of the competent authority, which could lead to delays to the identification of victims in practice (Harvey 2008). This discretion can create difficulties for certain categories of victims, such as third country nationals, victims exploited in the commercial sex industry, or victims from national minorities, who can face disbelief and mistrust from authorities, as evidenced in the above cases.

Case study

In the case of *ZZZ v Netherlands* (CEDAW/C/42/D/15/2007) a girl asylum seeker who had been trafficked to the Netherlands for the purpose of sexual exploitation was not informed of her right to assistance under Dutch law, nor identified as a victim of trafficking. This was in spite of the presence of trafficking indicators including her having suffered violence and trauma in the Netherlands. Rather, she faced mistrust and disbelief from the authorities and was exposed to secondary harm. Although the case was deemed inadmissible on the grounds that the applicant had failed to exhaust domestic remedies, a dissenting opinion by three members of the CEDAW Committee recommended *inter alia* appropriate training for border guards on identification and appropriate treatment of victims.

The ZZZ case highlights the importance of a properly trained competent authority, responsible for the identification of trafficking victims, as well as the need for specialist training and expertise.

In addition, to support authorities in making a 'reasonable grounds' determination, and thus reduce the discretion of authorities during the identification process, it is generally recommended that indicators should be used. These should be specific to the form of exploitation under investigation, similar to the comprehensive list of indicators compiled by UNODC (2009). Indicators have similarly been recognised as an important tool for identifying cases of domestic abuse and other forms of violence against women which can remain invisible for similar reasons to those identified above (First Action Project 2017). Although Recital 4 of the Anti-Trafficking Directive envisages the development of a

common set of European indicators to support the identification of victims, the Directive does not require that Member States use indicators during the identification process. Given **the uncertainty surrounding the term ‘reasonable grounds’ and its potential to reduce the risk of secondary victimisation and ensure the speedy identification of trafficking victims of women and girl victims of trafficking for sexual exploitation and/or forced marriage**, the failure of the Directive to require the use of indicators during the identification process is a weakness.

Victims’ Rights Directive

The Preamble to the Victims’ Rights Directive complements the Anti-Trafficking Directive somewhat, by recommending that *“support should be provided through a variety of means, without excessive formalities”*. It does not, however, discuss the evidentiary standards necessary for the identification of victimhood and consequently cannot further our understanding of the term ‘reasonable grounds’ in the Anti-Trafficking Directive. The emphasis on less formality, in the approach to establishing victimhood, represents an opportunity.

Conclusion

It is welcome that the Anti-Trafficking Directive and Victims’ Rights Directives both enshrine a low threshold to the identification of victims. Both Directives, however, lack the required detail to ensure that it is implemented in practice. Combined with a proper understanding of the definition of trafficking, this could be achieved in practice, in part, through the use of indicators. These could formalise the identification of victims and provide concrete guidance on the meaning of ‘reasonable grounds’. Given the recognised importance of indicators in the areas of human trafficking and gender-based violence, it is a weakness of the Directives that they are generally overlooked.

3.3 Age

As will be discussed in later sections, the support and protection measures available to girl victims of trafficking in the Anti-Trafficking Directive need to be adapted to their age. While this is generally not contested, issues can emerge over the age of victims during the identification process. Taking into account the relationship between the identification process and the provision of support to victims, and the importance of tailored assistance for girl victims, it is crucial that they can be identified swiftly. Consequently, where there is any doubt over the age of a victim and whether they are a child, there should be a presumption in favour of identifying them as a child. The importance of this presumption cannot be overstated. Without it, a child risks being treated as an adult irregular migrant, with all the consequences that flow from this: for example, a risk of detention in many European States, a risk of homelessness and destitution in others.

Anti-Trafficking Directive

Article 13(2) of the Anti-Trafficking Directive requires that where there are doubts over the age of a victim of trafficking, and there are reasons to suggest that the victim is a child (defined in Article 2 of the Directive as someone under the age of 18) it should be presumed that they are a child victim for the purpose of receiving immediate support. This presumption is a key strength. Girl victims of trafficking for sexual exploitation, in particular, may present as older than they in fact are, due to having been sexualised at an inappropriately young age. As such, they are often initially mistaken for adults by the

authorities (Franklin & Doyle 2013) and denied access to the additional assistance and protection measures to which they are entitled.

Girl victims of trafficking may also misrepresent their age as older, having been told to do so by the person controlling them (WHO 2003:7). These victims are also unlikely to have identity documents, making age assessment a matter of guesswork by social workers, as it cannot be medically ascertained with any great degree of accuracy and it should be a last resort for verification ^(ix). A further problem derives from the fact many victims will not be lawfully resident in the country of discovery – the age of irregular migrants, in particular, is often disputed by the authorities as the person may be suspected of lying about their age to secure more advantageous treatment / an immigration advantage. For example, some countries have blanket policies not to remove / deport children until they reach age 18^(x). Financial considerations may also be in play – it is often costlier for a State to accommodate a child than an adult, and as such, officials working with budget constraints have an incentive to assess a child as an adult (or as an older child, who will leave their care sooner). As a result of these and other issues, age disputes are not uncommon in cases of child trafficking victims; these can be damaging and lead to secondary victimisation. Children find disputes about **their age or immigration status particularly stressful; a ‘culture of disbelief’ in this regard can silence a child** (Pearce, Hynes & Bovarnik, 2009).

Although the substantive obligation contained in Article 13(2) is an obvious strength, which can reduce the risk of secondary victimisation of girl victims, the recent European Commission report (EC 2016b) on Member States’ transposition of the Directive highlights difficulties surrounding its implementation, relating to the procedures for assessing the age of victims in uncertain cases and the actual application of the above presumption. In this regard, the Directive does not contain guidance on who should be responsible for determining whether there are reasons to believe a victim is a child and how this should be determined in practice.

The wording used in the Anti-Trafficking Directive exposes victims to a potential threat: the **presumption only applies where there are “reasons to believe” the person is a child**. Officials thus have discretion to argue, for example, that they have reason to believe the opposite and to deny a child protection by inappropriately failing to apply the age presumption. Experience shows that States do fail to apply presumptions of this kind (EASO 2015: 89), most likely due to the combination of strong financial disincentives and cultures of disbelief engendered by, *inter alia*, the fact that trafficked children often present with classic ‘credibility issues’ – e.g. unclear or incoherent narratives of their past, failures to disclose the truth about their true situation at an early stage, false identity documentation. According to ECPAT, child victims are unlikely to give direct disclosures, and their accounts may be confused and sometimes contradictory – often because they are traumatised, scared of telling the truth or have been coached into telling a story (ECPAT 2014: 25). As such, it will be important to apply the presumption in case where there is any indication that a victim may be a child.

Victims’ Rights Directive

The Victims’ Rights Directive contains an identical presumption as that found in the Anti-Trafficking Directive. It is, however, silent on the time frame for when the presumption should kick in, and on the controversial issue of how (and by whom) age should be assessed.

In that sense it does not enrich the provisions of the Anti-Trafficking Directive in any specific way.

Conclusion

The age presumption found in the Directives is a *prima facie* strength of each. It provides an opportunity for girl victims of trafficking to be swiftly identified and receive age appropriate assistance and protection. It can further protect girl victims from secondary victimisation. The actual protection offered by the presumption will, however, depend on how it is implemented in practice. The wording of the presumption creates the threat that competent authorities will not apply it, where they can claim that they did not have grounds for believing that the victim is a child. This is compounded by the lack of guidance on how the presumption should be implemented and by whom.

3.4 Competent Authority

The Explanatory Report attached to the Council of Europe Trafficking Convention defines a competent authority, in the context of the identification of victims, as the different authorities which may have contact with victims, such as the police, labour inspectorate, and immigration authorities. In practice, the term generally refers to the authority responsible for formally identifying victims. Those responsible for making a reasonable ground determination are central to the identification process. The choice of identifying authority has important implications for the identification of women and girl victims of trafficking for sexual exploitation and/or forced marriage. For example, the designation of the United Kingdom Border Agency as competent authority in the United Kingdom has been criticised (GRETA 2012), and has led to unsafe and unfair decisions (**RE's Application [2014] NIQB 15**). In this case, no evidence was provided by the Border Agency for refusing **the applicant's trafficking claim as "incredible" and thus the applicant was unable to know** the facts of the case against her. The training available to the identifying authority, seen as necessary in the text of the **Trafficking Convention's Explanatory Report**, and the extent that this takes gender issues into account, will also have an impact on the identification of victims.

Anti-Trafficking Directive

The Anti-Trafficking Directive requires that Member States designate a competent authority responsible for the identification of victims of trafficking. It is thus the responsibility of Member States to determine the authority responsible for identifying victims. The choice will likely have an impact on who is recognised as a victim and the speed at which victims are identified and can access the assistance and support envisaged in the Anti-Trafficking Directive.

It has been highlighted by Eurostat (2013: 30) that the majority of Member States have nominated police authorities as the competent authority responsible for the identification of victims. The Directive, however, appears to envisage a role for other stakeholders, particularly those involved in the support of victims, in the identification process. Article 11(4) of the Anti-Trafficking Directive requires that Member States establish appropriate mechanisms for the early identification and support of victims, in cooperation with support organisations. The involvement of independent **women's rights** NGOs ^(xi), could be beneficial in the determination of reasonable grounds for victims of trafficking for sexual exploitation and/or forced marriage, due to their gender specific expertise. The added value

of such an approach relates to the concept of gender mainstreaming and the principle of gender balance in decision making. Through gender mainstreaming and such a balance, a gender perspective can be integrated into the identification process which will be to the benefit of women and girl victims. Such involvement is not explicitly required by the terms of the Anti-Trafficking Directive, however, and this is a weakness in the text.

Taking into account the preference of Member States to designate police authorities as the competent authority (Eurostat 2013: 30), it is important that police officials possess gender expertise and thus receive gender specific training. This has been identified as particularly important in the identification of victims of trafficking for sexual exploitation (EC 2016a:8). It is likely of importance in the identification of trafficking for forced marriage also, so as to avoid perceptions of cultural female roles that may result in non-identification. The need to provide such training can be linked to a wider requirement found in Recommendation 19 of the CEDAW concerning measures to tackle violence against women, which requires that States provide gender sensitive training to public officials and judicial and law enforcement officers (CEDAW, Recommendation 19).

Article 18(3) of the Anti-Trafficking Directive contains a general requirement that Member States **'promote' regular training for officials likely to come into contact with victims or potential victims**, which should enable them to identify and refer victims and potential victims. Recital 25 of the Directive outlines the categories of officials who should receive training, including police officers, border guards, immigration officials, public prosecutors, lawyers, members of the judiciary and court officials, labour inspectors, social, child and health care personnel and consular staff. The Anti-Trafficking Directive, however, is silent on the type of training which should be provided to these officials and does not explicitly require the provision of gender-specific training. There is a general requirement that Member States adopt a gender-specific approach, where appropriate, to the support and assistance of victims. This could be interpreted broadly, to include gender-specific training for those responsible for the identification of victims. Furthermore, Recital 25 recommends that education programmes designed to prevent trafficking should adopt a gender perspective. While not a mandatory provision, this recommendation could also be extended to the training programmes for officials. The importance of gender specific training cannot be overstated when dealing with violence against women and gender based violence. **The CEDAW Committee, for example, has stated that it is "essential for the effective implementation of the Convention"** ^(xii). It is similarly essential for the identification of women and girl victims of trafficking for sexual exploitation and/or forced marriage.

Victims' Rights Directive

The Victims' Rights Directive does not include guidance as to who should be responsible for the identification of victims. According to Recital 19 of the Directive, it is "without prejudice" to any national procedures for identifying victims. Consequently, it does not build on the approach enshrined in the Anti-Trafficking Directive. It does, however, contain importance guidance on the type of training which should be available to national authorities.

Importantly, the provisions of the Victim Rights' Directive concerning training are more specific than those found in the Anti-Trafficking Directive. Article 25 requires that Member States ensure that those officials who will likely come into contact with victims, including judges, prosecutors and lawyers, receive general and specialist training, enabling them to recognise and respond to the needs of victims and further deal with victims in an impartial,

non-discriminatory, respectful, and professional manner. At the same time, Member States are encouraged to establish initiatives providing those involved in victim support groups and restorative justice services with appropriate training. Recital 61 of the Directive recommends that officials should receive initial and ongoing training. Importantly, Recital 61 recommends that, where relevant, such training should be gender-sensitive. This could be interpreted to be a necessary component of the specialist training that is required by Article 25 of the Directive. Overall, however, the focus of Article 25 is on those involved in the criminal justice process. Consequently, the Directive is limited *vis-à-vis* those who should receive the specialist / gender-specific training. When one bears in mind the very low criminal prosecution rates in trafficking generally, and particularly in trafficking for sexual exploitation and forced marriage, the impact of these gender-sensitive provisions of **the Victims' Rights Directive** – while helpful – are nonetheless limited as far as these victims are concerned.

The first point of identification for women and girls trafficked for sexual exploitation is not likely to be a criminal justice stakeholder. The identification source is more likely to be a medical professional, social worker or NGO service provider coming into contact with victims of gender-based violence. It may also be hotel and airline staff, or border guards. In the case of victims of trafficking for forced marriage, marriage registrars, ethnic community or religious leaders, refugee camp relief workers, and embassy personnel could be the first point of identification. The omission to leave open the door for the training of these kinds of relevant groups is a missed opportunity in the Directive, albeit an understandable one, given it is primarily concerned with victims as they interact with the criminal justice process.

A risk is presented by the fact that Recital 61 of the Victims' Rights Directive opens with the caveat: "where relevant, such training should be gender sensitive". The opening caveat arguably weakens the provision (which is in any event non-binding). The point of gender-sensitive training is to alert individuals to matters about which they may otherwise go unnoticed – thus without training, gender issues may appear not to be 'relevant', leading to their exclusion from a training programme. Rather, in the implementation of the Directive, gender-sensitive training should be provided as standard, for anyone dealing with victims of crime, of any kind. Through a broad interpretation of the Directive, it is possible for the words 'where relevant' to be defined in this way, mitigating the risk that the training will not be widely offered.

Overall, Article 25 of **Victims' Rights Directive** represents an opportunity and has the potential to strengthen the approach followed in the Anti-Trafficking Directive, by requiring gender specific training for, at a minimum, the competent authority responsible for identifying victims.

Conclusion

Combined, the **Anti-Trafficking Directive** and **Victims' Rights Directive** require that those engaged in the identification of victims receive specialist training, which could be extended to include gender specific training, providing that Member States adopt a broad interpretation of the phrase 'where relevant' in **Recital 61 of the Victims' Rights Directive**. This represents an important strength of the Directives read together, and can increase identification of women and girl victims of trafficking. Furthermore, the wording of the Anti-Trafficking Directive creates an opportunity for Member States to include independent

women's non-governmental organisations in the identification process. This, however, is not strictly required by the wording of the Directive. There is a threat that Member States could exclude such organisations from the process.

3.5 Identification Interview

Interviewing actual or suspected victims of trafficking is not a straightforward matter. It cannot be assumed that victims will, given the opportunity, hold forth on their experiences. Rather, deep seated reluctances to make disclosures should be considered the norm. There are numerous complex factors at play which inhibit women and girls trafficked for the purpose of sexual exploitation and/or forced marriage from making disclosures, including: fears for their own safety or safety of family members; the fear of arrest and imprisonment, which is particularly relevant in cases involving trafficking for sexual exploitation; the fear of deportation; and the mistrust of authorities (WHO 2003: 7). In the case of women and girls trafficked for the purpose of forced marriage, the involvement of family members can be an impeding factor for victims to self-identify to State authorities. To encourage disclosures, it is recommended that all interviews with victims should be conducted in a gender-sensitive manner (OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO 2011). The central features of a gender sensitive interview are that it is conducted by an interviewer of the chosen gender of the interviewee and minimises the risk of secondary harm to victims, for example by minimising the number of interviews that victims must undertake (WHO 2003).

Anti-Trafficking Directive

The Anti-Trafficking Directive contains one important aspect of a gender-sensitive interview. By Article 12(5) of the Directive, authorities are required to avoid the unnecessary repetition of interviews with victims. It is questionable, however, to what extent this applies to the identification interview. The wording of the Directive restricts this protection to interviews during the criminal justice process (investigation, prosecution, or trial). Given its necessary connection to the investigation, however, it could be argued that the identification interview is subsumed by Article 12(5). There is an opportunity for Member States to take such an interpretation, which would provide added protection to victims.

The Anti-Trafficking Directive fails to make provision for a gender choice of interviewer. This presents a risk that victims will be inhibited from making full disclosures. The omission does not prevent a practice being implemented that would offer victims this choice; however the failure to include any provision for this is unhelpful as regards this important protection. It is commonly reported that female victims prefer to make disclosures in an all-female environment (Refugee Women's Legal Group (UK) 1996: para. 5.20). As such, a gender choice of interviewer should be offered as a matter of course to all victims and during all interviews, so that sensitive disclosures are facilitated in the first instance. Moreover, this choice should be offered to groups that may contain trafficking victims, more generally, for example to all irregular migrants encountered by State authorities and all asylum seekers.

Victims' Rights Directive

In common with the Anti-Trafficking Directive, Article 20(b) of the Victims' Rights Directive requires that the number of interviews with victims are kept to a minimum and only carried out where strictly necessary. The Directive further requires that interviews with victims of sexual and gender-based violence are routinely carried out by an interviewer of the same gender, unless the victim wishes otherwise. This is a key strength of the Directive,

particularly when compared to the omission in this regard in the Anti-Trafficking Directive. Furthermore, it is a strength that consent is built into the protection. This is in line with the underlying best practice aim of empowerment of victims of gender-based violence, as identified, for example, in Article 18(3) of the Istanbul Convention. Moreover, it can account for the rare situation where a victim of gender based violence may prefer an interviewer of the opposite gender.

Intersectional vulnerabilities must be considered. Neither Directive deals with the gender of interpreters. It is vital for Member States, seeking to implement a gender choice of interviewer, that the gender of an interpreter (where applicable) is in line with that of the interviewer where a victim has indicated a preference. This equally applies to a sign-language interpreter in the case of a victim with hearing difficulties. Any gender choice should be offered in a neutral way, i.e. on a form or by an intermediary, not the person who intends to carry out the interview. Women and girl victims of trafficking may be anxious to avoid giving offence to a male in a position of authority by being honest about their true gender preference.

Given the context of the Victims' Rights Directive (largely concerned with criminal proceedings), it is unclear whether these important protections could be taken to extend to the identification interview, i.e. before victimhood has been established. Where Member States adopt a broad understanding of the concept of victim, and apply such measures to the interviews for identifying trafficked women and girls, the above measures can offer further protection to victims beyond that provided for by the Anti-Trafficking Directive, representing an opportunity.

Conclusion

In combination, the Directives enshrine important features of a gender-sensitive interview, which can encourage disclosure and protect victims from secondary harm, and thus should be considered an important strength of the Directives. There is, however, the threat that these may not extend to the identification interview. It appears from the language of the Directives that these protections are limited to victims who have already been identified by the competent authority. Consequently, they may not extend to the identification interview. This will necessarily depend on how they are implemented in practice and whether Member States consider the identification interview to form part of the criminal investigation. As such, the wording of the Directives simultaneously represent an opportunity and a threat.

3.6 National Referral Mechanism

Following the identification of victims, it is important that women and girl victims are referred to appropriate services for support and assistance. This can be achieved by establishing *inter alia* a formalised National Referral Mechanism. The EU progress report identifies a formal National Referral Mechanism as a key step in the early identification, support and assistance of victims.

Anti-Trafficking Directive

Article 11(4) of the Anti-Trafficking Directive requires that Member States establish a mechanism for the early identification, support, and assistance of victims, based on cooperation with relevant support organisations. Thus, although the Directive does not use

the term National Referral Mechanism, Article 11(4) appears to require that Member States establish one. This reading of Article 11(4) is supported by the EU Strategy on Human Trafficking 2012-2016, which includes establishment of a National Referral Mechanism as a priority for Member States.

From a gender-based violence perspective, Article 11(4) is a strength of the Directive. The need for a formal and coordinated referral structure for victims of gender-based violence is similarly enshrined in Article 18 of the Istanbul Convention and is further contained in Recommendation (2002)5 of the Committee of Ministers to Member States on the protection of women against violence.

The strength of a National Referral Mechanism will likely depend on those involved. In recognition of the role of NGOs with gender expertise in providing a gender-sensitive response to the issue of human trafficking, these should be included, along with *inter alia* child protection services (EU Strategy 2012 - 2016), which are well placed to identify and assist girls trafficked for sexual exploitation and/or forced marriage. Through their formal involvement, NGOs could contribute towards early identification and ensuring equal access to services for women and girl victims of trafficking. Given that these groups will likely constitute relevant support organisations for many victims of trafficking, their involvement in the National Referral Mechanism would appear to be mandated by Article 11(4) of the Anti-Trafficking Directive. To date, however, just under half of Member States remain without a formalised National Referral Mechanism, while the involvement of child protection services remains limited. At the same time, civil society, including NGOs, in Member States have called for more meaningful participation in existing mechanisms (EC, 2016).

Victims' Rights Directive

Article 8(2) of the Victims' Rights Directive requires that Member States facilitate the referral of victims to victim support services by either the 'competent authority who received the complaint' or by other relevant actors.

This provision represents a particular strength of the Directive, specifically in the context of gender-based violence and the identification and onward referral of women and girl victims of trafficking to services. As stated previously, in most Member States, the competent authority, in the area of human trafficking, is the police. Yet, it is known that many victims of gender-based violence will refuse to make contact with or be identified by the police, for a number of reasons, including fear, shame and social stigma (EIGE 2014:32). They are more often willing to have contact with other stakeholders, including NGOs, medical professionals, and social workers. Given that such actors could likely be identified as a relevant entity, as per the wording of Article 8(2), the provision could ensure that victims are referred to the appropriate services immediately following identification, even if this is not done by the competent authority. Bearing in mind the strong link between formal identification and the provision of services in the Anti-Trafficking Directive, **Article 8(2) of the Victims' Rights Directive could give victims who do not yet wish to engage with the competent authority access to important services and support, outside the structure of the National Referral Mechanism. This represents an opportunity.**

Conclusion

The link between the identification of women and girl victims and the availability of support and assistance is best secured through the presence of a National Referral Mechanism. It is a clear strength of the Anti-Trafficking Directive that Member States must establish such a mechanism in cooperation with support organisations. There is the danger, however, that this will be limited to those victims identified by the competent authority, understood here as the authority responsible for making a reasonable grounds determination. It is thus **welcome that the Victims' Rights Directive extends the obligation to refer victims to other relevant organisations that may come into contact victims.** The opportunity created by this provision of the Directive, however, will depend on whether those organisations receive appropriate guidance on referring victims. It will further depend on the type of assistance available and accessible to victims outside the formal National Referral Mechanism.

Chapter 4: Support and Assistance

Following on from the identification of women and girl victims of trafficking for sexual exploitation and/ or forced marriage, it is crucial that Member States offer support and assistance to such victims which are suited to their actual needs. In order to do so, these supports must take into account the gender specific harms inflicted on women and girls trafficked for sexual exploitation and/ or forced marriage.

Research on sexual violence, including on exploitation in the sex trade, prostitution, as well as traditional harmful practices, such as forced and child marriage, highlight the similarities in the traumatic outcomes for victims, particularly on their physical, sexual, and mental health. These include: sexual and reproductive dysfunctions, severe and complex post-traumatic stress disorder (CPTSD), suicidal tendencies and attempts, clinical depression, psychosis, loss of confidence and a reduction in professional and educational attainment. Victims are reported to have persistent feelings of shame and disgust, loss of sleep and psychological disassociation (WHO 2002), as well as the symptoms identical to those exhibited by the victims of torture and war. In addition, it has been found that victims of trafficking often suffer from high rates of secondary victimisation (Andrijasevic 2010; Akwida 2010, Mishra 2013), while many of those fleeing such exploitation lack the economic means to survive (Reid, 2012). As such, effective intervention with women and girl victims requires a wide range of gender-specific supports.

The following Chapter examines the extent that such an approach to support and assistance is enshrined in the text of the studied Directives, focusing on a number of key areas.

4.1. Equal Treatment

Trafficking victims come from different backgrounds and are trafficked for a variety of purposes. In order to ensure that *all* victims can access services, it is important that this is based on *inter alia* the principle of equal treatment, a cornerstone principle of EU law generally. Thus women who are trafficked for sexual exploitation and/or forced marriage should be able to access social supports and services on an equal footing to other victims (EC, 2016a:8). **This can remove the risk of "illegal discrimination in accessing health, welfare and criminal justice services" (EC 2016a).**

Anti-Trafficking Directive

There are no specific provisions in the Anti-Trafficking Directive concerning equal treatment. **Recital 33 states that the directive “observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union” which includes equality and equal treatment of men and women.** Consequently, there is an implicit reference to the provision of services to victims being based on the principle of equal treatment.

Victims’ Rights Directive

Similarly, the **Victims’ Rights Directive contains** references to the principles of EU law in Recital 66, including the protection of rights and equal treatment of men and women. **According to the EIGE (2016), this recital with its multiple references to ‘gender’ is a strength of the Victims’ Rights Directive from a gender based violence perspective.** Several other recitals are relevant to the principle of equal treatment and are thus worth mentioning. Recital 9, read in conjunction with Article 1(1), mandates that victims should be treated without discrimination, including discrimination as to gender. This is beneficial for victims of gender based violence and trafficking as it helps to ensure their gendered experiences are taken seriously by the authorities. Article 1(1) mandates that the non-discrimination treatment applies to residence status, however the Directive does not offer a resolution for cases where the eligibility for some services requires a lawful residence status, which represents a weakness of the Directive.

With regard to equal treatment, two strengths are of note. Recital 63 deals with non-discriminatory treatment at the time of making a complaint. Given the overall underreporting of crimes of violence against women, this is a helpful provision. Recital 61 recommends appropriate training for practitioners ensuring that they treat victims in non-discriminatory manner. While the European Institute on Gender Equality (EIGE 2016) rightly considers this provision of the Directive a positive, it should be remembered that the lack of specificity with regards to regularity of trainings, and qualification requirements of practitioners, could undermine its effectiveness in practice.

Conclusion

The Directives explicitly invoke the EU principles of equal treatment and equality between **women and men. The Victims’ Rights Directive contains more concrete provisions regarding** the non-discriminatory treatment of victims, especially during contact with the authorities, training of relevant practitioners. Gender and residence status are recognised as grounds for discrimination. However, there is insufficient guidance, in either of the Directives, as to how this can be achieved in practice. As such, it will depend to a great extent on how Member States uphold the EU principles in their implementation of the Directive.

4.2 Access to Supports: Early Access

Taking into account the harms associated with trafficking for sexual exploitation (EC 2016a) and the overlap between this type of exploitation and forced marriage, it is incumbent that women and girls trafficked for the above purposes receive assistance and support immediately following their identification by the competent authority. Early assistance to

victims is closely linked with their early identification and referral to services, which in trafficking cases involving gender based violence requires the involvement of specialist organisations. Training and gender expertise amongst those responsible for formally identifying victims is required, as discussed in the previous chapter.

Anti-Trafficking Directive

Article 11(2) of the Anti-Trafficking Directive requires that States provide victims with early access to available supports – as soon as competent authorities have reasonable-grounds to believe they have encountered a victim. Read in conjunction with Recital 18 – which similarly requires early assistance to victims – this represents a strength of the Directive. In spite of such explicit wording, however, this is an area of concern *vis-à-vis* implementation. The European Commission (EC 2016c) points out that only half of Member States clearly require that **assessment and support should be provided as soon as ‘reasonable grounds’** are established. This needs to be improved in order to best ensure a gender-sensitive implementation of the Directive, which is particularly important for female victims of these serious forms of exploitation, which are documented to inflict serious trauma (EC 2016a).

Victims’ Rights Directive

Recital 37 refers to support commencing as soon as the authorities become aware of a victim, which arguably represents a lower threshold compared to **the ‘reasonable grounds’** mentioned above. According to the Directive, an individual is a victim notwithstanding **his/her ‘role’ in the national criminal justice system** (EC 2013c:10). This position is reaffirmed by the European Court of Human Rights in *J and others v Austria* (Application No. 58216/12).

Case Study

In *J and others v Austria* the application was made by three women of the Philippines who were recruited and exploited in Dubai and for a shorter period in Austria, where they managed to escape. They turned to the police and made a statement, which triggered an investigation which was shortly discontinued. The applicants complained to the European Court of Human Rights (ECHR) that Austria had failed to investigate their allegations regarding the crime of trafficking committed against them. The ECHR distinguished between the positive obligation on a State to investigate allegations of human trafficking on the one hand and the identification and assistance of victims of human trafficking on the other, stating **‘(potential) victims need support even before the offence of human trafficking is formally established’**.

Another positive aspect of the Victims’ Rights Directive is that it recommends referral of victims to services, including referrals made by ‘other relevant entities’, which are vital for victims of gender based violence who might disclose to practitioners different from the competent authorities (EIGE 2016). Article 8(3) of the Directive requires access to specialist services in addition to the general services, in accordance with the specific needs of the victim and the degree of harm suffered. This is a strength from a perspective of victims of violence against women, where gender specific needs often arise.

Conclusion

Although early access to services is ensured in both Directives, implementation of this principle needs to be monitored and enforced. The Victims' Rights Directive brings additional strengths to the implementation *vis-à-vis* victims of gender based violence, in particular the trafficked women and girls which are the focus here, arising from the requirement to ensure access in accordance with the needs of the victims, including any special needs that could be met by specialised services. A further strength of the Victims' Rights Directive is that the referral to services is not confined to the competent authorities.

4.3 Duration of Assistance

It is important that victims receive continuous support and assistance, before, during, and after any criminal proceedings. This is important for trafficking victims who have been sexually assaulted and have likely suffered severe physical and psychological harms, recovery from which may require significant investments (EC 2016a). Any discontinuation of services could have a significantly negative impact on the victims and make them more vulnerable to re-trafficking.

Anti-Trafficking Directive

Article 11(1) of the Anti-Trafficking Directive requires that Member States provide victims with continuous support and assistance, *'before, during and for an appropriate period after'* the criminal proceedings. This obligation should be read with the expressed intention in the Preamble, at Recital 18, where it is stated that the extension of the assistance and protection ***"for a period of time after" the criminal proceedings is necessary in cases where "medical treatment is ongoing due to the severe physical or psychological consequences of the crime, or if the victim's safety is at risk due to the victim's statements in those criminal proceedings"***. Recital 20 further recommends that victims of trafficking, who have suffered abuse and degrading treatment should receive treatment proportionate to their needs, which may include longer term assistance. Abuse and degrading treatment, in this regard, is **recognised as including "sexual exploitation, sexual abuse, rape, slavery-like practices"**. It is thus evident from the Preamble that violence against women provides a clear basis for the provision of more enduring assistance measures; this is a strength of the Directive.

It is recognised that recovery from the gender-specific harms associated with trafficking for sexual exploitation and forced marriage often requires long term support and assistance (EC 2016a, WHO 2002, Zimmerman et al 2008). In this regard, Article 11(1) is of potential benefit **(as it has no firm ending point: 'appropriate duration')**; however, the actual duration victims can benefit from support measures is dependent on implementation by individual Member States.

There is a threat as regards undocumented third country national victims, due to the minimal standards regarding their residence rights as provided for by Directive 2004/81/EC, which permits for the termination of such rights at the end of any criminal investigation or (if applicable) criminal proceedings. As such, the situation of female victims of trafficking who are third country nationals should be taken into account by Member States, and any

residence status provided should be extended, specifically where it is required to avoid premature discontinuation of assistance and support measure. The sudden removal of certain supports at this point could lead to re-traumatisation of victims of trafficking for sexual exploitation and forced marriage. Adopting such an approach is supported by the Anti-Trafficking Directive which, as previously seen, does not consider the end of criminal proceedings to be an end point for victim supports.

Victims' Rights Directive

The Victims' Rights Directive similarly requires that Member States provide support to victims for an appropriate period after the conclusion of criminal proceedings. The Directive does not fill the gap that exists with regards third country nationals, but it benefits legally resident victims who are facilitated by the terms of the Directive to make a complaint about a crime and receive assistance in their country of residence as opposed to the country in which the crime took place: Article 17(2).

Conclusion

The provisions for durable assistance to victims in the Anti-Trafficking Directive maintain a clear focus on those affected by violence against women and thus benefit the women and girls in focus, whose experiences of sexual violence and harm require longer term recovery measures. There is a potential weakness regarding victims who lack the residency rights that entitle them to this vital assistance, which should be monitored during implementation by Member States.

4.4 Conditional Support

The question of commencement point as well as duration of the assistance and support offered to victims is narrowly linked to the requirement to make such measures independent of the investigation of the trafficking crimes committed against the victims. Given the utmost importance of assistance and support for all victims of trafficking, it is essential that these should be provided **irrespective of a victim's** cooperation with authorities / police. There are a number of grounds which can inhibit victims trafficked for the purpose of sexual exploitation from cooperating with the authorities, including trauma, fear of State authorities and fear of traffickers (EC 2016a). Given the potential proximity of victims trafficked for forced marriage to their trafficker, cooperation may not be forthcoming in these cases either.

Anti-Trafficking Directive

Article 11(3), in line with Recital 18, requires that assistance and support to victims should not be **conditional on a victim's willingness to cooperate in criminal investigation, prosecution or trial**. Similarly, Article 9 clearly separates investigation from a complaint by the victim: the former is not dependant upon the latter. This apparent strength of the Directive, however, is somewhat **reduced by the proviso that this requirement is "without prejudice" to Directive 2004/81/EC**, dealing with residence permits for victims of trafficking. While the recovery and reflection permit is provided to all victims who are identified by competent authorities, residence beyond this, by Article 8, is **explicitly linked to the victim's**

assistance in criminal investigation and/or proceedings. The Anti-Trafficking Directive echoes this position^(xiii). As a result, third country nationals face an additional obstacle to access unconditional assistance beyond the short term. It is positive that EU citizen victims are not bound by the condition for cooperation, particularly as the majority of trafficking victims in the EU are EU nationals, however the gap for third-country nationals is a weakness.

A recent European Commission report **found that provisions for the “assistance and support of victims and presumed victims irrespective of their cooperation with criminal prosecutions”** are not established in many Member States (EC 2016b). Similarly, the Commission report on the transposition of the Anti-Trafficking Directive (EC 2016c), concludes that EU Member States have adopted inconclusive and ambiguous provisions for support irrespective of the willingness of the victim to cooperate. Both reports indicate that there is a room for improvement in ensuring assistance and support are provided irrespective of **victims’** cooperation in criminal justice processes.

Victims’ Rights Directive

Article 8(5) states that access to assistance must not be linked to a formal complaint, which is beneficial to the victims of trafficking in focus and thus constitute a strength. EIGE (2016) notes that victims of gender based violence often do not make complaints because of fear, shame or stigma. Victims of gender-based violence more generally are not well served by the criminal justice process. A reluctance of female trafficking victims to engage with it is mirrored across the wider continuum of violence against women: this trend must be taken into account by Member States whose national systems make victim support conditional on engaging with criminal justice systems.

Conclusion

The implementation of the provisions of assistance and support must accord primacy to the position of the victim as a victim, independently of the criminal justice process, in order to effectively meet the recovery needs of victims of trafficking for sexual exploitation and/or forced marriage. Relevant Court judgements could be used as a guidance for implementation (e.g. *J and others v Austria*, 2017). Unconditional assistance is of special importance to victims of gender based violence who seldom make complaints and are reluctant participants in criminal investigations. Third country national victims require further attention in ensuring this right beyond the reflection period.

4.5 Consent in Obtaining Services

The issue of consent and choice is generally considered core to the work of anti-trafficking organisations providing services to trafficking victims. Where this issue is overlooked it can reinforce patriarchy and gender inequality by perpetuating a form of discrimination against women by removing their ability and right to choose (Bindel et al 2012).

Anti-Trafficking Directive

The stipulation in Article 11(5) that the assistance and support measures be provided in a ‘consensual and informed basis’ is an important one. It is underscored by Recital 21, which

points out the need for victims of trafficking to be informed of available protection and to accept them on a consensual basis rather than see assistance as an imposition. Efforts to **obtain women's informed agreement could aid their regaining of control**. This emphasis on consent is a strength of the Directive, from a gender perspective. Efforts to seek informed consent could be aided by the involvement of survivors, either in direct information provision or in design and development of information materials outlining available assistance and support (EC 2016b).

Victims' Rights Directive

By contrast, the Victims' Rights Directive does not include an awareness of the need for informed consent as part of service-provision to victims generally, or specifically, in the case of victims of gender-based violence. The Directive refers to consent in its text only in an unrelated context (restorative justice)^(xiv).

Conclusion

The provision for informed and consent-based assistance aid the recovery process of victims of gender based violence, whose ability to choose has been severely undermined as part of their victimisation. This right is important and could be more efficiently implemented by the involvement of survivors.

4.6 Needs Assessment

Measures for the assistance, support, and rehabilitation of victims need to be adapted to different categories of trafficking victims and their experiences (UN 2011). This involves tailoring *inter alia* the housing, information and advocacy services, and medical services available to the specific needs of such victims. Those needs can only be properly identified through an individual assessment.

Anti-Trafficking Directive

Recital 18 recommends that provision of support and assistance to victims should follow an individual needs assessment taking into account their experience, cultural context and individual characteristics. Women trafficked for the purpose of sexual exploitation and/or forced marriage, suffer particular (and severe) types of harm and trauma, thus the importance of individual assessment in this cases cannot be over stated. Assessment of the individual needs of women trafficked for forced marriage could be challenging and understanding of the cultural context is essential as this crime may be linked to a traditional practice. The recent migration crisis represents another novel context for the phenomenon of forced marriage that has to be studied, in order to accurately identify the needs of victims of such form of trafficking.

While Recital 18 creates an opportunity for implementation, it is not followed by a binding obligation and this represents a threat during implementation. Child victims, on the other hand, must undergo an individual assessment *via-a-vis* the type of support and assistance they require, which is a strength that benefits girl victims (Article 14(1)). The only type of assessment required by the Anti-Trafficking Directive that is applicable to all victims is in relation to their protection needs during criminal proceedings. Again, the emphasis on

criminal proceedings is unhelpful, given only a small fraction of victims' cases will be brought to trial.

Victims' Rights Directive

Similarly, the only type of assessment required for all victims in the Victims' Rights Directive is with respect to their protection needs in the criminal justice system. These measures are discussed in the chapter dedicated to access to justice.

Conclusion

Individual needs assessment could lead to tailored assistance to victims of trafficking for sexual exploitation and/or forced marriage, taking due account of their experiences, cultural background and particular needs. This obligation is particularly important for trafficked victims affected by violence against women, which tends to create gender **specific harms which can themselves be defined by the victim's cultural background**. Needs assessment must be considered a mandatory provision for such victims regardless of their age and in addition to the protection needs assessment in the criminal process.

4.7 Special Needs

There are specific characteristics which can create additional or special needs for trafficking victims, including women and girls trafficked for sexual exploitation and/or forced marriage. The Anti-Trafficking Directive itself recognises sexual violence as a *"particularly grave offence"* (Recital 12). **Trafficking, which involves** sexual exploitation, either in a commercial context or within a forced marriage, is a particularly severe form of violence against women. Research on sexual violence, including on exploitation in the sex trade, as well as traditional harmful practices such as forced and child marriage, have similarities in the traumatic outcomes for victims. These include: sexual and reproductive dysfunctions, severe and complex post-traumatic stress disorder (CPTSD), suicidal tendencies and/or attempts, clinical depression, psychosis, loss of confidence and a reduction in professional and educational attainment. Victims are reported to have persistent feelings of shame and disgust, loss of sleep and psychological disassociation (WHO, 2002), as well as the symptoms identical to those exhibited by the victims of torture and war. Guided by such evidence, the European Commission **concludes that 'effective intervention requires a wide range of gender-specific specialist services for victim-survivors'** (EC 2016a:34).

Anti-Trafficking Directive

The special needs of certain categories of trafficking victims are recognised in Article 11(7), which lists factors such as pregnancy, health, disability, mental or psychological disorder or serious psychological, physical or sexual violence. This provision is of particular importance in the case of women and girls trafficked for the purpose of sexual exploitation and/or forced marriage, who are at increased risk of suffering from ill-health, including psychological disorders, as a result of the gendered harm and violence they have suffered. There is also an increased risk of pregnancy amongst this category. Although the provision is overall a strength, there is little guidance on any practical measures which Member States must take.

Victims' Rights Directive

The **Victims' Rights Directive** has added value in this area in the form of guidance on victims with special needs. Recital 17 identifies “[w]omen victims of gender-based violence” as having special support needs. **Recital 37 stipulates that** “*victims who have suffered considerable harm due to the severity of the crime could require specialist support services*”. **Recital 38 offers** a more comprehensive list of the circumstances that invoke specialist support, including gender based violence and repeat violence in close relationships: both of which concern victims of trafficking for sexual exploitation and forced marriage. According to EIGE (2016), this recital draws the attention of the authorities to the special needs of women victims of violence, which is a strength. The types of special assistance outlined in Recital 38 include “*shelter and safe accommodation, immediate medical support, forensic exams in cases involving sexual assault, short and long-term psychological counselling, trauma care, legal advice, advocacy and specific services for children involved*”.

Conclusion

The Directives contain strong provisions directing Member States’ attention to the fact that victims of gender based violence have special needs, which can benefit victims of trafficking for sexual exploitation and/or forced marriage requiring specialist services. Successful implementation requires that such special needs are identified and that services equipped to respond to such needs are accessible to victims. The expert findings of recent European Commission studies can be utilised in filling the gap left by the omission of specific guidance in the Directives as to meeting special needs (EC 2016a, EC 2016f, EIGE 2016) . For example, the provision of accommodation in a gender-specific shelter offering confidentiality and safety, which is operated by persons with expertise in violence against women and which integrates other types of assistance on the same premises, and including peer group support. Response to complex medical cases, early, free, comprehensive legal aid provision (covering compensation claims, welfare, immigration and family matters) in addition to sustainable post-victimisation and prostitution exit strategies fall squarely within the category of special needs.

4.8 Support and Assistance to Children

4.8.1 Best Interests of the Child

In order to ensure an adequate response for girl victims of trafficking, it is important that their best interests are placed at the core of any assistance measures.

Anti-Trafficking Directive

The Anti-Trafficking Directive requires that Member States take into account the best interests of the child when providing them with assistance and support. That it strongly emphasises this important principle is a strength. **Article 13(1) states** “*in the application of this Directive the child’s best interests shall be a primary consideration*”, echoing Recital 22 of the Directive.

The Directive takes its understanding of a child’s best interest from the Convention of the Rights of the Child (CRC), the provisions of which could inform Member States’ implementation of the Directive *vis-à-vis* support and assistance measures for girl victims of

trafficking. Only through an individual assessment of girl victims of trafficking can their best interests be properly established, **taking account of the child's views, as provided by Article 14(1)**. To ensure the effectiveness of this measure it will be important that those responsible for assessing the interests of a girl victim have appropriate training. The importance of training and specialisation for the delivery of assistance and support is highlighted in the EU Fundamental Rights Agency report on Child Friendly Justice (FRA 2017). This, however, is not provided for in the Directive and thus represents a weakness in the text.

Victims' Rights Directive

The Victims' Rights Directive similarly requires that Member States rely on the 'best interests' principle, as enshrined in the CRC, in their treatment of child victims of trafficking.^{xv} Recital 61 could be interpreted as requiring training for officials involved in **criminal proceedings as it references "specialist training where their work focuses on victims with specific needs"**, which to a certain extent addresses the weakness previously identified in the Anti-Trafficking Directive.

4.8.2 Guardianship

Children deprived of parental care are particularly vulnerable to abuse and exploitation, which an effective guardianship system must prevent. The Fundamental Rights Agency (2015) points out that a robust guardianship system is a cornerstone to any comprehensive child protection system that addresses child trafficking. This position is underscored in the EU Strategy for Eradication of Trafficking in Human Beings 2012-2016. The practice of many Member States is to use the existing guardianship systems to cater for the needs of victims of trafficking.

Anti-Trafficking Directive

The Anti-Trafficking Directive provides for a guardian to be appointed in the case of an unaccompanied child victim or where there is a conflict of interest between the interests of the child victim and those with parental responsibility: Articles 14(2) and 16(3). This is an important protection and a welcome binding obligation, particularly for girl victims of trafficking for sexual exploitation and/or forced marriage involving parents or those with parental responsibility. Although the Directive contains no detail as to the duties of the guardian, representing a potential weakness, Recital 23 makes it clear that the core of **guardian's role is to safeguard the child's best interests**.

The Fundamental Rights Agency (2015) observes that migration and asylum law applies to third country national child victims if they are not formally identified as victims by the competent authorities. As a general rule, the report recommends the independence of the guardianship system from migration and asylum authorities. Given the nature of exploitation that is prevalent in cases of trafficking for sexual exploitation and/or forced marriage, it is also important that the guardian has special training on working with children who are recovering from sexual abuse.

Victims' Rights Directive

The Victims' Rights Directive also refers to guardians / representatives, but in a more limited way, in relation to criminal proceedings only. As such, it does not add to the Anti-Trafficking Directive's provision in this respect.

4.8.3 Durable Solutions

Anti-Trafficking Directive

According to Article 14(1) the purpose of conducting an individual assessment, discussed earlier, is finding a 'durable solution' for child victims of trafficking. This follows a similar intention outlined in Recital 22. This can be contrasted with the support measures for adult victims of trafficking, which do not consider their longer-term needs. Given a child's need for stability, the focus on a durable solution is thus a strength of the Directive and can contribute towards the recovery and reintegration of girl victims of trafficking. It is an opportunity, in particular, that Member States are encouraged to offer integration into the host country as a durable solution. The longer-term reintegration strategies for exiting prostitution could be considered in cases of girls trafficked for sexual exploitation. The European Commission recommends the extension of exit services and protection for young victims of sex trafficking to the age of 21 to minimise harm and prevent re-trafficking (EC 2016a).

The European Commission find that the return and reintegration are concerning in cases of **child victims and that** 'fast track' methods of return are not in the best interest of the child and should be avoided (EC 2016b). Bearing in mind that there are third country national girls trafficked in the EU and that the size of this group may have increased in the current migration crisis, all returns of children should be closely monitored. In particular, girl victims must not be repatriated to countries with significant gender discrimination, which may lead to their speedy re-victimisation. The European Commission states that the implication of family involvement in child trafficking and the returning of child victims to their communities are matters that need to be further studied and understood (EC 2016b).

Victims' Rights Directive

The Victims' Rights Directive does not address this issue in a significant way.

Conclusion

Both Directives strongly uphold the principle of best interest of the child; however there are insufficient requirements for the training necessary to properly assess the needs of the child. **The Directives have a similar weakness in that they lack detail as to a guardian's remit and his/her independence.** The Anti-Trafficking Directive's mandatory provision of guardianship to unaccompanied girl victims of trafficking, or those who otherwise cannot rely on family support, is a strength. The focus on durable solutions is also a significant strength of the Anti-Trafficking Directive. The reintegration of girl victims requires intense and extended support from the time of exit from prostitution beyond the age of maturity of the victims. There is some caution necessary regarding the repatriation of girl victims of trafficking to their communities.

4.9 Service Providers

At the centre of each of the above measures are service providers, who are responsible for supporting and assisting victims. Those providing services to trafficked women and girls e.g. info, referral, medical, counselling, legal representation, should possess the necessary gender expertise. It has been recognised that specialist non-governmental services with such expertise are best suited for service provision to the victims in focus and should be funded for this purpose (EC 2016a). Given the high level of mistrust amongst victims of trafficking, the involvement of victim survivors in the provision of services has been suggested as an additional means of delivering gender-specific services to trafficking victims (EC 2016a).

Anti-trafficking Directive

Overall, the Anti-Trafficking Directive does not outline any specific characteristics of support services that would ensure that they meet the gender specific needs of victims, which is a weakness. It is of note that **Recital 18 requires that “Member States should provide for resources to support victim assistance, support and protection”**. Complemented with the **recent European Commission study’s conclusions regarding assistance (EC 2016a)**, this Recital could represent an opportunity.

Victims’ Rights Directive

The Victims’ Rights Directive establishes necessary features of the support system. In the first place Article 8(1) requires that supports are free of charge and confidential. This is in line with the guidelines of the Recommendation Rec(2002)5 of the Committee of Ministers of the Council of Europe^{xvi}. **Recital 37 of the Victims’ Rights Directive** provides a useful practical requirement regarding the geographical spread of services, which is complementary to the Anti-Trafficking Directive and could prove important for victims of trafficking for sexual exploitation and/or forced marriage. EIGE (2016) considers that it is a weakness of the Directive not to enshrine this in a binding Article. The high specialisation which is required for best practice provision of services to female victims of gender-based violence must be taken into account in order to avoid random dispersing of victims, especially to areas where specialist providers are not available. Another weakness, which EIGE (2016) identifies is the omission to require that supports be accessible to disabled victims, pointing out that important international treaties (Beijing Platform for Action 1995) concerning gender based violence have such requirements.

Conclusion

There is little guidance on the implementation of victim support services, their funding and features, which, given their vital importance, necessitates special monitoring during the implementation of the Anti-Trafficking Directive. In particular the involvement and funding of specialist NGOs appropriate for the needs of victims of gender based violence more generally (e.g. domestic violence shelters and sexual violence support services) could be made available to victims of trafficking alongside more specialised services. The involvement of survivors enhances service effectiveness; this approach is recommended by the European Commission as best practice for victims of trafficking recovering from sexual **exploitation (EC 2016a)**. **The Victims’ Rights Directive** complements the Anti-Trafficking Directive with requirements for confidential supports that are free of charge and by

recommending a geographical spread in its Preamble. Implementation could further be supported through recourse to the Beijing Declaration as well as CEDAW which direct attention towards the need for supports to cater for victims with disabilities.

4.10 Integrated Support

For victims of gender-based violence, the integration of the different support and assistance measures contained in Article 11(5) of the Directive, has been recognised as best practice. The Istanbul Convention (Article 18(3)), recommends integration of services for all victims of gender-based violence where **support measures** *'allow, where appropriate, for a range of protection and support services to be located on the same premises.'* **Adopting** an integrated and holistic approach has also been recognised as best practice in the specific context of victims of trafficking for sexual exploitation and/or forced marriage (FRA 2014, EC 2016a).

Anti-Trafficking Directive

The failure by the Anti-Trafficking Directive to mention integration of services is a missed opportunity, although there is reference to a range of services potentially required by victims. There is a threat that Member States will consider that providing victims with disparate (rather than integrated) supports will suffice to meet the needs of victims of trafficking for sexual exploitation and/or forced marriage.

Victims' Rights Directive

The **Victims' Rights Directive** eliminates the above threat to some extent through its explicit requirements for the integration of services. Article 9(3)(b) mandates that the supports **available should include** *"targeted and integrated support for victims with specific needs, such as victims of sexual violence, victims of gender-based violence and victims of violence in close relationships, including trauma support and counselling"*. **Further guidance is found** in Recital 62 of the Preamble. **EIGE (2016) considers that the Directive's** recommendations are not explicit enough and do not match the standards of relevant international agreements (Istanbul Convention and Recommendations of the Committee of Ministers (2002)5), which for victims of gender based violence is insufficient.

Conclusion

Location of services on the same premises is a recognised best practice approach to support **of victims of gender based violence. The Victims' Rights Directive complements the Anti-Trafficking Directive** on this matter and the two texts should be read in tandem so as to import the need for integration into any accommodation provision for these categories of victims. For successful implementation, full attention to relevant international agreements is also required, such as those contained in the Istanbul Convention (CoE 2011) and the Council of Europe Committee of Ministers Recommendations (CoE 2002).

4.11 Accommodation

In the majority of cases, trafficking victims have no place to stay once they have escaped their traffickers and require immediate access to safe and secure accommodation (Mair and Warren 2012, Akidwa 2010, Rosenberg 2006, ICI 2014). The absence of this vital support can **force victims to remain with their traffickers as** *"leaving can involve more danger and greater vulnerability"* (UNODC 2003). Through the availability of safe and appropriate housing,

victims obtain a space to detach from and escape the influence of their traffickers which is central to their recovery. In the context of women and girl victims of trafficking for sexual exploitation and/or forced marriage, gender-segregated accommodation is best practice (Larasi and Tweedale 2014, EC 2016a). Single-gender accommodation can promote a feeling of safety and prevent re-traumatisation as well as reduce the possibility of further sexual violence by men (EC 2016a:39).

Wherever possible, shelters providing accommodation to trafficking victims should be run and administered by specialist women's NGOs, who have found to be most responsive to the needs of women and girl victims of trafficking (EC 2016a). The involvement of survivors in these services has similarly been mooted as a means of enhancing the service. As previously discussed, there should be an integrated approach to accommodating trafficking victims, in which other supports should be available to victims in the same premises where they are accommodated. Accommodation provision must take account of intersectional vulnerabilities, such as disability or the needs of mothers with children.

An example of how a State's accommodation provision for victims of crime can fail to meet an individual's specific needs is provided by the case of A.T. v Hungary^{xvii}, a complaint which came before the CEDAW Committee. In that case, a female victim of domestic violence with children was unable to access a shelter, as none of the shelters in the country were equipped to meet the needs of her disabled child. As such, despite Hungary ostensibly having met its requirement to provide domestic violence victims with shelters, they were found to have in fact **violated this particular victim's rights under the Convention (^{xviii}).**

Anti-Trafficking Directive

The Directive provides for safe and appropriate accommodation in Article 11(5), a binding obligation and a strength. In addition, Recital 3 calls for gender-specific assistance and support measures in relatively strong terms, providing a further opportunity for effective implementation for female victims.

Victims' Rights Directive

Member States are required to provide accommodation to trafficking victims under Article 9(3) of the Victims' Rights Directive '*due to an imminent risk of secondary and repeat victimisation, of intimidation and of retaliation*'. This is a key strength of the Directive. The express reference to the underlying rationale is welcome. Further guidance on gender-specific accommodation can be found in the Preamble. Recital 17 makes reference to special support being required by women victims of gender-based violence and their children who '*often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence*'. This presents an opportunity for the tailoring of accommodation to **victims'** special needs, albeit the provision is non-binding and the wording could be stronger.

Although the housing provisions read as gender-neutral, in fact they will impact more on women. There are two reasons for this. First, women are more likely to be victims of the types of crime that require these kinds of integrated and residential services (e.g. victims of trafficking for sexual exploitation^{xix}). Secondly, women, as a group are more likely to be in need of these particular services than men, due to *inter alia* the financial disempowerment of victims which is part-and-parcel of the crimes of trafficking for sexual exploitation and/or

forced marriage as well as the complex socio-economic reasons which combine to make women financially disadvantaged in general terms.

Conclusion

It is a strength of both Directives that accommodation provision is mandatory. The omission of explicit considerations *vis-à-vis* gender-specific accommodation is a weakness in the texts, though the wording of the respective Preambles create an impetus for Member States to integrate a gender perspective into their approach to accommodation, which represents an opportunity.

Neither Directive provides specific guidance on accommodation but there is a scope for Member States to take account of the recent research as best practice direction. The **European Commission study on the gender dimension of human trafficking finds that ‘the confidentiality and safety of gender-specific, civil society accommodation is reported as crucial’** for victims recovering from sexual exploitation, and this service is best provided by women-only refuges for women and their children (EC 2016a:37). Important guiding principles with regards to the provision of accommodation could be derived from the Istanbul Convention, which lists the security (including technical security) and ease of access alongside the need for establishing of shelters in sufficient numbers as necessary features of this essential support (CoE 2011, Art 2, Explanatory Report (133)(134)(135)). Similarly, CEDAW General Recommendation 35, views adequate shelter for women and their children as an integral part of specialist women support services (CEDAW GR 35, 40(c)). The integration of other complementary services on the same premises as well as the involvement of survivors in the delivery of assistance, dramatically enhances the quality of accommodation, according to the same report.

The implementation must address the risk that certain groups of women will not be provided with support by Member States, for example women living in isolated rural areas, women with children, disabled victims, or mothers of a disabled child.

4.12 Material Assistance [OPTIONAL SECTION, decision lies with the EIGE]

female victims of trafficking are often financially disempowered, with no means of survival (EC 2016a: 34). Consequently, the provision of some kind of financial support to aid their recovery is vital. The provision of material assistance can help victims regain control of their lives. Material assistance extends to the provision of other practical essentials, e.g. food and clothes. To further assist in this regard, it is important that any material assistance provided seeks to empower victims by encouraging independent living.

Anti-trafficking Directive

Article 11(5) of the Anti-Trafficking Directive mandates support measures including “*material assistance*” to victims, which is a strength. There is no additional guidance in the Directive on the meaning of this term which is a weakness of Directive, though it is likely to be interpreted as including some degree of financial support, as well as other types of assistance.

Victims’ Rights Directive

There is no reference to material assistance or financial support to victims in the Victims’ Rights Directive, apart from the requirement for provision of ‘advice relating to financial and

practical issues arising from the crime' (**Article 9**) and reimbursing costs associated with participation in criminal proceedings (Article 14). These are peripheral issues, not the core material supports that victims initially require. EIGE (2016) considers these limitations in the provision of financial assistance as weakness from the perspective of a victim of gender-based violence.

Conclusion

Material assistance could be vital for victims of trafficking for sexual exploitation and/or forced marriage in light of the fact that, unlike other labour-based forms of exploitation, they may not have had professional skills or qualification that are transferrable to the EU labour market and could be entirely reliant on the supports at this stage of their life. If this assistance is unavailable or insufficient, or if it creates further dependence and does not **promote a sense of dignity and personal choice, this could negatively impact on victims'** recovery and pose a threat. Therefore, special attention needs to be paid to the implementation of the requirement for material assistance to ensure that it is conducive to recovery of victims who are vulnerable to secondary victimisation.

4.13 Medical and Psychological Needs

As stated before, the European Commission study on the gender dimension of trafficking concludes that the harms of trafficking are distinctly specific to gender and generate gender-specific needs among victims. These harms are closely linked to sexual exploitation (Zimmerman et al 2008, WHO 2002, EC 2016a). The study on gender dimension defines trafficking for sexual exploitation as a gendered, severe and sustained form of violence against women, which causes physical, reproductive, mental, secondary victimisation related that are often different and more severe than those in domestic violence. This is linked to greater risk of multiple rapes by men, hyper-violence causing vaginal injuries and blood loss leading to high rate of sexually transmitted infections including HIV (Zimmerman et al 2008). Gender-specific harms also include spontaneous and multiple pregnancies, forced and unsafe abortions, long term chronic vaginal and pelvic pain, neck and mouth injury from forced oral sex, hepatitis C infections, severe diarrhoea, fatigue and malnutrition (EC 2016a:34). The psychological harms of coercion, violence and isolation are described in the European Commission study as severe and enduring. Such harms include multiplied rates of post-traumatic stress disorder, depressions, eating disorders, attempted and completed suicides (Courtis & Gold 2009, Herman 1992). Exploitation within families could also result in similar harms, i.e. disabled women trafficked for forced marriage (Shah, Balderston & Woodinm 2015).

Anti-Trafficking Directive

Article 11(5) of the Anti-Trafficking Directive mandates that assistance and support shall include **'necessary medical treatment including psychological assistance'**. As a firm, binding obligation, this is a strength. The inclusion of psychological assistance is an important step, from a gender perspective, as victims of gender-based violence have distinctly higher needs for this type of assistance. The added element of consent of the victim is in line with best practice and empowerment strategies. Read in conjunction with Article 11(7) concerning the special needs of victims, the above obligation requires that Member States take into account the characteristics and experience of victims in determining the medical and psychological assistance necessary. Member States should ensure that medical services

available to trafficking victims are tailored to their needs, as established by the individual needs assessment, that they are provided early and for a sufficient duration of time. These are important opportunities *vis-à-vis* implementation. The limited access to services beyond the recovery and reflection period provided by Directive 2004/81/EC, impacts on the access of third country national victims to medical assistance and presents a threat. This threat is especially significant where the harms are lasting, which they often are in cases of severe sexual violence. For instance, the FEMM Committee (2016:19/20) calls on EU Member States to extend the recovery and reflection permit beyond the required minimum of 30 days (CoE 2005, Article 13) for victims of trafficking for the purposes of **sexual exploitation, 'given the significant and sustained harm caused by this form of violence'** It is important that this is monitored during implementation by focusing on more favourable provisions of the Directive, which separate assistance from criminal proceedings with entailing residence permits (e.g. temporary residence permit).

It is important to ensure that access to medical and psychological assistance for victims is equally available to all victims including EU nationals, who, based on other provisions of EU and national law, may need to satisfy certain conditions, relating to the length of their residence in a Member State and tax contributions. While this is not mentioned in the Directive, it could present another threat. Thus Member States should remain responsive to the needs of victims in such circumstances and where necessary, establish a waiver for female victims from any such conditions.

Victims' Rights Directive

The Victims' Rights Directive contains a weaker obligation on Member States in respect of medical assistance. This is referred to only in the Preamble (Recital 38): *"The types of support that such specialist support services should offer could include providing shelter and safe accommodation, immediate medical support, referral to medical and forensic examination for evidence in cases of rape or sexual assault, short and long-term psychological counselling, trauma care..."*. The wording used *"could include"* is weak. However in respect of psychological care, Article 9(3)(b) of the Victims' Rights Directive mandates the provision of **'trauma support and counselling'** for all victims of gender based violence, sexual violence or violence in close relationships – this is a strength from the perspective of female victims of trafficking for sexual exploitation and/or forced marriage who are likely to have high take-up of this service. The omission to mandate the provision of other kinds of necessary medical care to victims, however, is a gap.

Conclusion

The obligation to secure speedy access to healthcare and psychological support, in light of the severe harms experienced by the victims in focus is essential. Due to the nature of harms suffered, such assistance should take into account special needs, such as pregnancy, addiction, disability, HIV or other sexually transmitted infections, Hepatitis C or other complex conditions. With regard to the provision of these services, it has been recommended that the infrastructure created to respond to victims of gender based violence, in particular to those who have experienced violence of a sexual nature, could be utilised in addition to the mainstream health services (EC 2016a). Nationality represents a secondary consideration in determining the access to medical and psychological care for victims, relative to the medical needs. Thus third country national victims of trafficking for sexual exploitation should enjoy a recovery and reflection permit of duration that is sufficient for treatment of their significant harms (FEMM 2016). Cultural mediation provided

by the involvement of survivors could be used as a means of securing the informed consent to any necessary treatments. It is important that medical and psychological services are offered for an appropriate duration of time, especially in cases where the harms are of lasting nature, i.e. caused by severe forms of violence.

4.14 Interpretation and Translation Services

A significant proportion of those trafficked in the European Union originate from outside the Member State in which they are exploited. These victims often face a language barrier which can inhibit their ability to communicate with authorities and to access services. Consequently, it is important that translation and interpretation services are available to victims. The Council of Europe's Convention on preventing and combating violence against women and domestic violence mandates the provision of independent and properly qualified interpreters (Article 56(1)(h)).

Anti-Trafficking Directive

Article 11(5) of the Anti-Trafficking Directive requires that Member States provide victims **with translation and interpretation services** "*where appropriate*" as part of the measures for assistance and support. This represents a strength of the Directive. The Directive does not expand on the circumstances where this support should be seen as appropriate, which is a gap.

Although there is no specific provision in the Directive which concerns the gender of the interpreter, the gender-specific assistance and support requirement could be extended to the interpretation service and thus represents an opportunity. There are no provision for gender sensitive trainings in the Directive as mentioned elsewhere, which could pose a threat to the quality of the service.

Victims' Rights Directive

The provisions of the **Victims' Rights Directive** are complementary, however they apply solely in the context of criminal proceedings and as such are more limited. On the other hand, they offer more detail as to the access to such services and the circumstances in which they should be available (Article 7). Interpretation must be provided, upon request, free of charge during any interviews or questioning in the criminal proceedings. The refusal to provide an interpretation service should be capable of being challenged by the victim, as per Recital 35. EIGE (2016) stresses the importance of a quality interpretation service to victims of gender-based violence with a view to accurately recording the facts of such cases. It considers the omission of interpreters in the list of professionals who need gender-sensitive training in Recital 61, to be a threat to victims, while pointing out that insufficient regard to training is also observed in the Istanbul Convention, even though it similarly mandates the use of qualified interpreters.

Conclusion

Interpretation and translation is an explicitly identified support that victims of trafficking are entitled to. Any refusal to provide such a service during the criminal process may be challenged by a victim. For women and girls trafficked for the purpose of sexual exploitation and/or forced marriage, it is important that any such services are gender specific. In particular, given the nature of their exploitation, it should be possible for victims to select the gender of any interpreter. The quality of interpretation in conveying an accurate

account of sexual violence cannot be underestimated and should be ensured by all available means, including the provision of gender-sensitive training.

Chapter 5: Access to Justice

Access to justice herein **refers to victims' ability to claim legal rights** through legal assistance, to participate in criminal investigations and proceedings against their trafficker(s), and to access compensation. This section considers each of these three topics in turn, starting with legal assistance.

Although this section concerns **victims'** rights to access justice, it must also be noted that they are sometimes doubly-victimised by being wrongly prosecuted by State authorities for **'crimes' that they were forced to commit** by those controlling them. Non-EU nationals, in particular, are often treated as illegal migrants instead of being recognised as a victim of trafficking. Some even receive prison sentences as a result of being moved across borders by those exploiting them. That trafficking victims face risks of injustices of this kind must be borne in mind by those seeking to enhance their access to justice.

Case study

The case of 'O' in the United Kingdom is a particularly egregious example of a victim of trafficking being prosecuted rather than assisted. A 16-year old Nigerian girl was encountered by UK officials departing their territory bound for France. She was arrested, detained and charged with a crime: an immigration offence.

At Court, the girl's own defence lawyer stated that a prison sentence was 'mandatory' – and one was duly imposed upon her by the judge: 8 months imprisonment. The sentence was quashed by the UK Court of Appeal who expressed concern at the fact that the police, immigration lawyers, a defence lawyer and the judge in the Crown Court had all neglected to treat the victim as a child victim of trafficking, who should not have been prosecuted (let alone convicted). The background facts were that the appellant had been trafficked to the UK from Nigeria, raped repeatedly on arrival, and told she had to work as a prostitute to pay off a 60,000 euro debt. The appeal court described a report into her experience as **"horrific reading"** and **lambasted the criminal system for multiple failings in this case, stating its hope that "such a shameful set of circumstances never occurs again."** *R. v O* [2008] EWCA Crim 2835 (Court of Appeal, 02 September 2008)

A further point which deserves emphasis at the outset of any exploration of women's access to justice is the degree to which woman experience difficulties generally in the criminal justice system. Crimes of gender-based violence, including sexual assault, rape, domestic violence and so forth, feature very low investigation, prosecution and conviction rates. This trend is no different in cases that involve victims of trafficking for sexual exploitation / forced marriage.

5.1 Legal Assistance

Access to legal assistance is crucial to enable victims to access justice. This is a cross-cutting issue; without accurate legal information and assistance, victims are unlikely to become aware of their legal rights, let alone be able to fully access them.

Legal assistance can provide victims with vital information about the scope of their rights, help them to secure appropriate legal support during criminal proceedings (e.g. special measures), and facilitate claims for compensation for their ordeal. The latter legal right, in particular, may play a vital **role in a victim's** recovery and reintegration.

Different groups of female victims present with different needs related to their individual characteristics, for example age (child or elderly), disability (physical and mental) and nationality. For example, nationals of non-EU countries often present with additional needs for legal assistance regarding their immigration status. Such individuals will often be in a precarious position as regards their residence in the State in which they have been encountered. They will often require immediate assistance to regularise their status and, in some cases, to avoid wrongful prosecution for immigration law transgressions (as per the case study highlighted above). There may also be a language barrier: victims in this group may be less able to articulate their needs and may struggle to explore, understand and access their full range of legal rights without support.

In order to be effective, it is important that legal assistance is based on an early legal intervention model: that is, available to victims immediately after their initial contact with the authorities. It should be provided by a person with appropriate training and expertise, including gender-expertise. Moreover, given the often complex needs of women and girl victims of trafficking, as well as the fact that the harm they have suffered can seriously undermine their capacity to assert their rights, it is recommended that such assistance should go beyond mere information and advice, to include legal representation. The junctures at which such representation should be made available to victims should be based on their needs. Given the likely vulnerability of these categories of victims, they may require a level of representation going beyond that generally made available to victims of sexual violence, which is often restricted to situations where the private life of the victim (witness) is called into question at trial. In relation to the profile of those providing legal assistance to women and girl victims of trafficking, the European Commission has recommended that it should come from independent (as opposed to State) sources (EC 2016a).

It is possible to divide 'legal assistance' into three parts: information on legal rights ('legal information'), advice or counselling on legal rights ('legal advice') and full legal support including representation in court ('legal representation'). For ease of reference / understanding the terms in brackets will be used in the analysis which follows.

We turn now to analysis the provisions in the two Directives in order to assess to what degree legal assistance is available to victims of gender-based violence, in particular victims of trafficking for the two forms studied.

Anti-Trafficking Directive

Article 11 mandates the provision of assistance and support. Article 11(5) provides that '**information**' be part of the package of measures provided. This is a wide term, open to interpretation. It presents an opportunity for Member States to **provide** 'legal information' as part of the information provision to victims, and in so doing, to take due account of the needs of particular groups for different types of specialist legal support, e.g. non-EU nationals.

Article 11(6) provides **further clarification of what this ‘information’ should encompass**. It specifies that it must include, at a minimum, information on two important immigration rights: the right to claim international protection / asylum and the right to claim a residence permit, as a victim of trafficking, pursuant to Council Directive 2004/81/EC. This is a strength of the Directive as regards the subset of victims who are non-EU nationals and who may require this advice. The specific inclusion of these particular topics of information in Article 11(6) **presents an opportunity as to a broad interpretation of ‘information; to include the provision of legal information more generally**. Female victims of trafficking, in particular those subjected to a forced marriage, may require specialist legal support regarding their civil law rights, for example family law matters such as divorce, child custody and so forth. The Anti-Trafficking Directive is silent on this matter, which is a weakness.

Advice on one’s legal rights is the next step after information provision. Article 12(2) of the Anti-Trafficking Directive mandates that Member States ensure that all victims of trafficking **have access to ‘legal counselling’, in line with the sentiment expressed in the Preamble in Recital 19**. This is a blanket, mandatory provision and, as such, a strength of the Directive. The provision, however, stops short of mandating full legal representation. Representation **is provided for only ‘in accordance with the role of victims in the relevant justice system...including for the purpose of claiming compensation’**. This is helpful where victims have a clear role in the justice system (for example, in some European States victims can be represented by an advocate in the criminal proceedings), but the provision could be narrowly defined, denying victims other types of legal representation, for example in immigration or family cases. In States where the victim does not have a role in criminal proceedings there is a risk / threat that those States will provide no legal representation at all, by interpreting the mention of compensation in this provision to be linked to the **criminal matter (as the word ‘including’ could be taken to imply)**. It is welcome, however, that the Directive at least recognises the need for legal representation during claims for compensation; there is an opportunity for this provision to be interpreted more widely, as intending to provide victims with a right to legal representation for *any* compensation claim (not just via criminal proceedings).

This represents a threat to victim because advice on one’s rights, without the means to actually progress those rights, is meaningless – particularly in the case of female victims of gender-based violence, who may be economically disadvantaged and unable to afford a private lawyer. Non-national victims, in particular, may lack the ability to self-represent within a strange legal system, in an unfamiliar language. It is a weakness of the Directive that legal representation is not provided for, comprehensively, in the case of all legal avenues that victims of trafficking may require to pursue: which could include criminal law, family law, immigration / refugee law, community care law (for example in the case of a child whose age is disputed), and others. Member States are, of course, free to make more generous provision in their national rules.

Importantly, Article 12(2) provides that both the legal advice and (where applicable) the legal representation must be free of charge (as long as the victim does not have sufficient financial resources). This is a strength; as above, female victims of trafficking for sexual exploitation and forced marriage are likely to lack funds to pay for legal assistance. The provision leaves the way open for means testing, however, which is a risk / threat. National rules in this regard may create difficulties for women who are victims of sexual exploitation and/or forced marriage involving an intimate partner. In such circumstances, it is important

any means testing done for the purpose of claiming this assistance only takes into account the means of the victim herself (ICJ, 2016). Given the clear intention of the provision for free legal assistance, Member States should not create undue barriers in the implementation. Member States are bound by other international agreements which contain obligations to provide free (or at least affordable) legal services for victims of gender-based violence, for example the Beijing Platform for Action and Istanbul Convention.

With respect to the timing of the legal assistance, the Directive requires the provision of information (including the legal information on immigration matters outlined in Article 11(6)) immediately **following a ‘reasonable grounds’ indication by a competent authority** (Article 11(2)). As regards the right to legal representation, this must be provided *“without delay”*; **this wording imports a degree of urgency, which is a strength in the text.**

Where possible, legal advice should be provided by individuals who have training on gender issues and who possess gender expertise. Victims should also have a free choice as to the gender of their lawyer / legal advisor, as this may facilitate fuller disclosures. While the Directive is silent on these matters, taking a gender-sensitive approach in this way is certainly not precluded by its provisions and, as will be seen below, is encouraged by the **terms of the Victims’ Rights Directive.**

Victims’ Rights Directive

The **Victims’ Rights Directive is more limited** *vis-à-vis* the availability of legal advice and representation. Article 15 requires that Member States give legal aid to victims who are **party to criminal proceedings. The Directive further requires that the “conditions or procedural rules under which victims have access to legal aid shall be determined by national law”.** Recital 38 suggests that legal advice should form part of the measures which should be provided to victims by specialist support services. This, however, is not a binding provision. Article 26 recommends general and specialist training for lawyers on dealing with victims. This is a strength of the Directive, and complements the provisions of the Anti-Trafficking Directive by providing a basis for Member States to provide specialist, gender-sensitive training to those in the legal profession who may be involved in the assistance of victims.

Conclusion

The provisions of the Anti-Trafficking Directive relating to the availability of legal assistance and legal counselling generally represent a strength of the text. These can allow for the availability of important legal advice in a timely manner. There is, however, a threat from the wording of the above provisions that assistance will not be available in relation to all legal issues faced by victims including in the area of compensation. Moreover, victims may be restricted from accessing legal counselling, depending on their available means. To ensure this rule does not discriminate against victims of gender based violence that have been abused by a partner, it will be important that Member States put in place measures to conduct means testing on the woman alone. **The overall strength of the Anti-Trafficking Directive is supported by Article 26 of the Victims’ Rights Directive, which can ensure that the studied groups are assisted by lawyers with specialist training, which could extend to gender sensitive training.**

5.2 Protection of Victims during Criminal Investigation and Proceedings

In any criminal investigation or proceedings, victims are exposed to various risks. These include the risk of secondary victimisation (i.e. when the process is "victim-blaming" and insensitive, and re-traumatises victims), the risk of re-victimisation (being targeted for crime again) and the risk of retaliation and intimidation by the offender. These risks are particularly heightened in cases involving gender-based violence. The personal link between a woman and her abuser, for example the husband in a trafficking for forced marriage case (or a domestic violence case) gives rise to a clear risk that the offender may harass the victim at her place of residence in an effort to intimidate her.

As a result of these risks, cases involving gender-based violence require careful management during the criminal justice process. The risks may be mitigated by, amongst other things, the provision of 'special procedures' in the criminal justice process, heightened attention by the police to the safety and security of the victims, prosecutions of offenders for intimidation, and in extreme cases, placing victims in witness protection programmes. Provision for specific protective measures for victims is included in both Directives and this is a key strength in each. It should be noted that the Istanbul Convention contains a strong emphasis on victim safety, and forms an important part of the legal framework in this regard.

As regards secondary victimisation, sensitive conduct of investigations and court proceedings can play a significant role in avoiding the trauma that can arise from the criminal process itself – part of which arises from the victim having to relive her traumatic experiences when giving evidence.

The importance of protecting victims in the criminal justice process cannot be overlooked. It is vital that victims are protected, in order to bring offenders to justice. It should be borne in mind that this is an area in which offenders are rarely successfully prosecuted. There is a high attrition rate for crimes of gender-based violence generally^{xx}. In general, domestic violence, rape and other sexual offences feature low reporting rates^{xxi}, followed by low prosecution rates and – if they do reach trial – low conviction rates.

There are many reasons behind the low conviction rates. One is that, at every stage of the process, intimidated or vulnerable victims may decide to drop out. This may be due to an inability to cope with the inherent trauma of the process, intimidation, harassment or fear of the offender, or simply the woman feeling (or being) disbelieved – by nature crimes of gender-based violence of this kind often lack independent witnesses who can help **corroborate the woman's account. CEDAW consider stereotyping plays a large role here** (CEDAW 2015^{xxii}). Female victims of trafficking who are non-EU nationals may have additional fears – **for example a belief in witchcraft of 'juju' is prevalent amongst Nigerian trafficking victims^{xxiii}**. This group of victims may also fear indirect victimisation – their family members at home being targeted by vengeful traffickers. Lastly, this group may be slow to seek help, due in part to a lack of social networks or language barrier^{xxiv}.

Recital 57 of the **Victims' Rights Directive** highlights the vulnerable position of certain groups, stating that victims of trafficking, sexual violence and violence in close relationships, and child victims (*inter alia*) tend to experience a high rate of secondary and repeat victimisation, of intimidation and of retaliation. It states that there should be a **"strong presumption" that those victims will benefit from special** protection measures. This provision brings a helpful emphasis to the special needs of victims of trafficking for sexual

exploitation and/or forced marriage. **The wording used here “strong presumption” is a strength.** A similar point is made in Recital 17 of the same Directive, which states that *“women victims of gender-based violence and their children often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence”*. Recital 53 recommends the carrying out of **‘proceedings in a co-ordinated and respectful manner’ to prevent secondary victimisation.**

The Anti-Trafficking Directive also refers to the risks to victims in its Preamble: Recital 20 acknowledges the need to mitigate the risk of secondary victimisation for trafficking victims in the criminal justice system and Recital 19 acknowledges the need to protect victims from retaliation and re-trafficking. Both Directives go on to include substantive provisions (Articles) that contain measures to protect victims.

Combined, the **Anti-Trafficking Directive and Victims’ Rights Directive provide a strong basis** from which Member States can implement measures to appropriately protect victims of gender based violence, including trafficking victims, within their criminal justice systems. Of the two, the **Victims’ Rights Directive** contains the more comprehensive protections: for example, it dedicates an entire chapter (Chapter 4) to **‘special measures’**.

5.2.1 Special Measures

‘Special measures’ are modifications of usual criminal investigation or court practice designed to help vulnerable and intimidated victims give their best evidence and help to relieve some of the stress associated with giving their account of the ordeal they suffered. These measures can prevent (or reduce) secondary victimisation in the criminal justice system.

Examples of special measures include video-taping of interviews and provision of physical screens or a video link in court, so that a witness does not have to look at the defendant. Female victims of gender-based violence are a group who often present with a need for these kinds of special measures, as this group is highly vulnerable to secondary victimisation.

In common with the two Directives, the Istanbul Convention also contains provisions for special measures, and also mandates that the parties shall take the necessary legislative measures to ensure that, in any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary (Article 54).

Anti-Trafficking Directive

Article 12(4) states that **Member States should “ensure that victims of trafficking in human beings receive specific treatment aimed at preventing secondary victimisation”**. The protection intended here is particularly important for victims of gender based violence who are particularly vulnerable to secondary victimisation. Article 12(4) refers to adult victims; a similar requirement in Article 15 concerns children. Article 12(4) lists four specific things that Member States should avoid, where possible, when dealing with trafficking victims: (i) unnecessary repetition of interviews of the victim; (ii) visual contact between victims and defendants; (iii) giving of evidence in open court; and (iv) unnecessary questioning **concerning the victim’s private life. Having these four measures listed in a substantive provision, as well as an express statement as to the underlying rationale, is a strength of the Directive.**

Recital 20 of the Anti-Trafficking Directive encourages the use of video recordings of interviews. This, however, is recommended in the Preambles and thus does not constitute a binding obligation. In the case of children, however, Article 15 (4) Directives obligate Member States to take necessary measures to ensure that interviews may be tape-recorded and, further, that such tapes may be used as evidence in court, where appropriate. This is a strength as regards girl victims of trafficking. Member States are, of course, free to expand this particular protection to all female victims of trafficking; the failure of either Directive to mandate it for adults represents a weakness for victims of gender-based violence, who may be in particular need of this kind of provision, given the very high attrition rates during the criminal justice process for crimes of these kinds, including trafficking for forced marriage / sexual exploitation. Victims tend to be traumatised and may cease co-operation with the criminal justice process as a result of experiencing secondary victimisation. Having the option to tender a taped interview in lieu of live evidence may facilitate more prosecutions in crimes of gender-based violence.

As previously explored in the context of the identification interview, the effectiveness of the above protection measures can be increased by ensuring that all interviews with female victims are conducted in a gender sensitive manner including by limiting the number of interviews and providing an interviewer/ interpreter of the same gender. This can further limit the possibility of secondary victimisation. It may be recalled that while the Directive provides for the former, it contains no guidance on the gender of the interviewer/ interpreter.

In addition to the above, Article 12(3) **refers to a victims' right to enter** witness protection programmes. Although this is an extreme measure, in some cases victims of gender-based violence, including trafficking for the two forms studied, may require this kind of measure as the only means to ensure their safety from retaliation. The express mention of these kinds of programmes is thus welcome, from the perspective of these groups.

Recital 20 recommends that special measures be applied following the individual risk assessment mandated by Article 12(3), which should take account of **"circumstances such as their age, whether they are pregnant, their health, a disability they may have and other personal circumstances, as well as the physical and psychological consequences of the criminal activity to which the victim was subjected"**. It is helpful that an awareness of gender-specific needs is highlighted in the Preamble in this way.

Victims' Rights Directive

The **Victims' Rights Directive contains extensive provisions regarding the protection of victims** in Chapter 4. The rationale for these provisions is outlined in Article 18, which refers to the need to avoid secondary and repeat victimisation and to ensure the physical protection of victims. The rationale is gender-neutral and does not mention gender-specific needs. However as female victims of gender-based violence are likely to be more in need of these kinds of measures, the strong emphasis on them in the Directive is a strength in so far as this group is concerned.

Chapter 4 imposes some clear, practical obligations. For example, Member States are required to ensure that all new court premises are designed with separate waiting areas for victims by Article 19(2). This is to limit contact between victims and offenders. Obviously, it may not be practical to provide this protection in all pre-existing court buildings; in such cases, Article 19(1) provides that Member States shall establish the necessary conditions to

enable avoidance of such contact. While this measure is intended to benefit all victims, as victims of gender-based violence face a heightened risk of intimidation by offenders, they stand to benefit from this unequivocal protection, a strength in the Directive.

To avoid secondary victimisation, Article 20(b) of the **Victims' Rights** Directive requires that *"the number of interviews of victims is kept to a minimum and interviews are carried out only where strictly necessary for the purposes of the criminal investigation"*. To support this, the Directive recommends in Recital 53 that interviews with victims should be recorded and, where possible, tapes from those interviews should be used in Court proceedings. It further provides in Article 24(1)(a) that authorities may record interviews with child victims to use during criminal proceedings. Furthermore, as previously discussed in the context of the identification interview, the Directive provides victims of gender based violence with the ability to choose the gender of their interviewer. While this is certainly a strength of the Directive, care must be taken during implementation to ensure that the choice also extends to any interpreter present, and that victims are facilitated to make the choice as best as possible. Overall, the Directive contains a number of strengths from the perspective of women and girl victims of trafficking for sexual exploitation/ forced marriage *vis-à-vis* secondary victimisation.

Chapter 4 further mandates that a victim (assessed as in need of special measures) can have their legal representative and a person of their choice present during criminal investigations (Article 20(c)), provides for the option of hearings in private (Article 23(3)(b)) and mandates that all interviews must be conducted by trained professionals (Article 23(2)(b)).

Article 22 mandates an individualised assessment of all victims to assess whether they may benefit from special measures. This blanket, gender-neutral, provision serves to meet the needs of female victims of trafficking, in particular, as the assessment enables their needs to be taken into account and appropriate special measures applied. By Article 22(4) child victims are presumed to have specific protection needs; it provides that the extent to which they would benefit from special measures shall be subject to an individual assessment: as provided for by Article 22(1). This presumption is helpful. There is no hurdle for a child to overcome to demonstrate that she needs special measures: the starting point is that she does. Children may not be strong advocates on their own behalf and may be more inhibited from articulating their needs as compared with an adult victim. The presumption is therefore a helpful one; girl victims of trafficking benefit from this strong protection.

By Article 23(1), Member States *must* provide the special measures listed in Chapter 4 where the individualised assessment shows they are necessary (unless impossible due to practical constraints or an urgent need to interview **the victim**). **The Directive's strong emphasis on the importance of these measures is a key strength, allowing little 'wiggle-room' for Member States to fail to implement this chapter.**

Although the Victims' Rights Directive is in general the more comprehensive text, the Anti-Trafficking Directive is in one respect more extensive:

Conclusion

Overall, the protection measures contained in both Directives, taken as a whole, offer practical protection to women trafficked for sexual exploitation / forced marriage. However, the application of these protections is in both cases dependent on a thorough, gender-specific risk assessment. Much will turn on how Member States implement this

domestically. There remains a risk that some of these victims will not be identified as in need of special measures, particularly if inadequate training is given to those conducting assessments. It is a strength that child victims automatically qualify for special protection measures, however, and do not depend on an individual assessment in this regard.

5.2.2 Protection of Children

Given their circumstances and particular vulnerabilities, girl victims may present with different needs, specific to their status as children, which must be addressed in criminal proceedings.

Anti-Trafficking Directive

The Anti-Trafficking Directive provides additional measures for the protection of child victims. Article 15(1), for example, requires that in circumstances where those with parental responsibility are precluded from representing the interests of a child, owing to a conflict of interest, the competent authorities should appoint a representative for this purpose. Similarly it provides for the mandatory appointment of a representative for unaccompanied minor victims, as well as the appointment of a guardian, where appropriate: Articles 16(2) and (3).

Importantly, the Directive contains a number of binding provisions relating to how child victims of trafficking are interviewed during criminal proceedings. Some important aspects pertaining to interviews with child victims were already discussed under the chapter on identification: Article 15(3) of the Directive contains six specific, additional requirements for child interviews. The measures are designed to reduce the risk of secondary harm for girl victims of trafficking, and thus represent a significant strength of the Directive. To take one example, the provision to avoid unjustified delays in interview scheduling (Article 15(3)(a)) protects children by ensuring their cases are prioritised for speedy interviews. Delays in dealing with children create a risk that legal adulthood could be reached before the investigation is concluded, possibly leading to child-specific entitlements being withdrawn from the child victim: this is a threat. Member States can guard against this in **implementation by ensuring that 18 is not a 'bright line' when it comes to suspected child victims of trafficking**, and permitting them to continue to avail of some child services for a transition period after attaining adulthood. The benefits of the full implementation of the protections in Article 15(3) were recently highlighted by in a study by the EU Fundamental Rights Agency (FRA 2017^{xxv}), which records the opinions of child victims of crime.

There is, however, the threat that the protection offered by a number of the above **provisions will be undermined by their wording; in particular the use of the term "where necessary". Without an explicit requirement that those involved in criminal proceedings receive training and are specialised in the care of child victims of trafficking**, it is possible that those determining the necessity of certain measures may be ill-equipped to make that decision. This is something that Member States can guard against during implementation of the Directive by providing training to ensure that those interacting with girl victims of trafficking for sexual exploitation and/or forced marriage have specialist skills to do so – **which is supported by the provisions of the Victims' Rights Directive.**

Victims' Rights Directive

The **Victims' Rights Directive** similarly requires that Member States offer additional protections to child victims during criminal proceedings, as outlined in Article 24(1): (a) tape-recording of interviews; (b) children having a special representative appointed to

them if unaccompanied (or parents cannot represent their best interests) and (c) the child has a right to her own lawyer, if there is a conflict of interest with her parents. The provisions contain welcome protections **securing a child’s autonomy, in the event the parents cannot act on her behalf.**

Similar to the measures contained in the Anti-Trafficking Directive, these obligations can play an important role in protecting girl victims of trafficking by ensuring that their interests are represented, reducing the risk of secondary harm/repeat traumatisation. These measures are in addition to the suite of measures available to all victims contained in Article 23.

Importantly, Article 23 of the **Victims’ Rights Directive requires that “interviews with the victim [are] being carried out by or through professionals trained for that purpose”.** This is in the context of victims with specific protection needs, which, as has previously been discussed, includes children. As such, those responsible for assessing the protection needs of children and providing assistance are required to have appropriate training and expertise.

Conclusion

Recognising the added importance of protection measures for girl victims of gender based violence, including girl victims of trafficking for sexual exploitation/ forced marriage, the additional measures found in the Directives should be viewed as a strength in each. **Moreover, the obligation found in the Victims’ Rights Directive, relating to the training of those interviewing *inter alia* girl victims, can help ensure that girl victims have access to necessary protection measures, including those found in the Anti-Trafficking Directive and thus should be seen as a particular strength in the text.**

5.3 Compensation

States must provide victims of human trafficking with the possibility of claiming compensation. This right derives from international legal instruments, for example:

- UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, 2000, Art. 6(6);
- United Nations Convention against Transnational Organized Crime (UNTOC) Art. 25(2).

In the case of female victims, endemic socio-economic inequalities related to their gender can contribute to their targeting for exploitation. Women are in many countries disadvantaged when it comes to accessing education and employment opportunities. As a result, they are more likely to be preyed upon by traffickers, including those who use false promises of employment as a ruse. A background of socio-economic disadvantage makes it less likely that a victim who has recently escaped a trafficking situation will be able to support herself. A compensation payment can provide vital cushioning for a woman to enable her to support herself, prevent her falling back into exploitation as a result of economic duress, or otherwise.

Equal treatment should be **at the core of victims’ capacity** to claim compensation. Taking into account the variations in residency status of different categories of victims, it should be

possible for victims lacking legal immigration status to remain in a territory and receive residency rights for the duration of a claim (ICAT 2016).

In practice, a victim of trafficking will generally only be able to pursue a civil claim if he or she can secure legal representation (UNODC 2016). The scarcity (or absence) of provision of free legal aid for these claims in European states contributes to the rarity of awards of this kind (ASI and La Strada 2012).

Anti-Trafficking Directive

The Anti-Trafficking Directive provides, by Article 17, that victims have access to existing schemes of compensation to victims of violent crimes. It essentially seeks to ensure equal treatment for victims of trafficking. This is a strength. Particular issues may arise, however, where trafficking victims attempt to access such schemes. For example, where there are requirements that a victim is of ‘good character’ or that she must have reported the crime against her within a certain timeframe (ICAT 2016). The former may create difficulties where a victim has been arrested for immigration or prostitution related matters, while the latter may adversely affect those victims unable to report the crime against them within a designated timeframe, possibly owing to the harm they have suffered or the nature of their relationship with their trafficker. Such barriers are of particular importance in cases of women and girls trafficked for sexual exploitation and/or forced marriage. Consequently, it is important that any such barriers to victims being able to access compensation schemes are removed. The Anti-Trafficking Directive does not address barriers of this kind – these threats are a matter for States to mitigate in implementation.

Victims’ Rights Directive

Article 16(1) mandates that Member States “shall ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time...” Article 16(2) states that Member States shall “promote measures to encourage offenders to provide adequate compensation...”

The first provision aims to ensure that compensation for victims is provided as part of the normal process of criminal proceedings (unless there is provision for compensation elsewhere in the national law framework). The provision further provides that a decision is required within a reasonable time. The second provision aims to require Member States to promote measures that encourage offenders (as distinct from the State) to provide compensation to victims.

The right in Article 16(1) is not a substantive right to claim compensation (in contrast to the substantive right contained in the Anti-Trafficking Directive). This provision merely provides a procedural right to a decision within a reasonable time. The provision is toothless, therefore, unless the right to make such a claim against the offender is enshrined in national law. While this could be read as a purely procedural right, it does have a substantive element, whereby it assumes that there must be a means of a victim claiming compensation in either the criminal law or other (i.e. civil) legal proceedings. The matter is, in fact, covered by another Directive: Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, which provides *inter alia* that Member States must have compensation funds for victims, across all areas of crime^{xxvi}.

Article 16 should also be read with Recital 49, which states: *“The right to a decision on compensation from the offender and the relevant applicable procedure should also apply to victims resident in a Member State other than the Member State where the criminal offence was committed.”* **In the case of women and girls** who have been trafficked, upon their escape from the situation of exploitation, they may return to their country of origin (or a third country). This provision (albeit only in the Preamble) encourages Member States to permit compensations claims to be made / progressed from abroad. The provision, however, adds nothing to the already binding obligation in this regard in Directive 2004/80/EC ^(xxvii).

The second part of Article 16 – subsection (2) – **is in weaker terms: Member States “shall promote measures to encourage” (emphasis added).** The mandatory term ‘shall’ is undercut by the fact that **a Member State only has to ‘promote measures to encourage’ action.** This creates a weak impetus for the introduction of the measures in question. That said, the fact that there is some impetus (at all) to ensure that offenders are financially liable to their victims is to be welcomed, and represents an opportunity. Making offenders liable in this way may have a deterrent effect (ICAT 2016).

A weakness in the compensation provisions of both Directives is their failure to specify the ambit of what types of harms could/should be covered by compensation. In particular whether, and to what extent, psychological harm is included. This matter is left to Member States to determine. When it comes to female victims of trafficking for sexual exploitation/forced marriage, in many cases they experience harms that are not material, in the sense that they are difficult to quantify – there is no tangible, objective measurement of harm. While this is the case for many violent crimes, the psychological damage for trafficking victims, in particular, is in many cases extensive and long-lasting. In order to ensure that this can offer the required protection to victims, it is important that national rules take account of the different types of harms which victims of gender-based violence encounter and do not place restrictions on those who can access such funds.

Conclusion

The issue when it comes to compensation, for victims of trafficking for sexual exploitation, is not so much the theoretical availability of compensation – **it is victims’ ability to access it.** The very low rate of prosecutions for these crimes (in line with the general low prosecution rate for crimes of gender-based violence generally) means that opportunities to make compensation claims in the criminal courts are rare. The civil law courts provide a route for financial recompense, but too often victims are shut out by the unavailability of information or legal aid to make such claims. The Anti-Trafficking Directive goes some way towards addressing this issue by requiring that Member States ensure that trafficking victims have **access to any existing compensation fund.** The **Victims’ Rights Directive contains no mandatory substantive right,** and only refers to criminal compensation, a weakness in the text. Female victims have a heightened need for compensation, for a variety of reasons; it can be essential to avoid their re-victimisations. Member States are free to recognise the importance of compensation to female victims of gender-based violence, and to make due provision for this.

Chapter 6: General Conclusions and Recommendations

General Conclusions

For the purposes of the analysis of the Anti-Trafficking Directive within the set terms of reference, focused on Articles 11 - 17 and conducted from the perspective of women and girls trafficked for the purposes of sexual exploitation and/or forced marriage, it is considered that the laws and policies concerning violence against women and girls and gender-based violence and, more broadly, discrimination against women, provide the most appropriate framework. The legal framework concerning the rights of women appears to most adequately reflect the needs of both adult and child female victims in focus. In the context of trafficking for sexual exploitation and/or forced marriage, one instrument that presents a unique added value to the Anti-Trafficking Directive (as complemented by the Victims' Rights Directive) is the Istanbul Convention, which offers a comprehensive framework on violence against women directly relevant to the provisions on victim-protection and assistance. In the context of trafficking in women and girls for sexual exploitation and/or forced marriage, **where victims' psychological and economic dependence is used by the exploiting party to justify the situation of exploitation, the Convention's "integrated approach", which recognizes the complex relationship "between victims, perpetrators, children and their wider social environment"** (Istanbul Convention, Chapter IV, Article 18, 3), can serve as a framework for developing all protection and assistance measures.

Overall, the analysis establishes that the **Anti-Trafficking Directive, complemented by the Victims' Rights Directive**, could provide a viable system for support, assistance and protection of women and girls trafficked for sexual exploitation and/or forced marriages, provided certain conditions are fulfilled. In the first place there is a need to give sufficient weight and attribute concrete meaning to the gender-specific aspects of implementation. This is required due to the fact that the positive obligations on assistance and protection often require practical solutions that are not necessarily detailed or spelled out in the **Anti-Trafficking Directive**. **In this regard the Victims' Rights Directive** offers essential additional interpretation, which could bring the combined application of the two Directives to the necessary standards for effective response to women and girls in focus.

Secondly, efficient implementation of the anti-trafficking measures for support, assistance and protection requires the acceptance and utilisation of the legal standards established in the wider area of violence against women as well as the maintenance of synchronicity with such standards at all times. This is implicitly mandated by the Anti-Trafficking Directive in terms of the requirements for needs assessment and special needs identification, which firmly position the trafficked victims in focus within the wider profile of victims of sexual and gender based violence, however, it needs to be reaffirmed in the process of implementation. For example, the analysis establishes that the theoretical eligibility for protection, assistance, and compensation, does not automatically deliver results for such victims due to their diminished capacity to participate in and benefit from the welfare and justice system as a result of the trauma and economic disadvantage, which is common for survivors of violence against women.

Thirdly, and uniquely for victims of trafficking, is the need for a gender specific identification and recognition of such victims in the context of an extremely complex legal definition of trafficking in human beings, which is a multifaceted crime, with several elements that must be evidenced. The

highly traumatic and gender-specific nature of the exploitation in these crimes calls for special competence and gender-sensitivity by those responsible for victim identification. Unconditional assistance and protection of victims (irrespective of their cooperation with the criminal process) cannot be ensured without special safeguards for third country nationals as well as support for the particular medical and psychological needs that emerge as a result of these specific forms of exploitation.

The detailed legal **analysis unfolds alongside three complex areas of trafficked victims'** recovery, which concern their identification, followed by assistance and support as well as access to justice. It is conducted from the perspective of women and girls trafficked for the purposes of sexual exploitation and/or forced marriage, as specific manifestations of violence against women. As a result the analysis focuses on the gender specific and exploitation specific implications (benefits, opportunities and risks) that could arise in the process of implementation of the Anti-Trafficking Directive as complemented by the **provisions of the Victims' Rights Directive. Comparisons with the latter are sought** and highlighted in assessment of the potential for assistance, support and protection of trafficked victims as a subcategory of victims of gender based violence.

Identification

There are a number of barriers impeding the identification of women and girl victims of trafficking for sexual exploitation and forced marriage, relating to the specific experiences and characteristics of those categories of victims, which can be compounded where additional, intersectional issues arise, such as the legal status of the victim. Consequently, it is important that the identification system adopts a broad understanding of victimhood; operates, in practice, a low evidentiary standard; is administered by appropriately trained authorities, possessing gender expertise, and in cooperation with *inter alia* independent NGOs; ensures that interviews are conducted in a gender sensitive manner; and can ensure the swift referral of victims to the appropriate services.

The analysis has demonstrated that much of the above is possible through a combination of the relevant provisions of the **Anti-Trafficking Directive and the Victims' Rights Directive**. Combined, the strengths of the Directives include a broad definition of victim, based on the principle of non-discrimination; the possibility of accessing victim support services prior to identification as a victim of trafficking; a low threshold approach to the identification of victims; the possibility of having appropriately trained officials, possessing gender expertise, involved in the identification of victims; an age presumption in favour of girl victims of trafficking; important features of a gender-sensitive interview; and mechanisms for the swift referral of victims to services. In a number of areas, the respective weakness of each of the Directives can be addressed by the content of the other. This may be seen, in particular, in the areas of gender specific training and gender sensitive interviews, which are **represented in the Victims' Rights Directive to a greater extent than in the Anti-Trafficking Directive**. A possible threat arises, however, from the fact that much of this is dependent on a broad interpretation of the Directives by Member States and thus may not be implemented in practice.

Support and Assistance

The detailed exploration of the complex system of support and assistance invited multiple conclusions *vis-à-vis* effective implementation for the victims in focus. In the first place, the implementation of the provisions of assistance and support must accord primacy to the position of the victim as a victim, independently of the criminal justice process, in order to effectively meet the recovery needs of victims of trafficking for sexual exploitation and/or forced marriage. Relevant Court judgements could be used as a guidance for implementation (e.g. *J and others v Austria*, 2017). Unconditional assistance is of special importance to victims of gender based violence who seldom make complaints and are reluctant participants in criminal investigations. Third country national victims require further attention in ensuring they can access these rights beyond the reflection period.

The analysis found that early access to services and sufficient duration of assistance is provided for in both Directives, however the implementation needs to be monitored carefully for trafficked victims who are third country nationals, in particular. A sufficient duration of assistance is ensured by the Anti-Trafficking Directive, which benefits the women and girls in focus, whose experiences of sexual violence and harm often require longer term recovery measures.

Nationality represents a secondary consideration in determining the access to medical and psychological care for victims. Thus third country nationals victims of trafficking for sexual exploitation should enjoy a recovery and reflection permit of duration that is sufficient for their treatment (FEMM 2016). It is important that medical and psychological services are offered for an appropriate duration of time, especially in cases where the harms are of lasting nature, i.e. caused by severe forms of violence.

The Directives strongly suggest that victims of gender based violence have special needs, which can benefit victims of trafficking for sexual exploitation and/or forced marriage requiring specialist services. Successful implementation requires that such special needs are identified and that services equipped to respond to such needs are accessible to victims. For example, the provision of accommodation in a gender-specific shelter offering confidentiality and safety, which is operated by persons with expertise in violence against women and which integrates other types of assistance on the same premises and including peer group support. Response to complex medical cases, early, free, comprehensive legal aid provision (covering compensation claims, welfare, immigration and family matters) in addition to sustainable post-victimisation and prostitution exit strategies fall squarely within the category of special needs.

It is a strength of both Directives that accommodation provision is mandatory. The lack of specificity in the wording is offset by the respective Preambles that create an impetus for Member States to integrate a gender perspective into their approach to accommodation, which represents an opportunity. The need to observe international standards and the results of recent European Commission studies should be considered in implementation. The special needs of certain victims must be taken into account, for example women living in isolated rural areas, women with children, disabled victims or those with disabled children.

Access to justice

The provisions of the Anti-Trafficking Directive relating to legal assistance and legal counselling to victims represent a particular strength, as complemented by **the Victims' Rights Directive** which ensures that the victims in focus are assisted by lawyers with specialist and gender sensitive training. Legal aid for compensation claims should be given priority in implementation, given its central importance to female victims of trafficking.

Both Directives provide for important practical protections for women trafficked for sexual exploitation and/or forced marriage. However, the application of these protections in both cases is dependent on a thorough, gender-specific risk assessment, which in turn highlights the importance of gender-specific training of the individuals who carry out such assessments.

Recognising the added importance of protection measures for girl victims of gender based violence, including girl victims of trafficking for sexual exploitation/forced marriage, the additional measures found in the Directives are a strength in each. Moreover, the obligation **found in the Victims' Rights Directive, relating to the training of those interviewing *inter alia* girl victims**, can help to ensure that girl victims have access to necessary protection measures, including those found in the Anti-Trafficking Directive and is a particular strength in the text.

Female victims have a heightened need for compensation, for a variety of reasons; in particular, it can be a vital means of preventing their re-victimisation. Member States are free to recognise the importance of compensation for female victims of gender-based violence, and to make due provision for this. The analysis found that the theoretical availability of compensation is hampered by **victims'** inability to access in practice. Opportunities for claims in criminal proceedings are rare (as such proceedings are very rare) and legal aid for civil claims is often unavailable. The Anti-Trafficking Directive provision for recourse to any available compensation funds goes some way to addressing the issue, while **the Victims' Rights Directive contributes little** as regards improving access to compensation for these victims.

Recommendations

On the basis of legal analysis conducted, a range of recommendations to Member States has been drawn up for the implementation of Articles 11 – 17 of the Anti-Trafficking Directive, **as complemented by the Victims' Rights Directive**, from a gender perspective. They formulate concrete recommendations for Member States, which can ensure an effective implementation of the Anti-Trafficking Directive that accounts for the specific needs of women and girls trafficked for sexual exploitation and/or forced marriage.

6.1 Over-arching Recommendations

- Taking into account the approach enshrined in the Anti-Trafficking Directive, Member States should be cognisant of the provisions of the **Victims' Rights Directive** and

the wider body of law and policy on gender equality, gender-based violence and on violence against women and girls, in the implementation of Articles 11 – 17.

- National action plans on trafficking should be gender sensitive and contain indicators, benchmarks, timeframes and specific budgets which can be monitored and evaluated from a gender perspective, and informed by experts and national frameworks on violence against women and girls. Recognising the gender specific harm, particularly violence against women and girls, experienced by victims of trafficking for sexual exploitation and forced marriage, Member States should ensure that all anti-trafficking measures in relation to identification, support and assistance and access to justice, are specific and appropriate to their needs.
- Member States should integrate gender specific anti-trafficking measures into broader programmes such as humanitarian responses, disaster relief programs and conflict management. Member States especially need to recognise increased gender specific risks posed by the migration crisis and which can make women and girls especially vulnerable to human trafficking for sexual exploitation and forced marriage. Measures should include training programmes for all personnel in identifying girls and women at risk and the provision of gender specific services and accommodation.
- Training on the gender dimension of human trafficking, including specialist knowledge and expertise on all forms of violence against women, with a particular emphasis on domestic and sexual violence should form an intrinsic part of all training materials and programmes delivered to officials including legal practitioners, the Judiciary, the police force, immigration officials, court personnel and medical and health practitioners who may come in to contact with or are responding to cases of trafficking for sexual exploitation and/or forced marriage.

Member States should ensure that all victims can access services, based on inter alia the principle of equal treatment. Women who are trafficked for sexual exploitation and/or forced marriage should be able to access social supports and services on an equal footing to other victims, irrespective of citizenship or immigration status.

- Member States should ensure that all aspects of anti-trafficking policies and actions bear in mind the specific risks and forms of exploitation and violence that the girl child maybe be subjected to. Anti-trafficking measures must prioritise **the 'best interests' of the child' in the implementation of the Directives. Member States** should consider the intersection between a child-rights approach and a gender-sensitive response in the provision of services, to ensure that no major protection gap for girl victims is created.
- Members States should prioritise prevention measures addressing the root causes and risk factors that increase the vulnerability of women, girls, with an emphasis on how the intersection of gender and other forms of disadvantage and discrimination result in increased vulnerability to human trafficking, exploitation and forced marriage.
- Members States should collate sex and age-disaggregated data to promote a better understanding of the gender and age dimensions of human trafficking and/or forced marriage.

6.2 Identification

- Mechanisms to establish early and pro-active identification of victims of trafficking for sexual exploitation should be a priority for all Member States, recognising and responding to the specific barriers to identification which pertain to these victims including:
 - the fact that victims of trafficking for sexual exploitation and forced marriage are hidden within the wider population of prostituted people;
 - failure to identify women who are coerced and trafficked because of a presumption that women have consented to engaging in prostitution;
 - the level of control exercise by pimps and traffickers;
 - irregular migration status as a barrier to disclosure to official authorities;
 - the potential involvement of family members and communities.

- Member States should recognise the critical importance of early and pro-active identification in the cases of forced marriage due to the specific barriers to identification which pertain to these victims including: isolation of victims in private homes, involvement of family members, abusive partners, cultural practices and the possible threat of honour based violence, all which may prevent self-identification, disclosure and help seeking.

- Member States should recognise that victims of trafficking for exploitation and/or forced marriage are victims of other crimes, in particular, physical and sexual violence, and as such, they should be afforded identification as a victim of gender based violence under **the Victims' Rights Directive. They should receive specific, targeted and integrated supports**, regardless of whether the offender is identified, prosecuted or convicted.

- Given the current migration crisis, and the increasing number of asylum seekers and immigrants, Member States need to introduce special measures to identify and protect girls and women at risk of, and subjected to trafficking, prostitution and forced marriage, in precarious contexts including populations displaced by war and conflict and refugee camps.

- Competent authorities and practitioners and all those who are likely to encounter potential victims of trafficking for sexual exploitation and forced marriage should receive training on the gender dimension of trafficking and the traumatic impacts of gender based violence and sexual exploitation. Considering the importance of indicators in the identification of victims, it is important that gender sensitive indicators informed by the evidence in relation to gender specific push factors and the vulnerabilities and trauma experienced by victims of sexual exploitation are an integral part of the identification process and the training of responders.

- A low threshold *vis-à-vis* the evidentiary standard used for identification should be adopted in all Member States. Competent authorities should be trained to recognise indicators of the multiple forms of direct and subtle forms of coercion, deception and abuses of vulnerability which are used in the trafficking of women and girls. As soon as there is reason to suspect that a person is a victim of Trafficking for Sexual Exploitation or Forced Marriage they should receive immediate protection and assistance ensuring they are

removed from harm and the high risk of re-victimisation and /or re-trafficking. Confirmation of their status as a victim of trafficking should occur at a later stage.

- Specialised Non-Governmental Organisations should be recognised as competent authorities in establishing reasonable grounds to believe that a person is a victim of trafficking for sexual exploitation or forced marriage. Assistance and support should be provided **immediately irrespective of the victims' willingness to co-operate** with police or criminal proceedings. This is particularly important in the context of trafficking for sexual exploitation for forced marriage as there are several grounds which can preclude victims from cooperating with authorities, including fear of State authorities, fear of repercussions from traffickers and negative consequences for their families.
- National referral mechanisms must also be able to identify and ensure links between trafficking and refugee protection rights to ensure that international protection as a refugee is available to victims of trafficking when appropriate. Access to both legal and policy frameworks should be complimentary and run in parallel.
- Victims should be able to choose the gender of the interviewer in the identification process. Interviewers should be aware of the barriers faced by victims of trafficking for sexual exploitation and forced marriage in disclosing, including: Fear of reprisals to themselves or their families; mistrust of police and authorities as they may have been complicit in their exploitation; fear of deportation or arrest due to insecure immigration status; shame and stigma related to disclosing sexual violence and exploitation within prostitution.
- Interviews should be kept to a minimum to avoid secondary harm and traumatising. Interview recordings and protocols for transfer of evidence between agencies must adhere to the highest standards of personal data protection and confidentiality. Given the forms of exploitation that victims of trafficking for sexual exploitation and forced marriage may disclose, such as rape, sexual assault and inhuman and degrading treatment, it is critical that they should not be made to extraneously repeat accounts of the abuse experienced.
- Member States should ensure that the identification process is not influenced by legal status, ethnicity, nationality and the right to seek asylum. Recognising that irregular (or undocumented) migration status is a major barrier to seeking help and may have been used to control victims of trafficking for sexual exploitation and forced marriage, it is particularly important that competent authorities assure victims of their rights as victims of trafficking and that their primary concern is identification and protection, not immigration status.

6.3 Assistance and Support

- A needs assessment for each suspected victim should be conducted as soon as possible with a specialist practitioner who is trained to recognise and respond to the specific harms which victims of trafficking for sexual exploitation and forced marriage have been subjected to. This should include assessment of: the potential threat of re-victimisation; the

level of trauma experienced and exhibited by the victim; their psychological and physical health needs; their sexual and reproductive needs, including pregnancy; and additional special needs such as disability.

- Member States should ensure that all victims of trafficking for sexual exploitation and forced marriage receive support and assistance which is proportionate and appropriate and tailored to meet the needs of each individual victim. Given the levels of control that may be exercised over the lives of these victims, it is critical that best practice is observed regarding any intervention being provided on a fully informed and consensual basis.
- Victims of trafficking for sexual exploitation and forced marriage should receive continuous support and assistance, before, during, and after any criminal proceedings. Member States should consider violence against women as valid grounds for durable assistance and on-going support which is not dependent upon the willingness to cooperate with the police or criminal proceedings. This is particularly important because of **the severe physical or psychological consequences of these crimes, and/or if the victim's safety is at risk on account of their cooperation in said proceedings.** Member States should recognise that any discontinuation of those services could have a devastating impact on the victims re-traumatised by sexual violence and ensure that support is provided from the point of detection to recovery regardless of the residence rights of third country nationals.
- Accommodation for victims of trafficking for sexual exploitation and forced marriage should be safe, secure and appropriate recognising that victims of these forms of trafficking are at heightened risk of re-victimisation at the point of leaving. Accommodation should be gender specific promoting a feeling of safety, preventing re-traumatisation and the potential for further targeting and sexual exploitation. Shelters should also be culturally sensitive and adapted to meet the needs of disabled women and children. Extra protection should be available in locations where refugees and asylum-seekers reside to prevent targeting by traffickers, especially for those who have already been trafficked or are vulnerable to trafficking due to their migration journey and/or specific migration status.
- **Member States should recognise the role of specialist women's NGOs who have the knowledge and experience in responding to victims of sexual violence.** With the provision of these services, Members States should utilise the existing infrastructure and services which respond to victims of gender based violence, domestic violence and sexual violence.
- Best practice models should continue to be developed and resourced, which locate an integrated range of protection and support services on the same premises including accommodation, health and medical services; trauma support and counselling; legal advice and information (with multi-disciplinary expertise on violence against women, migration, human trafficking, forced marriage, family law and children rights), material assistance financial support, access to education, training and the labour market.

6.4 Access to Justice

- Early legal intervention should be ensured, without delay, for all victims of trafficking for sexual exploitation and forced marriage at the point of detection or disclosure to any front-line responder or competent authority. This should include, but not be limited to, legal

advice and representation on their rights to recovery and reflection periods, the right to claim international protection or access other immigration related procedures, the provisions of marital/family law and/or guardianship of children, the right to compensation and the provision of legal representation at every stage of civil and criminal proceedings.

- Legal advice and representation should be provided by independent specialist legal practitioners who are trained and skilled in responding to the gender specific harm that victims of trafficking for sexual exploitation and forced marriage have been subjected to. Specialised legal practitioners can ensure that vulnerable victims are afforded the best legal representation in accessing their rights as victims of trafficking and in participating in criminal proceedings if they so choose to.
- Training on gender, gender based violence and the traumatic impacts of sexual exploitation, including the possible impacts of disclosure, should be undertaken by all legal practitioners, the Judiciary, the police force, immigration officials and court personnel to ensure sensitive, respectful and appropriate responses to victims of trafficking for sexual exploitation and forced marriage. Legal practitioners and those advocating for the rights of victims of trafficking for sexual exploitation and forced marriage should be fully briefed on the provisions of both the **Anti-Trafficking Directive and the Victims' Directive to ensure that the highest and optimum rights can be realised for their clients.**
- Preventing secondary victimisation should be a priority in all interventions with victims of trafficking for sexual exploitation and forced marriage by: avoiding unnecessary repetition of interviews during investigation, prosecution or trial; recording of same and developing protocols for transmission of data inclusive of recording, handling and storage of data, preventing visual contact between victims and defendants; ensuring there is no **unnecessary questioning concerning the victim's private life; removing the requirement to have the victim appear in court; admitting evidence and testimony through the use of communication technology; and having hearings in camera.**
- Special protection measures should be provided especially during criminal trials to ensure that victims are protected from retaliation, intimidation, and from the risk of being re-trafficked or re-victimised. Comprehensive standardised risk assessment procedures should be developed and conducted at the earliest stage with each individual victim. Safety audits and assessments for privacy should also be carried on all interview rooms and courtroom premises to ensure that victim cannot be intimidated or placed at risk. Witness protection programmes should be available where needed.
- Member States should ensure that victims of trafficking for sexual exploitation and forced marriage have legal advice and representation in seeking compensation from offenders or from a compensation fund within a reasonable time. The specific harm of sexual violence including the psychological impacts should be recognised in the claim. **Equal treatment should at the core of victims' capacity to claim compensation and the system for victim compensation should ensure it benefits all victims of trafficking equally.**
- Member States should recognise that regardless of the legal residency status of the victim, all victims should receive permission to remain, at a minimum, for the duration

of any investigation against their alleged trafficker(s), to ensure that they can participate in the process and claim compensation. Such participation, however, should invariably be based on the consent of the victim.

- Repatriation should be voluntary, informed and safe, ensuring protection against refoulement and the risk of re-trafficking on return. Access to services should be facilitated if reintegration is feasible. Member States should consider pathways to a third country including resettlement and humanitarian admission for refugees who are victims of trafficking or forced marriage at risk in their home country to re-trafficking or where there are barriers to integration due to the exploitation experienced.
- Judicial authorities should ensure that victims of trafficking are not subject to criminal proceedings or sanctions for offences related to their situation as trafficked persons, including violations under immigration, prostitution and marital laws.

6.5 Recommendations regarding Children in the Respective Areas of Identification Assistance and Support and Access to Justice

6.5.1 Identification

- Early and proactive identification of child victims of trafficking for sexual exploitation or forced marriage should be a priority for all Member States recognising the specific barriers to identification which are relevant to child victims. Identification mechanisms should take into account the special circumstances and gender specific needs of child victims of trafficking, involving child and gender specialists to ensure that the best interests of the child are the primary consideration. Identification guidelines for child victims should be developed by Member States, inclusive of measures and procedures, to facilitate quick and accurate, age related assessment.
- Member States should **adopt the principle of a 'presumption of age' when dealing** with potential child victims and are thus required to identify child victims as such, where there are reasons to believe they are a child. Member States, upon identification of a child victim, where the age is uncertain, should presume the victim to be a child and provide immediate access to assistance and protection. Member States could consider the provision of guidance on who should be responsible for determining whether there are reasons to believe a victim is a child and how this should be determined in practice and suggest an appropriate timeframe.
- Member States should ensure the 'best interest of the child' is the guiding principle and primary consideration underpinning all responses to child victims of trafficking. It is important that their interests are at the core of any measures for their assistance and can be taken into account at different stages following their identification. They should be assisted by a guardian who can represent those interests, particularly in cases where the girl victim is an unaccompanied minor or where those responsible for her exploitation have parental responsibility or where an illegal marital contract has been imposed on the child. Finally, it is important that the assistance of girl victims is based on the need to find durable solutions.

- Appointment of a guardian – Member States should provide child victims of trafficking, when necessary, with a guardian and/or legal representative at all stages of **assistance, (re)integration and/or return, to ensure the child’s best interests. The systems** established should consider the situation of unaccompanied children. This should include prevention of return from entry points, prior to full assessment, by services with the relevant expertise. In the interest of best practice, Member States could consider the provision of guidance on the duties of the appointed Guardians.
- Guardians shall be given specialised, gender based training, professional support and appropriate assistance pertaining to the girl-child and the additional implications of gender on child victims of trafficking. Competent authorities and practitioners responding to children victims of trafficking for sexual exploitation and forced marriage should receive training on age related traumatic impacts of gender based violence and sexual exploitation.
- Member States should ensure that agencies or individuals whose interests could conflict with those of the child, or who are accused of being complicit in the trafficking of the child, cannot be eligible for guardianship. In appointing the guardian, the competent **authority shall give due weight to the child’s views and shall keep the child informed.**
- Member States should recognise the role of Non-Governmental Organisation in providing a gender-sensitive response and specialist knowledge on violence against women *vis-à-vis* human trafficking. Such expertise should be integrated within National Referral Mechanisms along with inter alia child protection services to identify and assist girls trafficked for sexual exploitation and/ or forced marriage.
- Member States should recognise that interviews with children involve additional considerations as well as additional obligations on the part of those conducting the process. Protection should be offered throughout the interview process particularly in circumstances where those with parental responsibility over such victims may have been complicit in their trafficking. Member States should ensure that the child has an appropriate **adult present, whose role it is to safeguard the child’s welfare. Interviews should be kept to a minimum to avoid secondary harm and traumatisation.**

6.5.2 Assistance and Support

- Member States should ensure that the child/presumed child should be giving immediate access to support and protection measures. Member States should ensure the development of age-appropriate, safe and confidential programmes and medical, social **and psychological support services to assist girls. Specific services for children as ‘direct or indirect victims’ should be considered including situations of women fleeing with children.** Given the harms suffered by women and girl victims of trafficking and their experiences, it is important such supports are for an appropriate duration of time and take into account any additional or special needs, such as pregnancy, or having a disability. Member States should recognise the particular needs of children born in the context of human trafficking and/or forced marriage and provide the specialist services required, inclusive of immigration status.

- The individual assessment of the best interests of the child is a continuous process that has particular relevance for trafficked children. Each trafficked child should have its case individually assessed to ensure that their best interests can be established. Those responsible for conducting assessments should receive appropriate training (child and gender specific, inclusive of violence against girls) and should have specialist expertise in the provision of care to child victims of crime. As per adult victims, it is critical that best practice is observed regarding any intervention being provided on a fully informed and consensual basis.
- Member States should provide for durable solutions in the case of child victims of trafficking. Individual risk assessment should be conducted with each girl victim prior to their repatriation and Member States should be encouraged to offer integration into the host country as a durable solution for child victims of trafficking.
- Member States should integrate a gender perspective into their approach to support measures such as accommodation. Child victims shall be in safe and suitable accommodation immediately after their identification. Member States should recognise the **role of specialist women's NGOs, working with child victims, who have the knowledge and experience in responding to victims of sexual violence, child victims of domestic violence (directly or indirectly).** Member States should be encouraged to offer women-only shelters as part of the accommodation services available to girl victims. Standards should be developed and implemented.

6.5.3 Access to Justice for Children

- Member States should ensure that child victims have the right to legal advice and representation, in their own name, in proceedings where there is, or there could be, a conflict between the child victim and the holders of parental responsibility. Legal assistance and representation with termination of illegal forced marriages should be available where needed.
- Given the high risk of secondary and repeat victimisation, intimidation and of retaliation connected with such victims, there should be a strong assumption that special support and protection is necessary for child victims without any demonstrable need. Special protection measures should be available to ensure that criminal proceedings and/or court practices are specially designed to help vulnerable and potentially intimidated child **witnesses. Interviews with child victim's or child witnesses should be videotaped so that evidence can be presented in court without the presence of the child.**
- Court facilities should be safety proofed with separate waiting areas where child victims will not encounter traffickers or family members implicated in their exploitation. To protect the privacy of the child victim, Member States should have the facilities to hold criminal proceedings involving child victims of trafficking without the public present.
- Preventing secondary victimisation should be a priority in all interventions with child victims of trafficking for sexual exploitation and forced marriage. Law enforcement and judicial authorities should develop practices that protect the rights of child victims and reflect their special needs and vulnerabilities.

- Children should be given a choice, where possible to the gender of the investigator/officer and interpreter/translator. Interviewers of child victims should have training in gender sensitive and child centered interviewing skills.

Chapter 7: Indicators

These indicators provide a framework for monitoring and assessing actions, measures and achievements by Member States, based on the legal analysis and recommendations. The indicators consist of quantitative and qualitative benchmarks which can be used to systematically measure, monitor and evaluate the implementation of gender specific responses to victims of trafficking for sexual exploitation and forced marriage. Indicators enable consistent collection of data across Member States which can support comparative analysis within the EU. They also make it possible to identify gaps and failures in delivering effective protection and support which can form the basis of recommendations for improved performance by Member States.

Objective/measure relating to overarching recommendations	Indicators	Source/verification
Ratification and transposition of the Anti-Trafficking Directive ¹ , the Victims' Rights Directive ² , the Council of Europe Trafficking Convention ³ , the UN Palermo Protocol ⁴ , Istanbul Convention, ⁵ and CEDAW ⁶ .	Ratification and transposition completed or Government issued timeframe / commitment to do so	-Government -GRETA -GREVIO -CEDAW Committee
Member States have enacted a comprehensive legal framework in compliance with international standards in relation to trafficking, gender based violence and violence against women and girls.	Legal framework compliant with international standards	-GRETA -GREVIO -CEDAW Committee -Trafficking in Persons Report (TIP)
National Action Plans on trafficking developed and/or revised and strengthened in	Experts and specialised NGOs engaged in gender proofing,	Relevant stakeholders on gender proofing,

¹ Directive 2011/36/EU of on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

² Directive 2012/29/EU of establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

³ Council of Europe Convention on Action against Trafficking in Human Beings

⁴ United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime

⁵ Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence

⁶ United Nations Convention on the Elimination of all Forms of Discrimination Against Women

<p>consultation with experts on gender proofing, gender based violence and violence against women and girls.</p>	<p>gender based violence and providing services to women and girls subjected to violence sign up to the NAPs</p>	<p>gender based violence and violence against women and girls</p>
<p>National Action Plans contain indicators, benchmarks, timeframes which can be monitored and evaluated from a gender perspective. Any strategies (National Action Plans) on human trafficking or violence against women, mutually refer, complement and reinforce each other in explicit terms.</p>	<ul style="list-style-type: none"> -Specific budgets are allocated to each measure -independent monitoring and evaluation is commissioned -Evaluation transparent and publicly available -annual reports delivered to parliament by Independent Rapporteur -Number of references to the national strategy on violence against women in the anti-trafficking National Action Plan and vice-versa and number of common actions/indicators in both strategies 	<ul style="list-style-type: none"> -Relevant stakeholders on gender proofing, gender based violence and violence against women and girls -Independent evaluations of national strategies on human trafficking and violence against women -Independent Rapporteur
<p>Prevention measures addressing the root causes and risk factors that increase the vulnerability of women and girls are integrated into National Action Plans. Measures are targeted and budgeted, addressing poverty, disadvantage and discrimination based on <i>inter alia</i>, racism, ethnicity and disability in destination and origin countries.</p>	<ul style="list-style-type: none"> -% increase in budget allocation to targeted initiatives to address and reduce poverty, disadvantage and discrimination for girls and women - % of vulnerable girls reached and supported by child protection and violence against women services and NGOs working on racism and other forms of discrimination a 	<ul style="list-style-type: none"> -Indices measuring poverty and gender inequality at national level -Eurostat -UN Women-Child protection and women's services -Organisations working on racism and other forms of discrimination
<p>Comprehensive measures and entitlements for victims of trafficking for exploitation, forced marriage and gender</p>	<p>% increase in number of women identified</p>	<p>-Government reports</p>

<p>based violence, including the principle of equal treatment are enshrined in national legislation.</p>	<p>-% increase in number of women availing of entitlements -% of third country nationals identified and accessing rights</p>	<p>-Independent law centres and legal practitioners</p>
<p>Budgets and resources allocation is consistent transparent and placed on a statutory basis to ensure the implementation of measures and ensure sustainability, including to specialist women's services on violence against women.</p>	<p>-% increase in budget allocation for implementation of measures -% increase in budgets to specialised women's NGOs</p>	<p>-Government financial statements and reports -Specialised women's services</p>
<p>Monitoring and evaluation procedures are in place to enable the independent, objective and systematic assessment of the implementation of the Directives and National Action Plans to determine the efficiency, effectiveness, impact and sustainability of measures.</p>	<p>-Independent evaluations funded and conducted on a regular basis -NAPs amended and strengthened according to recommendations -% increase in budgets to implement recommendations for improvement</p>	<p>-Independent evaluations -Government financial statements and reports</p>
<p>Mechanisms for recording data are in place in all relevant bodies. Gender and age-disaggregated data including nationality, ethnicity and migrant status is collated</p>	<p>-Number of victims of trafficking per 100,000 population, by sex, age and purpose of exploitation recorded -Number of victims of forced marriage according to age and nationality -Proportion of women aged 20-24 years who were married or in a union before age 15 and before age 18</p>	<p>-UNODC -TIP reports -UNICEF -UN Women -World Health Organisation</p>

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ⁱ An EU funded transnational project explored the presence of exploitation in sham marriages and coined the term Exploitative Marriage to indicate a presence of exploitation. Of the studied cases in six EU MSs, it was established that some of the cases involving exploitation of one of the partners amounted to trafficking in human beings, while others did not (HEUNI 2016).

ⁱⁱ This concept was first outlined by Liz Kelly in *Surviving Sexual Violence* (1988) as a framework for and analysing Violence against Women that is not deviant and episodic, but normative and functional - an everyday context in which the lives and experiences of women and girls all over the world are understood in relation to the spectrum of socially sanctioned male aggression, coercive behaviour and patriarchal norms.

ⁱⁱⁱ The Lanzarote Convention has been criticised for using problematic terms such as “child prostitute”, which, according to child-rights and women’s rights organisations should not be applied to children in the context of their *sexual exploitation* in prostitution (The Luxembourg Guidelines, 2016).

^{iv} Ratified by 17 EU States (Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, France, Finland, Hungary, Italy, Latvia, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain) and signed by Denmark.

^v see Special Court of Sierra Leone, *Prosecutor v Brima, Kamara and Kanu*, Appeals Judgment, Case no SCSL-04-16-A, 22 February 2008.

^{vi} Pursuant to Council Directive 2004/81/EC of 29 April 2004.

^{vii} When a person makes an asylum claim within a State signatory to the 1951 Geneva Convention Relating to the Status of Refugees ('Refugee Convention') – all European Union States are signatories – the person has the right to remain in the country until the final conclusion of that claim, including the full conclusion of all appeals.

^{viii} See for example Article 18 of the UNODC Model Law against Trafficking in Persons in which it is stated that a person "*should be considered and treated as a victim of trafficking in persons, irrespective of whether or not there is already a strong suspicion against an alleged trafficker or an official granting/recognition of the status of victim*", thus recognising the need for identifying potential victims as such prior to their formal identification.

^{ix} European Parliament resolution of 12 September 2013 on the situation of unaccompanied minors in the EU (2012/2263 in Mannion, K. (2016) Child Migration Matters, Dublin: Immigrant Council of Ireland, p178.

^x For example, the UK has a policy to grant leave to remain to all children who have made an unsuccessful asylum claim, until they reach age 17 and a half: Para. 352ZC Immigration Rules (UK).

^{xi} Council of Europe recommend the involvement of NGOs in the identification process

^{xii} CEDAW Committee General Recommendation No. 19 at para. 24(b).

^{xiii} 2011/36/EU, Recital 18 '... In cases where the victim does not reside lawfully in the Member State concerned, assistance and support should be provided unconditionally at least during the reflection period...'

^{xiv} Articles 2 and 12.

^{xv} Recital 14.

^{xvi} Rec(2002)5-23. "ensure that victims, without any discrimination, receive immediate and comprehensive assistance provided by a co-ordinated, multidisciplinary and professional effort, whether or not they lodge a complaint, including medical and forensic medical examination and treatment, together with post-traumatic psychological and social support as well as legal assistance; this should be provided on a confidential basis, free of charge and be available around the clock"; Recommendation (2002)5 of the Committee of Ministers to Member States on the protection of women against violence adopted on 30 April 2002 and Explanatory Memorandum

^{xvii} CEDAW Committee, Communication No.: 2/2003, Ms. A. T. v. Hungary (Views adopted on 26 January 2005), U.N. Doc. A/60/38, at 27 (2005).

^{xviii} Articles 5 and 16(a) of CEDAW were found to have been violated: see para. 9.4 of the CEDAW Committee's decision.

^{xix} Women and girls make up about 95% of documented cases of trafficking for sexual exploitation in Europe (Eurostat 2015).

^{xx} For a European study on attrition rates in rape cases, see Lovett and Kelly, *Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe* (2009).

^{xxi} In the majority of countries with available data, less than 40 per cent of the women who experience violence seek help of any sort. Among women who do, most look to family and friends and very few look to formal institutions and mechanisms, such as police and health services. Less than 10 per cent of those women seeking help for experience of violence sought help by appealing to the police: United Nations Economic and Social Affairs (2015), *The World's Women 2015, Trends and Statistics*, p. 159.

^{xxii} CEDAW, General Recommendation No. 33 on women's access to justice (23 July 2015), para. 26.

^{xxiii} Guardian (UK), The juju curse that binds trafficked Nigerian women into sex slavery, 2 September 2017.

^{xxiv} European Parliament, Policy Department, Citizens' Rights and Constitutional Affairs, *The Issue of Violence Against Women in the European Union* (2016), 3.1.2.

^{xxv} FRA, Child Friendly Justice

^{xxvi} This Directive is not within the scope of this study, however it is worth noting that the Directive is gender neutral and makes no reference to women, gender or gender-based violence.

^{xxvii} Article 1.