



# EUROPEAN POLICYBRIEF

## VULNER

**VULNER POLICY BRIEF: GERMANY**

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### KEY MESSAGES

- Under EU law, Member States are required to address the special reception and procedural needs of vulnerable asylum seekers (such as minors, disabled persons, elderly persons, pregnant women, single parents with minor children, victims of human trafficking, persons with serious physical illnesses or mental disorders and persons traumatized by severe experiences of violence such as torture or sexual exploitation).
- German regulations on detecting and addressing the special needs of vulnerable asylum seekers within the asylum and reception procedures are deficient. There is a lack of uniform and transparent legislation and administrative regulations and guidelines.
- Urgent action is needed. This begins with the identification of those affected. We need legal and administrative measures that effectively consider the particular vulnerabilities of these groups of people. This must include, where appropriate, separate housing.
- This policy brief makes concrete proposals to amend federal law.

### INTRODUCTION

EU law requires to identify and address the special reception needs of vulnerable asylum seekers, and to provide for special procedural guarantees (such as the assistance of a representative during the asylum hearing of an unaccompanied minor).

To this end, the German team of the VULNER project studied how vulnerable asylum seekers are identified, and how their special reception and procedural needs are assessed and addressed by German asylum authorities. They examined legislation, case-law and administrative guidelines and conducted interviews with key actors in Germany.

This policy brief explores the findings, highlighting the challenges and the shortcomings observed in Germany as well as proposing concrete legislative recommendations.

## The obligations of Germany under EU law

The Reception Condition Directive 2013/33/EU and the Asylum Procedure Directive 2013/32/EU (hereinafter: Reception Directive, Procedure Directive) contain measures obliging Germany to identify protection seekers with special reception and procedural needs (hereinafter: special needs) as early as possible in order to ensure that these needs are met throughout the respective procedure.

Art. 21 of the Reception Directive obliges EU Member States to consider in their legislation "the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence". In order to "effectively implement" this requirement, Article 22 (1) of the Reception Directive further requires Member States to assess "whether the applicant is an applicant with special reception needs" and "the nature of such needs" (hereinafter: identification). Subsequently, further requirements are specified regarding the timing of the identification and the provision of special assistance. In the further provisions of Art. 23 to 25 of the Reception Directive, there are also specific provisions regarding the situation of minors, unaccompanied minors and victims of torture and violence.

Article 24 (1) of the Procedure Directive obliges Member States to "assess" whether a person applying for asylum is "in need of special procedural guarantees". Art. 2 d) of the Procedure Directive clarifies that such a person is "an applicant whose ability to benefit from the rights and to comply with the obligations provided in this Directive is limited due to individual circumstances". Also in the Procedure Directive, requirements are made regarding the timing of the identification of special needs. According to Article 24 (3) "Member States shall ensure that where applicants have been identified as applicants in need of special procedural guarantees, they are provided with adequate support in order to allow them to benefit from the rights and comply with the obligations of this Directive".

As necessary procedural safeguards, Recital 29 of the Procedure Directive mentions "adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection." In addition, Article 15 (3) a) of the Procedure Directive prescribes certain requirements for the hearing "to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner". To this end, Germany must ensure, among other things, "that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability".

So far, the federal legislature has only mentioned vulnerable protection seekers in a brief provision in Section 44 (2a) of the German Asylum Act and, to a certain extent, has passed on the responsibility for implementation to the German states (Länder): "The Länder shall take appropriate measures to ensure the protection of women and vulnerable persons when accommodating asylum seekers in accordance with paragraph 1". In recent years, the states have issued initial regulations for their reception procedures. However, these vary considerably in terms of content and legal sources used (laws, decrees, administrative regulations, agreements). The Asylum Act does not contain any legal provisions regarding the asylum procedure for which the Federal Office for Migration and Refugees (BAMF) and thus the federal level is responsible.

As can be seen from this brief description, the EU Directives' requirements have not been fully implemented. The federal legislature has not enacted any legal provisions for its own area of responsibility – the asylum procedures – but merely refers the matter to the states, which are responsible for the reception procedure. The BAMF's administrative regulations do not satisfy the obligation to implement EU directives.

## Our main research findings

Our assessment was based on the requirements of Articles 21 to 25 of the Reception Directive and Articles 24 and 15 of the Procedure Directive, as well as other EU and international legal acts that oblige Germany to adopt additional protective measures in its asylum and reception procedures, e.g. the Council of Europe Convention on Action against Trafficking in Human Beings. The following points are based on a thorough analysis of the legal situation at the federal and state levels, including examples of administrative practice and supplementary expert interviews.<sup>1</sup> They illustrate the main research findings where German law and practice do *not* adequately fulfill international and EU law:

- **Legal provisions for the BAMF to fulfill the identification obligation** - regulations in the German Asylum Act have so far been limited to implementation requirements for the Länder (Section 44 (2a) Asylum Act) – and a requirement for identification as early as possible with the involvement of non-governmental agencies. In addition, the affected asylum seekers cannot see what claims they are entitled to. Both must be regulated in a transparent manner.
- **Legal provisions for needs-based measures** to support vulnerable asylum seekers, e.g.:
  - The right to a stabilization period during the asylum procedure and thus the exception of accelerated asylum procedures
  - Explicit regulation of the scope of health and support services
  - The right to have special representatives take over the procedure
  - Effective and early counselling on rights and available assistance in cooperation with or through non-governmental organisations
  - The right to be accommodated in a reception center where an adequate infrastructure is available to provide care and support regarding the assistance of vulnerable persons, - as adequate care and support for certain vulnerable persons can currently only be guaranteed in the vicinity of certain reception centers or in certain German states
  - Regardless of the last point also the right to be accommodated outside of state reception centers, if these in themselves cause a personally unreasonable situation.
- **Legal coordination of shared responsibility between the federal state and the Länder** regarding the implementation of EU law: In Section 44 (2a) of the Asylum Act, the federal legislature assumes that the German states have primary responsibility, but according to the Reception Directive and Procedure Directive, the federal state itself is also responsible for identifying and providing assistance. Therefore, a legal provision for a coordinated and cooperative approach is necessary in order to guarantee this shared responsibility.

Germany still lacks a legal framework that meets the requirements of the Reception and Procedure Directives and enables applicants with special needs to assert their claims easily and effectively in a uniform and transparent manner. There are considerable deficits in the implementation of EU law at the federal and state levels. Since it would be premature at the current stage of the research project to formulate proposals for improving the legal framework at the state levels, this policy recommendation focuses on those deficits for which the federal legislature is responsible for eliminating or overcoming, especially against the backdrop of the upcoming federal elections.

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<sup>1</sup> Documented in *Kluth/Heuser/Junghans*, Addressing Vulnerabilities of Protection Seekers in German Federalism, Research Report 2020 on the Identification and Assistance of Vulnerable Persons in Asylum and Reception Procedures and Humanitarian Admission, 2021; see also in detail: *Heuser/Junghans/Kluth*, Der Schutz vulnerabler Personen im Flucht- und Migrationsrecht. Grundlagen, Identifizierung und bedarfsgerechte Maßnahmen am Beispiel der Betroffenen von Menschenhandel, 2021.

## POLICY IMPLICATIONS AND RECOMMENDATIONS

Based on our research findings, we formulate the following recommendations:

- Supplement Section 24 of the Asylum Act with a regulation regarding the identification of vulnerabilities of applicants in the recognition procedure by the BAMF: A new paragraph 1a is added: *"In connection with the application, the Federal Office shall examine whether there are indications with regard to the applicant that give rise to special needs within the meaning of Art. 21 et seq. of Directive 2013/33/EU and Art. 15 and 24 of Directive 2013/32/EU. If corresponding needs are identified, these are to be communicated to the management of the agency responsible for admission in the country with the consent of the persons concerned. In addition, the implications for the continuation of the recognition procedure must be clarified. The details of this are regulated by legal ordinance. This shall also specify the cooperation with non-governmental counselling centers and all relevant authorities, as well as the requirements for the professional qualifications of the decision-makers responsible for continuing the procedure in cases requiring special professional qualifications."* The previous paragraph 1a becomes paragraph 1b.
- Rewording of Section 44 (2a) of the Asylum Act to include a mandatory obligation for the Länder to identify vulnerabilities and coordinate with the federal state: *"The states shall take appropriate measures for identification and support in order to ensure the protection of women and persons in need of protection within the meaning of Art. 21 of Directive 2013/33/EU and Art. 15 and 24 of Directive 2013/32/EU as early as possible and throughout the procedure when accommodating asylum seekers pursuant to paragraph 1. In doing so, the competent bodies under Land law shall act in coordination with the competent branch office of the Federal Office and in cooperation with non-governmental counselling centers and all relevant authorities."*
- Addition to Section 46 of the Asylum Act of a provision on the special designation of competent reception facilities for persons with special protection needs: New paragraph 1a: *"If a special need for protection within the meaning of Art. 21 Directive 2013/33/EU, which cannot be adequately met in the designated reception facility, is identified by the Federal Office or the competent authority of the federal state, assignment shall be made to another reception facility where this is possible."*
- Addition to Section 49 of the Asylum Act of a provision on the termination of the obligation to reside in a reception facility: A new paragraph 2 is added: *"The obligation to reside in the reception facility shall be terminated, in particular for persons in need of protection within the meaning of Article 21 of Directive 2013/33/EU, if accommodation in reception facilities is unreasonable for personal reasons."* The previous paragraph 2 becomes paragraph 3.
- Addition of a provision for persons in need of special protection to Section 53(1) of the Asylum Act: A new paragraph 1 sentence 3 is inserted: *"Sentence 1 shall not apply to persons in need of protection within the meaning of Art. 21 Directive 2013/33/EU."*

## THE VULNER RESEARCH PROJECT

This policy brief has been issued by Prof. Dr. Winfried Kluth, Helene Heuser and Jakob Junghans. It reflects the result of their own scientific data and analyses, which they developed within the framework of the VULNER research project.

The VULNER research project is an international research initiative, which objective is to reach a more profound understanding of the experiences of vulnerabilities of migrants applying for asylum and other humanitarian protection statuses, and how they could best be addressed. It therefore makes use of a twofold analysis, which confronts the study of existing protection mechanisms towards vulnerable

migrants (such as minors and victims of human trafficking), with the one of their own experiences on the ground.

This policy brief reflects only the authors' views. The European Union and the project coordinator are not liable for any use that may be made of the information contained therein.

## PROJECT IDENTITY

PROJECT NAME	VULNERABILITIES UNDER THE GLOBAL PROTECTION REGIME - How Does the Law Assess, Address, Shape and Produce the Vulnerabilities of the Protection Seekers? (VULNER)
COORDINATOR	Department of Law & Anthropology, Max Planck Institute for Social Anthropology, MPG, Halle a.d. Saale, Germany
CONSORTIUM	Max Planck Institute for Social Anthropology - MPG Halle, Germany Ca'Foscari University of Venice - UNIVE Venice, Italy Catholic University of Louvain - UCL Louvain, Belgium Center for Lebanese Studies - CLS Beirut, Lebanon Institute for Social Research - ISF Oslo, Norway Martin Luther University Halle-Wittenberg - MLU Halle, Germany Population Europe – PE Berlin, Germany University of Ottawa - UOTTAWA Ottawa, Canada
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FURTHER READING	Kluth, W., Heuser, H., Junghans, J., <i>Addressing Vulnerabilities of Protection Seekers in German Federalism - Research Report 2020 on the Identification and Assistance of Vulnerable Persons in Asylum and Reception Procedures and Humanitarian Admission</i> . 2021. <b>VULNER Research Report 1</b> . <a href="https://doi.org/10.5281/zenodo.5497309">doi: 10.5281/zenodo.5497309</a>



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