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Legal Assessment: Compensation Practices

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WORKING PAPER

LEGAL ASSESSMENT: COMPENSATION PRACTICES

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Introduction

The right of victims of trafficking to seek and obtain compensation is established in various international and European instruments, including the UN Trafficking Protocol, the Council of Europe Convention on Action against Trafficking in Human Beings (hereinafter European Anti-Trafficking Convention), the EU Directive on Trafficking in Human Beings (hereinafter EU Trafficking Directive), the EU Directive establishing minimum standards on the rights, support and protection of victims of crime[1] (hereinafter EU Victims' Rights Directive), and more recently the Protocol to the ILO Forced Labour Convention (See Annex I for an overview of the relevant international legal standards).

European law upholds the right of victims of crime to an effective remedy, including compensation as a form of reparation (Article 13 of the ECHR, Article 47 of the EU Charter of Fundamental Rights). States have an obligation to provide compensation to victims of crime: "This obligation results from the harm arising from the infringement of rights which it was the State's duty to protect but which it was not able to guarantee".[2] In the *Rantsev* case, for example, the European Court of Human Rights awarded compensation to the family of a victim of trafficking in respect of the anguish and distress they sustained as a result of the conduct of the Russian and Cypriot authorities.[3]

Under Council of Europe law, to be effective a remedy must meet certain criteria. It has to be accessible and capable of providing redress in respect of the applicant's complaints; and it has to offer reasonable prospects of success. Under EU law effectiveness requires that domestic law must not make it impossible or excessively difficult to enforce rights.[4]

The UN OHCHR Draft Basic Principles on the right to an effective remedy for trafficked persons emphasise that the right to an effective remedy encompasses both the substantive right to remedies and the procedural rights necessary to effectively guarantee such access (e.g. right to information; right to legal and other assistance; and possibilities of residence).[5] The European Anti-Trafficking Convention, the EU Trafficking Directive and the EU Victims' Rights Directive establish minimum standards on the rights of victims trafficking in all EU Member States without discrimination. These rights stipulate many essential procedural safeguards to enable victims' access to effective remedies.

Despite these standards, a number of legal, procedural financial and practical barriers hinder the access of trafficked and exploited persons to effective remedies, including compensation. This situation is exacerbated in the case of undocumented or irregular migrants who are disproportionately exposed to

[1]Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

[2]EU FRA Handbook on European law relating to access to justice, 2016, p.162.

[3]ECtHR - Rantsev v. Cyprus and Russia, Application no. 25965/04, 10 October 2010, para. 342 and 343.

[4]EU FRA Handbook on European law relating to access to justice, 2016, p.95 and p.102; "the level of compensation is not unreasonable in comparison with the awards made by the ECtHR in similar cases".

[5]UN HRC, Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, A/HRC/17/35, 2011, Annex I Draft Basic Principles on the right to an effective remedy for trafficked persons, para. 11-12.

violence and exploitation because of the challenges they face in accessing justice and support.[6]

The focus of this report is on practices in the implementation of victims' right to seek and obtain compensation as a form of reparation to offset the damage sustained as a result of trafficking or related crime.

Building on international and European law and on the findings of the COMP.ACT research on compensation for trafficked persons,[7] the report provides a legal analysis of 60 cases of compensation claims pursued by trafficked or exploited persons. The cases were collected through the NGO consortium of the Justice at Last Project, which comprises NGOs operating in ten countries. *Justice at Last – European action* for *compensation for victims of crime* is a two-year EU-funded project that aims to enhance access to compensation for trafficked persons and victims of related crimes.

The aim of this analysis is to identify barriers and gaps that trafficked persons face in obtaining compensation, as well as laws, policies and promising practices that contribute to the success of their claims. In other words, the report points out problems that emerge in proceedings for obtaining compensation and, where possible, solutions that were found. The report builds on concrete practice of lawyers and victims' support organizations in assisting trafficked and exploited persons in obtaining compensation for the harm suffered. These findings are meant to foster mutual learning among practitioners in NGOs working with trafficked persons. They also provide opportunities for NGOs to continue and strengthen their advocacy and action to promote compensation for trafficked and exploited persons.

This is part of a threefold assessment effort, which examines: a. legal practices in compensation claims of trafficked and exploited persons, b. cooperation in access to compensation in the cross-border context, and c. victims' needs related to obtaining compensation.

The report begins with the key findings emerging from a quantitative analysis of the compensation claims cases pursued by trafficked and exploited persons that were collected for this work. Then, it discusses the specific legal, financial and practical issues that emerge in the course of criminal, civil and administrative proceedings for claiming compensation, and highlights obstacles and promising practices. The third chapter highlights a number of persisting challenges that make the right to compensation still out of the reach of many victims of trafficking and related crime. A set of recommendations concludes the report.

As to the scope of the report, it is noted that the report does not include an analysis of the ancillary rights to enable victims' access to compensation, such as the right to assistance and protection, the right to information, the right to legal aid, the right to a reflection or recovery period and the right to a temporary residence permit. These issues are discussed in depth in the assessment on victims' needs and therefore here they are only mentioned in the context of factors contributing to the success of compensation claims. An analysis of each country's legal framework on compensation of trafficked persons is also beyond the scope of this work. A limitation of the report is related to the fact that only

[6] PICUM, Strategies to End Double Violence Against Undocumented Migrant Women: Protecting Rights and Ensuring Justice, 2012, http://picum.org/focus-area/women//

[7] COMP.ACT, Findings and Results of the European Action for Compensation of Trafficked Persons, 2012 http://www.compactproject.org

very few cases of compensation involved child victims and hence an analysis of the specific legal issues related to child victims of crime is not included.

Methodology

This report is built on desk research of laws and literature relating to compensation of trafficked and exploited persons in Europe, and on an analysis of the compensation cases collected by partners of the Justice at Last project in in ten countries. Initial and preliminary findings were discussed and validated during focus group discussions with professionals supporting victims in claiming and obtaining compensation. Furthermore, the report integrates written comments and feedback by project partners, participants in the focus group and other experts.

The desk research benefited in particular from an analysis of the findings of the COMP.ACT project of 2009 - 2012. Similar to the present project, the COMP.ACT project included country studies by the project partners, who completed questionnaires and collected case studies. Not just the approach was similar, but also the majority of the countries under study were the same. Both projects analyse compensation practices in Austria, Bulgaria, Czech Republic, Germany, Ireland, Macedonia, the Netherlands, and Spain. The present Justice at Last project includes additional data from Romania and Serbia.

A major source for the analysis was case descriptions and country questionnaires provided by project partners for the three Justice at Last assessments focusing on three aspects of compensation i.e. legal issues, victims' needs and cross-border referral. Initially, it was planned to prepare a template for the collection of case descriptions to feed solely into the legal assessment, and to prepare a country questionnaire for use solely in the other two assessments. However, the overlap between the topics under research made it more logical to include questions and elements that were relevant to all three assessments in both tools, i.e. the template for case description and the country questionnaire. La Strada International and the researchers developed the two tools, building on the COMP.ACT research template and questionnaires, and the BAN-2 tool for victims' advocates.[8] A draft version of these tools was shared for review with the project Steering Group, and with project partners MRCI and KOK, which were given this role in the project proposal. The final version of both tools was sent to all project partners, who each returned the completed questionnaire with country information, and three to ten case descriptions. To prevent any overlap with the COMP.ACT report, the case descriptions include only cases dated after 2012.

It is worth noting that the template for the collection of compensation cases was designed to include claims put forward by victims of crime, in particular trafficked or exploited persons, in cases of human trafficking or in cases in which there were elements of human trafficking or severe labour exploitation. The template was designed to gather information on the route selected to claim and obtain

[8] Astra, Monitoring and Evaluation of anti-trafficking policies: A handbook for victims' advocates, Balkans Act Now BAN-2 Project, https://www.astra.rs/en/balkans-act-against-crime-of-trafficking-now-2/

compensation, the reasons behind this choice, its outcomes, the main bottlenecks and success factors. To ensure the privacy of the persons whose cases were described, the collected cases were anonymised. A total of 60 compensation cases were collected by the project partners and analysed for this report.

Despite the significant number of cases collected, these are not necessarily representative of the overall situation in Europe. Instead, they reflect the experience, practice and knowledge of the NGO partners in the project and of other stakeholders. The NGO partners are specialised civil society organizations with years of experience in working with and for trafficked persons and/or victims of other crimes. The majority of cases concern trafficked and exploited men and women, with only a few cases involving children.

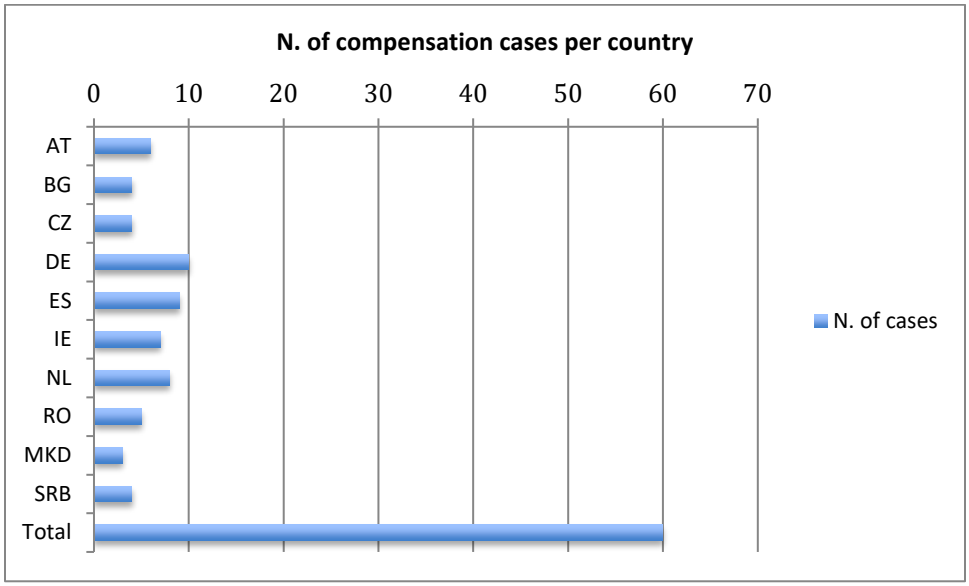
The preliminary findings from the assessments were presented in a focus group meeting held on 7 June 2018 in Vienna, Austria. A total of 50 participants joined the discussions: representatives of NGOs, lawyers, prosecutors, judges, academics and other experts It was not possible to ensure the participation of law enforcement representatives in the focus group meeting. This group will be targeted during other activities of the project.

A draft report was sent to all project partners for further clarifications and feedback, as well as to participants in the focus group discussions and to members of the project Advisory Board. Numerous written comments and observation were provided during these consultations that extended over July and October 2018 and have been integrated into the report.

1. Learning from practice: the compensation cases collected

The Justice at Last project engaged in a data collection exercise to learn from practice in claiming compensation for trafficked or exploited people, with a view to identifying barriers that prevent victims of crime from claiming and obtaining compensation, as well as to examine best practices.

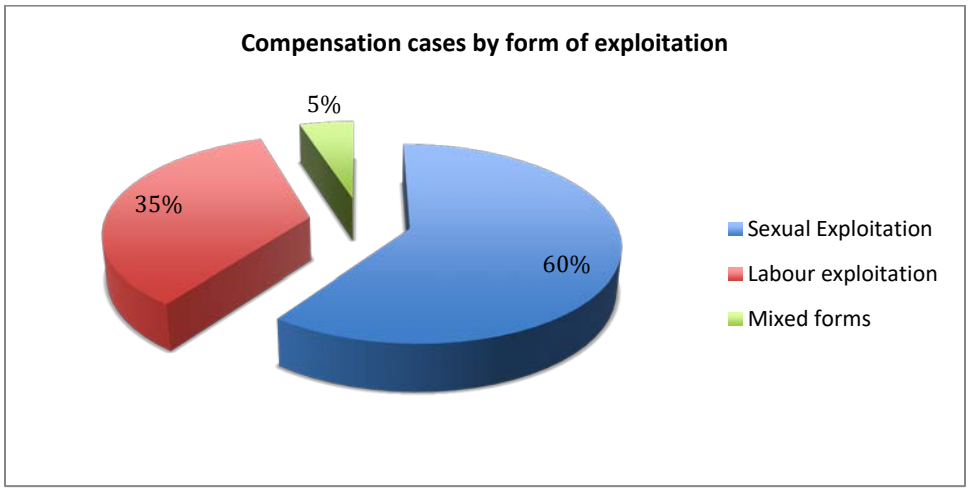
This section presents quantitative findings relating to 60 cases of compensation claims put forward by trafficked and or exploited persons in ten countries. The following graph provides a breakdown of the cases collected by country.



The cases concern situations in which people were exploited. Claimants are victims of crime, in particular trafficked persons and exploited persons where elements of human trafficking were present but could not be proven. 52% of claimants were EU citizens and the remaining were non-EU, including citizens of Serbia and the former Yugoslav Republic of Macedonia (FYROM).

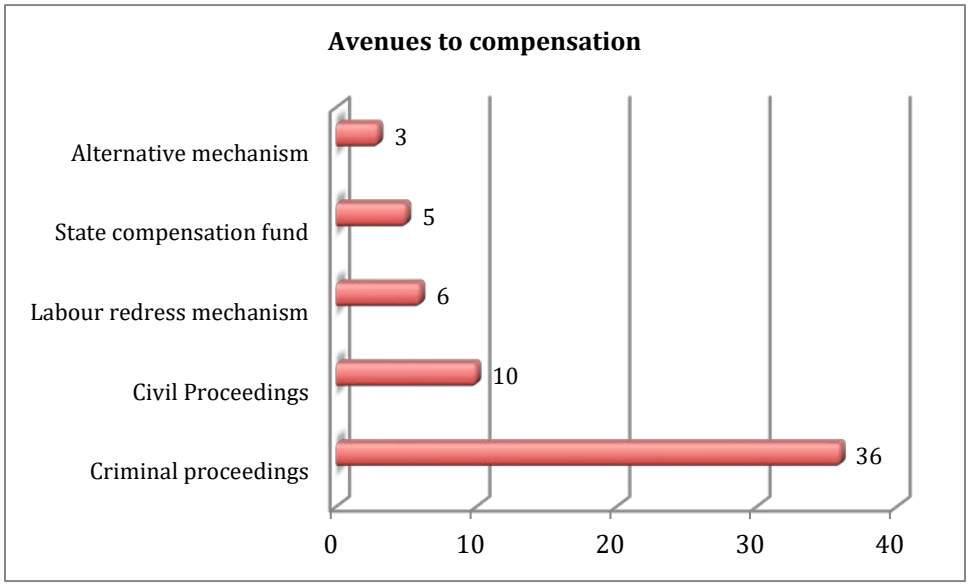
The cases examined relate to proceedings for the following offences: trafficking in persons, servitude, slavery, forced labour, pimping, smuggling of migrants, rape, grievous body harm, offences against the rights of foreign workers, fraud, labour exploitation, and various violations of labour law. The majority of cases (i.e. 50 out of 60) concerned judicial proceedings for the offence of trafficking in persons.

The following graph provides a breakdown of the cases by form of exploitation. The great majority of people were exploited for sex work (60%), followed by labour exploitation (35%) and in 5% of the cases people were exploited for both sexual and labour exploitation or for labour exploitation and begging or sexual exploitation and exploitation in criminal activities.

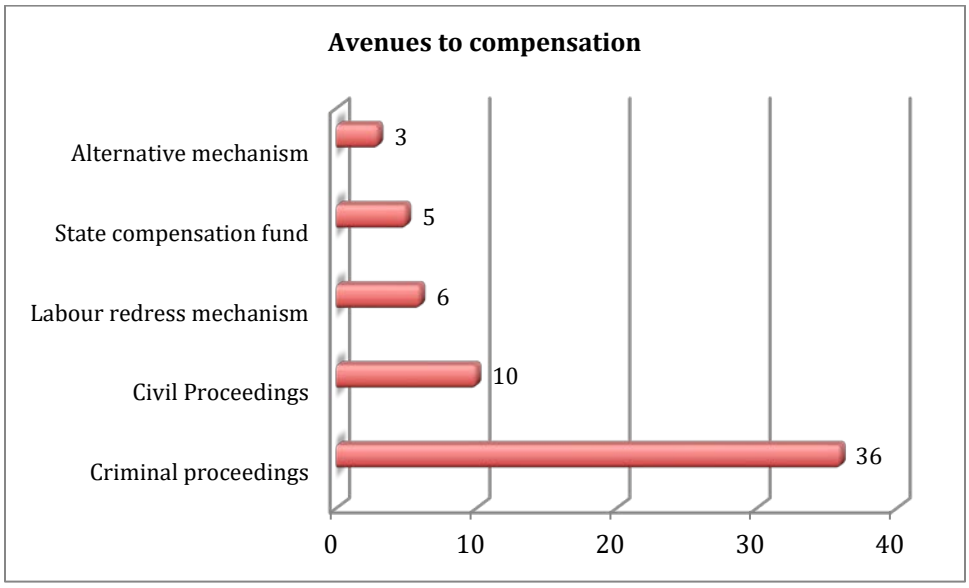


In all the cases analysed, trafficked or exploited people pursued compensation for the harm suffered via various avenues including: criminal and civil proceedings, labour redress mechanisms, state compensation schemes and alternative mechanisms. Labour redress mechanisms were accounted for separately because they constitute a very specific mechanism used only in some countries.[9] As for alternative mechanisms, these include out of court settlement, mediation and other mechanisms for redress, such as statutory accident insurance.

The graph below presents a breakdown of the cases according to the type of mechanism selected for claiming compensation.



[9]The features of labour redress mechanisms are discussed in the next chapter.



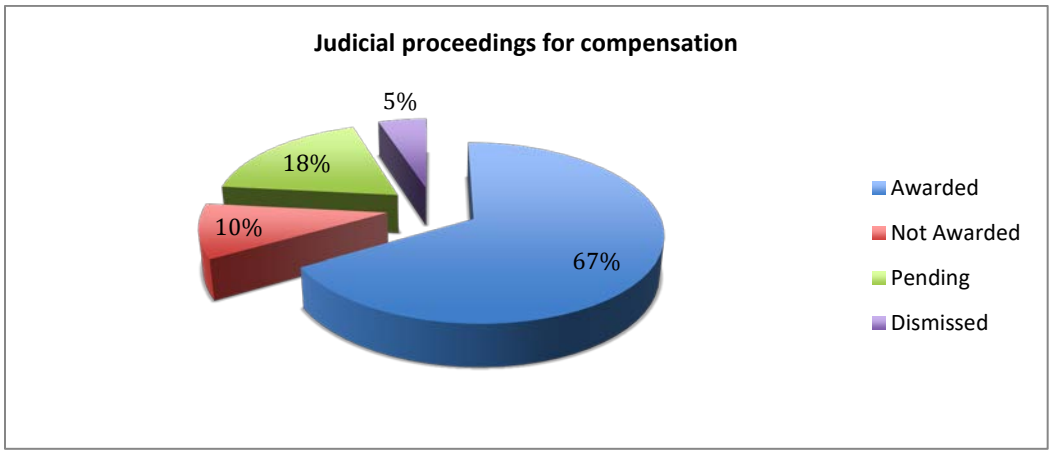
The graph above shows that 60% of the compensation claims of trafficked and exploited persons were addressed in criminal proceedings; these were civil proceedings appended to a criminal case.[10] With regard to civil proceedings, these were used in 17% of the total number of cases; moreover, it is worth noting that 60% of the claims in civil proceedings were put forward following a criminal case in which the compensation claim was referred to a civil court for assessment of the damages, so as to avoid considerable delays in the criminal proceedings. The remaining 40% of claims in civil proceedings relate mostly to cases in which trafficked or exploited persons lodged claims for unpaid wages and or other violations of labour law; these are often cases in which criminal proceedings for human trafficking were either not initiated or discontinued. A specific labour redress mechanism was used in 10% of the cases. Only 8% of the cases concern state-funded compensation schemes. This distribution of cases reflects the critical issues of compensation mechanisms, for example with regard to costs, legal aid, protection measures, burden of evidence and eligibility requirements; these issued are discussed in the next chapter.

The 60 cases collected relate to proceedings in which for the most part a single victim was involved in pursuing compensation for the damage sustained. However, a few cases concern more than one trafficked or exploited person who submitted individual claims for compensation within the judicial proceedings. Group cases in this quantitative analysis were taken to count as one case.

In terms of outcomes of the proceedings, the graph below provides a simple breakdown of the cases collected. Judicial proceedings for compensation concluded with a decision to award compensation to the trafficked or exploited person in 67% of the cases (i.e. 40 cases), out of which only 27% (i.e.11 cases)

[10] This is often referred to as adhesion procedure: the victim files a civil claim for compensation against the offender as a part of a criminal trial, rather than pursuing damages in a separate civil action.

of the awarded sums were paid or are being paid to various extents. In other words, compensation was granted in 40 cases, but in 29 of these cases victims did not receive any monetary compensation.



With regard to the amount of the damage recognised and awarded to the trafficked or exploited person, there are huge differences among the cases collected. The highest award was granted by a Criminal Court in Romania to a woman who was trafficked for the purpose of sexual exploitation by an organised crime group. The Court recognised moral and material damages for sexual exploitation, drug addiction and HIV infection and awarded €190,000. The sentence is pending execution.[11] The lowest amount was granted in a case of trafficking for sexual exploitation in Austria; the Criminal Court awarded compensation of €800 to the woman for moral and material damages. The sentence is pending execution.[12] Furthermore, the cases show that there can be significant differences between the amounts claimed in damages and the awards granted; the reasons are multiple and reflect the differences in the regulatory frameworks, approaches, and methods of substantiating the claims and calculating the amounts in the various countries. In addition, certain types of damages, e.g. loss of earnings from prostitution, are rejected in some countries but accepted in others. These issues are discussed further in the next chapter.

The cases reveal the complexity of compensation proceedings that very often involve examination before a court of first instance, followed by proceedings before an appeal court, and sometimes the case is taken to a higher tribunal (e.g. court of cassation or other court of third instance). The duration of these proceedings varies significantly. Clearly, it is quite unpredictable how long compensation claims in criminal, civil or administrative proceedings may last; it depends on multiple factors related both to the individual circumstances of the case and to the country legislative and judicial practice. For example, the longest case included in this analysis lasted nine years, the first compensation claim was put forward in 2009, rejected in 2013 and the last appeal was heard in 2018, after which the claimant withdrew the claim. The shortest case was dealt with within one year.

[11] Case RO01
[12] Case AT03

2. Learning from compensation practices

Legal aid and legal representation are essential to enable trafficked and exploited persons to seek and obtain compensation. This chapter begins by illustrating the importance of legal aid and the need for specialist casework. It is the victim's lawyer who helps the victim in determining the most suited means to pursue compensation. With this premise, this chapter then discusses practice and critical issues for each mechanism to claim compensation (i.e. criminal and civil proceedings, labour redress mechanisms or alternative mechanisms), and highlights promising practices.

2.1 The case for specialist legal casework

Trafficked and or exploited persons require legal assistance and representation to effectively enforce their rights, including their right to compensation. This entitlement is provided in international and European standards.[13]The Council of Europe Convention on Action against Trafficking in Human Beings in particular recognises the complexity of court and administrative procedures and establishes their right to information on rights and services available to them, including information on all relevant procedures for claiming compensation, in a language that they understand. The Convention further establishes victims' right to legal assistance for the duration of any relevant civil, criminal, administrative or other proceedings.[14] The Victims' Rights Directive also establishes that victims have the right to access legal advice and legal representation free of charge when they have the status of parties to the criminal proceedings.[15] The European Court of Human Rights recognises that failure to provide a person with free legal aid may result in a breach of Article 6 of the ECHR; this may relate to criminal proceedings[16] or civil proceedings if it is ascertained that effective access to a court necessitates free legal assistance, for example because of the complexity of proceedings or the emotional character of a situation.[17]

Together with the right to assistance, the right to legal advice and representation is key to empowering victims and enabling them to evaluate their situation and make an informed decision about their options and possible forms of legal redress.

[13]UN Protocol to Prevent, Suppress and Punish; Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime [UN Trafficking Protocol], Article 6 (3); Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [EU Trafficking Directive], Article 11.5; Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [Victims' Rights Directive], Article 3, 4,6, 9 ad 13, Recital (38), UN OHCHR, Recommended Principles on Human Rights and Human Trafficking, 2010, Guideline 4(8), Guideline 6 (2) (3) and (5), Principle 9 & Guideline 9 (2).

[14]Council of Europe Convention on Action against Trafficking in Human Being, CETS. 197, 2005, Article 12 and 15.

[15]EU Directive 2012/29/EU, Articles 13 & 14.

[16]Airey v. Ireland judgment, 9 October 1979, .. 26.

[17]P., C. and S. v. The United Kingdom, judgment, 16 October 2002, para. 88-91, Golder v. the United Kingdom, Judgment of 21 February 1975. See also Council of Europe, Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, para. 196.

National law generally does not provide an automatic right to free legal aid; this depends on domestic law requirements and it is often means tested. In some countries, the right to legal aid is tied to having legal residence or a stay or residency exceeding 90 days; as a result, irregular and undocumented migrants, even if they are victims of crime, are excluded.[18]

Victims participating in criminal proceedings are usually referred to existing pro-bono services. However, state-funded legal aid is not always completely free and is also limited in scope and quality. For example, it is often provided only in criminal proceedings, and is often not available at an early stage of the proceedings (e.g. first questioning or interview); or else it foresees representation in court only under specific circumstances.[19]

In Austria, victims of trafficking are entitled to state funded specialised legal advice and representation from the very first contact with the authorities through the partnership with the NGO LEFÖ-IBF.[20] In Spain, all victims of trafficking are entitled to state funded legal assistance without the requirement of a financial means test.[21]

Trafficked persons require specialist casework for the whole duration of proceedings, including in relation to immigration and administrative law, criminal and civil proceedings and pursuing compensation. Given the complexity of trafficking cases, NGOs therefore seek to mobilise specialised legal aid to assist their clients. In the majority of cases analysed, the NGOs made different arrangements to secure such expertise, for example by employing specialised lawyers, establishing partners with law firms, engaging and partnering with specialised pro-bono lawyers. For instance, in the Czech Republic, NGOs can provide only legal counselling, and cooperate with law firms to provide legal representation to victims. In Serbia, ASTRA established an informal network of lawyers who are trained and sensitised to represent trafficked persons.[22] NGO usually have to secure their own funding for legal aid and representation through projects; and hence without state funding their capacity is limited. In some countries, funding from the national anti-trafficking budget is allocated to cover the cost of a lawyer who works on trafficking cases only.

The cases collected for this assessment clearly illustrate that the representation of trafficked persons in claims for compensation necessitates a significant level of work in preparation of each case. It takes time to counsel victims on their rights, and help them to understand how the legal system operates and what possibilities of obtaining compensation exist. Each case requires preparation from the early stage of identification and investigation through to submission of the claim, the gathering of evidence, the representation in court hearings, and, possibly, an eventual appeal. The complexity of the proceedings demands specialist casework.

[18]European Parliament, The Victims 'Rights Directive 2012/29/EU. European Implementation Assessment, EPRS, 2017, p.62.
[19]For example in Ireland the Legal Aid Board provides information on the right to compensation but it is not mandated to appear or be present at court unless the victim's sexual history is called into question.
[20] Council of Europe, GRETA Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Austria, GRETA (2015)19, para. 142 and 145.
[21] Council of Europe, GRETA Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Spain, GRETA (2018)7, para.. 213.
[22]Justice at Last Project, Questionnaire on compensation for victims of crime, Serbia, 2018.

Some cases last for several years and clients are assisted in their claims through various procedures and multiple appeals. It is challenging for NGOs to secure funding for each client over such long periods of time (e.g. five or six years on average or more) and to ensure that the same lawyer will support and represent the client from beginning to end. Pursuing compensation over years of judicial proceedings is extremely stressful for the trafficked or exploited person who cannot move on with his or her life and may be confronted with his or her exploiter(s) multiple times. It also becomes challenging for victim support organizations to maintain contact with the victim over very long periods of time.[23] The case examples below are illustrative of these challenges.

Pursuing compensation in criminal and civil proceedings

In 2002, an 18 years old man from Serbia with a severe physical disability was recruited by a neighbour to be severely exploited in forced begging in various Balkan countries. In 2007, he was identified as a victim of trafficking during a routine police check and was referred to the NGO ASTRA for assistance. He received a wide range of support services, including legal assistance and representation. He took part in criminal proceedings for THB as an injured party and submitted a claim for compensation. The court convicted the traffickers of THB and referred the man for compensation to a civil court. Following the end of the criminal case, the NGO lawyer continued assisting him in seeking compensation in civil proceedings and submitted a claim in 2011. The Court granted compensation of 18,000 Euro in 2016; however the decision was not executed. The NGO provided support and legal representation to the man throughout the duration of the proceedings.[24]

Pursuing compensation through labour redress mechanism and civil proceedings

A woman exploited for domestic work in Ireland reported the crime to the police and was referred to the National Referral Mechanism (NRM) in 2011 to receive assistance and support. A criminal investigation was opened but subsequently discontinued. In 2016, the woman was informed that she was not going to be officially recognised as a victim of trafficking. Meanwhile, the woman received legal advice and was supported to pursue compensation for breaches of her employment rights. She submitted a claim to the Workplace Relations Commission in 2011 and won her case. The decision was later appealed to the Employment Appeals Tribunal and the award was finally upheld in 2017. Further applications have now been made relating to enforcement of the award. The case was ongoing at the time of writing.[25]

2.1.1 Determining the most suited means to pursue compensation

The EU-funded COMP.ACT project has developed guidance for lawyers and other professionals on

[23]Cases: CZ04, SP05.
[24] Case SRB01
[25] Case N.IE02

supporting and representing trafficked persons in compensation claims.[26] This guidance is based on a solid understanding of the victim's situation and experience of exploitation and is focused on the victims' needs.

The compensation claims examined for the present assessment show that depending on each client's situation, the country legal framework and practice, specialised lawyers assist each person in pursuing a compensation claim through the most suited avenue/s for their situation. In doing so, lawyers usually work in close partnership with social workers and psychologists, who support the person psychologically and in meeting basic needs (food, shelter, medical care). Their role is not only supporting the victim during the trial but also preparing reports that can provide information and evidence on the damages suffered.

The following are some case examples collected that show how lawyers help their clients in defining their legal objective and pursuing compensation through the most appropriate redress mechanism.

A man from the Czech Republic was trafficked to the UK under false job promises. Upon arrival, the employer confiscated his identity documents, assaulted him and forced him to work 12-16 hours per day cleaning buses, houses and offices. The man was dependant on the employer for food and accommodation. He was paid randomly and very little. He lived under these conditions for about three years. Then he escaped by deliberately provoking an accident, and reported his situation to the police. He received legal and psychological support from a NGO and participated as an injured party in criminal proceedings for THB. He received state-funded legal representation and pursued a compensation claim within the criminal proceedings. This route was chosen to enable the victim to deal with everything in one procedure and to protect him from re-victimisation. However, compensation was not awarded and the matter was referred to civil proceedings, which meant that the claimant had to decide whether to initiate a civil claim.[27]

In some instances, lawyers advise victims to claim compensation in both criminal and civil proceedings. One lawyer explained:

> *"We often start a criminal procedure and then at the same time we advise our clients to also start a civil action in the labour court. We ask the labour court to wait with starting the court procedure, until we obtain more evidence in the criminal proceedings. In the criminal procedure, we then claim compensation mainly for non-material damages and in the labour court for unpaid wages".*(Victim's lawyer) [28]

2.2 Obtaining compensation from the offender in criminal proceedings

2.2.1 Features and critical issues

Article 15.3 of the European Anti-Trafficking Convention provides for the right of victims to compensation. Article 16 of the EU Victims' Rights Directive stipulates the right of victims of crime in the

[26]COMP.ACT, Findings and Results of the European Action for Compensation of Trafficked Persons, 2012 http://www.compactproject.org.
[27] Case N. CZ01
[28] Focus Group Discussion, Vienna, 7 June 2018.

course of criminal proceedings to obtain a decision on compensation by the offender, within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings. The Victims' Rights Directive further establishes that Member States shall promote measures to encourage offenders to provide adequate compensation to victims.

There are two main ways through which victims can obtain compensation in criminal proceedings from the offender. First, the victim may join the criminal procedure as a joint plaintiff/injured party/civil party or as private prosecutor depending on domestic law (civil proceedings appended to a criminal case). Secondly, the judge can order, as part of the sentence, an ancillary financial sanction on the trafficker to compensate the victim.[29] However, with regard to the latter it appears that criminal courts make little use of this possibility.

The analysis of the cases collected shows that a civil procedure appended to a criminal case is the most frequent route selected (60% of cases collected): the victim files a civil claim against the offender as part of a criminal trial. For example, in Spain this route to compensation is usually selected because it shortens the period of uncertainty for the victim.

Promising practice – Prosecutor's obligation to request victim compensation

In Spain, the law on the standing of victims of crime in practice[30] provides that public prosecutors are obliged to request compensation for the victim from the defendant regardless of the victim's role in proceedings, unless the victim waives this right.

In the cases of trafficking for sexual exploitation examined in Austria, clients were advised on pursuing a civil claim for compensation appended to criminal proceedings because this procedure is free and time saving. In Austria, the authorities have entrusted the NGO LEFÖ-IBF with victim support; they provide psychosocial assistance from the first contact with the trafficked person and arrange for a specialised lawyer to provide free legal aid and representation. LEFÖ-IBF accompanies and supports the person throughout the proceedings, in coordination with the lawyer, thus also ensuring that measures for preventing re-victimisation are taken from first interview throughout investigation to trial.

The availability of measures to protect victims from secondary and repeat victimisation and intimidation is another factor that contributes to selecting this route to compensation. The cases collected show that in numerous cases of criminal proceedings for trafficking, measures for the protection of vulnerable victims were taken, for instance to avoid direct confrontation with the offender, to treat them in a sensitive manner and respect the victim's dignity. For example, in Spain, victims of trafficking may be granted the status of protected witnesses and this entails, inter alia, protection of victim identity, avoidance of any contact with the offender and deposition made by video-recorded statement, although this is not done systematically. However, there have also been cases in which the rights of victims with specific protection needs were not respected, and measures to avoid secondary victimisation were not taken, particularly to limit intrusive questioning on the victim's private life not related to the criminal

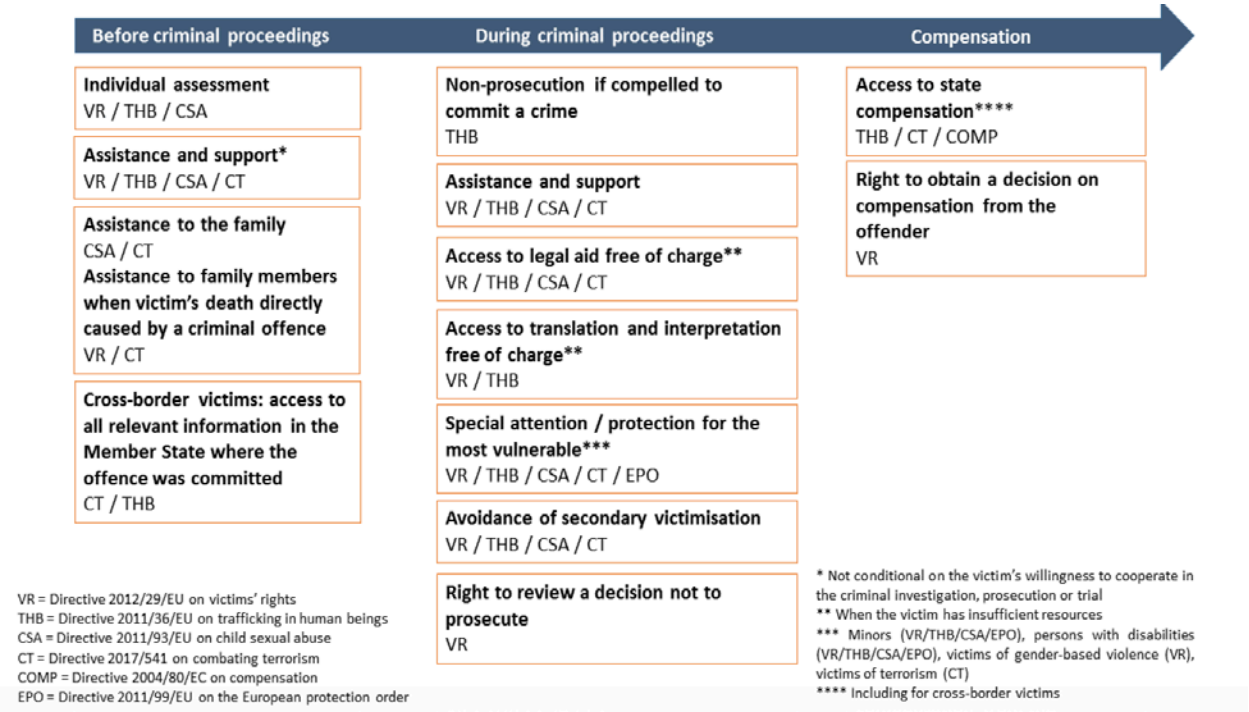
[29] See Council of Europe, HELP On line course Human Trafficking for legal professionals, http://help.elearning.ext.coe.int/course/view.php?id=1936

[30] Spain, Law 4/2015 of 27 April 2015 on the standing of victims of crime, Art. 110.

offence. In addition, court infrastructure and facilities do not always provide for separate entrances and waiting areas for victims to avoid contact with the offender and his/her family or friends. Information from several cases reveals that victims were exposed to direct confrontation with their alleged perpetrators in court.

In some countries, for instance in Germany, the credibility of the victim may be questioned ("*She is only after the money"*) when she or he pursues a claim for compensation within a criminal case Thus, this issue, amongst others, may be a consideration to opt for another route to compensation.[31]

Main victims' procedural rights as established in EU law



Source: European Parliament, The Victims 'Rights Directive 2012/29/EU. European Implementation Assessment, EPRS, 2017, p.22

2.2.2 Establishing the nature of the damage and providing evidence

Victims have a right to monetary compensation from convicted offenders in respect of both material damage and non-material damage. The table below list some possible types of damages.

[31] On the challenges to seek compensation see also the GRETA Report on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Germany, GRETA(2015)10, para. 173-181, and Social Fieldwork Research (FRA NET) Severe forms of labour exploitation Germany, 2014 which refers particularly to the long duration of the proceedings, the lack of clarity about the actual employer that can be held responsible for the exploitation, and victims' unwillingness of to press charges against the offender.

Possible types of damages

Material damages	Non-material damages (also called moral damages)
Costs of medical, physical, psychological or psychiatric treatment required by the victim	Physical or psychological injury
Costs of physical and occupational therapy or rehabilitation required by the victim	Pain and suffering
Lost income and due wages according to national law and regulations on wages	Emotional distress
Legal fees and other costs or expenses related to the victim participation in criminal proceedings	Damage to reputation
Costs of necessary transportation, temporary childcare, temporary housing of the victim	
Future lost incomes due to loss of earning capacity	

Source: Table developed on the basis of UNODC, Model Law against Trafficking in Persons, 2009.

Establishing the nature of the damages sustained by the victim and providing as much proof as possible is necessary to substantiate the compensation claim and inform decisions on appropriate compensation to the victim. The compensation cases collected show that there are a number of challenges in this respect and that compensation claims may be completely rejected or may result in minimum awards.

Another finding from the cases is that establishing the nature of damages and providing proof requires collaboration and joint efforts of the prosecutor, the victim's lawyer, the victim support organization, and of course of the victim her/himself who needs to be committed and ready to go through the path of pursuing compensation with all its implications. The following is a discussion of some of the issues in this respect that emerge from the compensation cases examined.

In criminal proceeding, the burden of evidence lies mostly with the public prosecutor and this means that a well-trained prosecutor who is knowledgeable about human trafficking can play a major role in documenting the damage sustained by the victim. For example, in a case of trafficking for sexual exploitation in Spain the prosecutor illustrated the serious consequences of the harm suffered by the victim by documenting the need to provide her with very specialised support for recovery and rehabilitation; the prosecutor used expert reports on risks involved in the continued exercise of prostitution as evidence of the consequences of the crime on the victim, and added the aggravating circumstances of freedom restriction and threats imposed by the trafficker.[32]

Conviction of THB and compensation award

The victim witness met a businessman in her country of origin, who offered her work as a waitress in Spain. Once in the country of destination, she was sexually exploited under threat and physical assault. The court considered the facts described by the complainant proved, and convicted the defendant. The final sentence established:

– imprisonment for 6 years and 6 months for THB and forced prostitution

– restraining order and prohibition to communicate with the victim for 5 years

– restraining order and prohibition of communication with the family of the victim (European Protection Order)

– Probation for 6 years following the custodial sentence

- Compensation order in favour of the victim for moral and material damages in the amount of €65,000

- Payment of procedural costs for the trial.[33]

[32] Case SP-03.

[33] Case SP-03.

In addition to the prosecutor, the judge obviously plays a fundamental role in deciding on the compensation claim. The cases examined indicate that the judge's awareness, understanding and sensitivity concerning human trafficking and related crimes are decisive in handling cases in court, in the application of victim/witness protection measures and in the outcome of the case.

The cases examined further show that the victim's lawyer –if specialised on trafficking issues- plays a very critical role in working with the police and the prosecutor to document and secure evidential proof of the damages suffered by the victim. The victim's lawyer works very closely with the NGO social workers and psychologist to prepare the victim to testify in Court and to collect the evidence to substantiate the claim. In addition, the NGO's support to the victim before, during and after the trial, assisting and accompanying her or him throughout all proceedings, from police interview to testimony in court and after, is fundamental.

In various cases of trafficking for sexual exploitation in which victims submitted a civil claim for compensation within criminal proceedings and were awarded compensation, the evidential proof of the damages was provided through police reports, victim's testimony and through the submission of a medical or an expert report detailing physical and psychological injury sustained by the victim. [34] However, in some instances there are challenges in obtaining an expert opinion or a medical report, for example on health impairment, within the timelines of the proceedings or due to very high costs. In some jurisdictions, the cost of an expert opinion on the psychological condition of the victim is to be paid by the victim and the costs are elevated. The testimonies of other witnesses, friends and/or family members can also contribute to corroborating the case and damage on the victim.[35] In some countries NGOs' social workers may be called upon to testify in court and this may expose them to direct confrontation with traffickers and to risk of retaliation. Furthermore, this has implications for their work since they have to inform their clients that such a possibility exists and this can hinder the building of trust, which is crucial for victims to open up and receive support. In response to this problem, in some countries, for example in Germany, NGOs are calling for the right to refuse testimony, invoking the principle of confidentiality for their counselling work with their clients; in other countries a compromise solution consists of the prosecutor requesting NGOs social workers or other professionals, e.g. psychologist, to submit an expert report, in order to provide information and evidence on the cases and the status of the victim etc., during the instruction – preliminary investigation. The professional will later be called to testify and answer questions in relation to the report submitted at the trial. Proyecto Esperanza noted that their clients have always agreed and authorised them to submit the report. It is unclear should clients deny permission, whether the professionals would still be obliged to collaborate with the court, as this would put them in a serious conflict of interest. In some instances in some countries, professionals from victim support organizations who are invited to testify in court may be granted the status of protected witness in order to avoid confrontation with the trafficker(s) and to reduce risks of retaliation against them.

[34] Cases: RO01, AT01, AT02, BG01.
[35] Focus Group discussion, Vienna, 7 June 2018, Case BG02.

Promising practice
When submitting a compensation claim, the victim's lawyer can include the costs incurred for collecting evidence, for example a forensic or medical report.

In the Netherlands for example, the victim's lawyer collaborates with the police to ensure that in the course of the investigation evidence is gathered also about the possible earnings made by the trafficker(s) (e.g. a calculation of how much the trafficked person earned for the trafficker providing sexual services), as well as the losses sustained by the victim (e.g. including evidence on physical injury and or the psychological condition of the person).[36]

In sexual exploitation cases, the establishment of material damage is particularly challenging; for example, in Bulgaria the court usually rejects compensation claims in respect of material damage of those exploited in the sex industry (loss of earnings from sex work) with the so called "illegal and immoral argument", reasoning that earning money as a sex worker, the victim had committed an offense and the earnings from sex work should be confiscated from the perpetrators in favour of the state. The following is an illustrative example.

The *illegal and immoral argument to reject a compensation claim for material damage*

A young woman from a small village in Northern Bulgaria was unemployed and was recruited through the lover-boy method by a trafficker and manipulated to engage in sex work. He kept all the money and gave her only pocket money. She escaped once with a client, but the trafficker found her and brought her back to work for him. She was exploited for approximately nine months before she managed to escape during a police patrol check. The case was investigated and prosecuted as THB. The woman received psychosocial support from an NGO and pro-bono legal aid and representation. She participated in the proceedings as a civil claimant and injured party. The victim's lawyer secured evidence of moral damages through the testimonies of the police officers who rescued her and the expert report of the NGO social worker who supported the victim in the first weeks after her escape. With regard to material damage, the lawyer relied on the testimony of two other women who engaged in sex work in the same area and confirmed the prices of sexual services, and of other witnesses who confirmed the difficult socio-economic situation of the family and the fact that the woman returned home without any money.

The first instance court convicted the trafficker of THB. In respect of the compensation claim, the judge awarded €4000 as compensation for moral damages from the perpetrator; this was only one quarter of the amount claimed. The judge rejected pecuniary damages because the "the victim K. was an active part in the realization of her relation with the defendant T., whereby the damages caused to her by the crimes of T. are due to her conduct as well. … a general principle in the law is that no one can benefit] from his/her own unlawful conduct, and precisely the conduct of the victim was capable to significantly and objectively facilitate the defendant to commit the crimes". The victim's lawyer appealed against the dismissal of pecuniary damages. The appeal court also dismissed the claim for pecuniary damages (loss of earnings from prostitution) because "the earnings were made in an immoral manner, banned by the law, as Section 329 of the Criminal Code provides". Further, the court held that the money should be confiscated from the perpetrator in favour of the state. At time of writing, the victim had a pending application before the European Court of Human Rights.[37]

In the cases concerning compensation claims by people trafficked for labour exploitation, a number of

[36] Focus Group discussion, Vienna, 7 June 2018.
[37] Case BG02.

challenges emerge with regard to establishing the type of damage and securing evidence. These include challenges in proving that the worker was employed and the duration of employment. The evidence often relies on the testimony of the victim and that of other witnesses, however co-workers may be reluctant to testify for fear of losing their job. In some instances, it is essentially *one person's word against another'*. Where available the evidence from a labour inspection report can prove determinant but this is not often the case.[38] Further, some cases are quite complicated because they involve a large group of people exploited at different times, for various periods and through the use of different means, making it very complicated to establish the damage for each individual.[39] A solution found in some cases has been that of granting each victim the same amount of damage. In this regard, a discussion on what fair compensation entails seems necessary.

The argument regarding the irregular situation of the migrant worker may be used by courts to reject claims for material damage also in labour exploitation cases. The court does not grant material compensation based on unpaid salaries because the worker was irregularly employed and such award would constitute an unjustified benefit.[40] This argument is contradictory to the non-discrimination principle embedded in various international standards, for example Article 4 of the 2014 ILO Protocol to the Forced Labour Convention explicitly requires States to "ensure that all victims of forced or compulsory labour, irrespective of their presence or legal status in the national territory, have access to appropriate and effective remedies, such as compensation".[41] The non-discrimination principle is also established under Article 3 of the European Anti-Trafficking Convention. The Victims' Rights Directive also clearly states that victims' rights shall not made conditional on the victim's residence status in country territory or on the victim's citizenship or nationality (Recital 9, 10 and 17 10).

In cases of exploitation in domestic work, it is even more challenging to prove the trafficking offences. In a case of trafficking for labour exploitation in domestic work, the prosecution pressed charges for the offences of coercion, illegal detention, offence against moral integrity and offence against the rights of a foreigner; compensation for the victim from the defendants was requested only for moral damages. The case involved a woman who was severely exploited by a family. She worked extremely hard, was never paid, often insulted, humiliated and deprived of food. She tried to escape but was brought back and her freedom of movement curtailed. Subsequently, she managed to escape and reported her situation to the police but the police did not recognise indications of trafficking, hence did not identify her as a victim of trafficking and did not refer her to any support organization.[42]

There are a number of cases in which criminal proceedings for trafficking for labour exploitation were initiated and then discontinued, presumably for lack of sufficient evidence. In some cases, there is not always systematic follow up with investigation and prosecution for related offences such as fraud,

[38] The Employers Sanctions Directive2009/52/EC stipulates: (17) Member States should further provide for a presumption of an employment relationship of at least three months' duration so that the burden of proof is on the employer in respect of at least a certain period.
[39] Case NL06.
[40] EU Study on case law on THB for labour exploitation, 2015, p.89
[41] ILO, Protocol to the Forced Labour Convention, 2014. See also ILO Recommendation No.203, which stipulates in para. 12(e) that victims of forced labour should be able to pursue 'appropriate administrative, civil and criminal remedies … irrespective of their presence or legal status in the State, under simplified procedural requirements, when appropriate'.
[42] Case SP07

deception. If trafficking for labour exploitation is not prosecuted under another crime, it becomes very difficult to claim compensation in civil proceedings as a victim of labour exploitation or other wrong.[43]

In cases of trafficking for forced criminality it may be difficult for the victim to claim unpaid wages, as in many instances the court does not consider "forced criminal activity" as a form of work or services. In a case of trafficking for forced criminality, the lawyer therefore put forward a claim for unpaid social benefits as vulnerable person as the basis for the calculation of material damages. It should be noted that the EU Trafficking Directive provides that "The expression 'exploitation of criminal activities' should be understood as the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain" (Recital 11). The Directive also establishes that "the exploitation of begging […] falls within the scope of the definition of trafficking in human beings only when all the elements of forced labour or services occur". Furthermore, the ILO has repeatedly stressed that "Forced labour is not defined by the nature of the work being performed (which can be either legal or illegal under national law) but rather by the nature of the relationship between the person performing the work and the person exacting the work".[44] Therefore, it can be argued that victims should be compensated for lost earnings while they were forced to work for the trafficker and commit criminal acts.

2.2.3 Calculating the monetary value of the damage

A number of critical issues emerge from judicial practice relating to methods of calculating material loss in the compensation claims examined. There are significant differences among countries regarding both the methods and the approaches used to calculate the amount of compensation owed to the victim. Often the judiciary lacks clear or common guidelines or benchmarks that could be used to inform their assessment and calculation of material and moral damages. Yet, prosecutors' and lawyers' practice suggest that the more accurate and documented the figures and estimations presented in the compensation claim, the easier it will be to persuade the judge to grant the requested amount.[45] In some countries, difficulties are encountered in the estimation of moral damages for pain and suffering and lost opportunities, common guidelines for calculation of damage amounts would help ensuring transparency and fairness.[46]

The collected cases are helpful in identifying some of the factors and reasoning followed by prosecutors and judges in the calculation of moral and material damage.

Factors considered by courts in calculating non-material damages may include:

- Medical report on consequences of physical and or psychological injury
- Expert reports on the psychosocial condition of the person
- Expert reports on the risks involved in the continued exercise of prostitution,

[43]EC, Study on case-law relating to trafficking in human beings for labour exploitation, 2015; Council of Europe, GRETA7th General Report on GRETA's Activities, 2018, p. 48; EU FRA, Severe labour exploitation in the EU, 2015.
[44]ILO, Global Estimates on Forced Labour, 2012, p. 19.
[45] Focus Group Discussion, Vienna, 7 June 2018.
[46] Focus Group Discussion, Vienna, 7 June 2018.

- Duration of the exploitative situation
- Age of the person
- Use of violence or threats, restriction of freedom, other aggravating circumstances
- Guidelines on measuring pain and suffering
- Principle of prohibiting unjust enrichment through compensation for non-material damage
- Background of the victim and circumstances of the exploitative situation
- Type of exploitation

In Austria, courts may consider the guidelines on measuring pain and suffering.[47] In Bulgaria courts rely on a ruling of the Plenum of the Supreme Court (No. 4/1968) which stipulates that in determining the amount to be awarded as compensation for non-material damage, all facts and circumstances related to the damage must be taken into account and should be expressly stated by the courts in their reasoning.[48]

Reasoning of the court

In a case of trafficking for sexual exploitation involving a young woman, the court took into account factors such as: the young age of the victim when the exploitation began; the duration of the exploitation; the restricted freedom of movement; the fact that she was in a foreign country, not knowing the language and was prevented from seeking support or protection from the local authorities; the fact that even contacts with her parents were controlled by the trafficker; the poor and deteriorated health and the considerable stress and trauma the victim suffered. The young age of the victim, her immaturity, as well as the prolonged sexual exploitation, in addition to the severity of the criminal offence justified the compensation of BGN 30,000. However, the court considered that above that amount, the claim of BGN 100,000 was excessive as the sustained pain and suffering did not threaten the victim's health or life.[49]

Factors considered by courts in calculating material damages may include:

- Calculation of unpaid wages based on minimum wage or collective bargaining agreement in relevant occupational sector
- Period of employment (number of working days, number of working hours per day, annual leave)
- Lost income
- Property damage
- Costs of medical, physical, psychological or psychiatric treatment required by the victim
- Costs of physical and occupational therapy or rehabilitation required by the victim
- Legal fees and other costs or expenses related to the victim participation in criminal proceedings

Calculating damages in sexual exploitation cases: The Dutch approach

[47] Case AT01, see also http://widab.gerichts-sv.at/website2016/wp-content/uploads/2016/09/Sach-2016-117-117-Schmerzengeld.pdf
[48] Case BG04.
[49] Case BG04.

Zwolle-Lelystad District Court, 2010

"The victim in this case submitted a claim for €100,000 for material loss and €5,000 for emotional injury. Explaining the claim of *material loss*, she argued that during the period in prostitution for which charges had been brought, she had earned €300 to €700 a day. She had to surrender all of her earnings to the suspect. She based the calculation on a sum of €100 a day in surrendered income; this amount was multiplied by 50 months (five years, with an average of two months that she had not worked each year), making a total of €100,000. Her [lawyer] stressed at the hearing that, to avoid any discussion at that time, a very conservative estimate had been made. The Public Prosecution Service argued that the claim should be awarded in full and that an order to pay compensation should be attached to it. The court found that the investigation at the hearing had adequately shown that the aggrieved party had suffered damage as a direct result of the acts of the suspect that had been declared proven. The court found it plausible that the amount of €100 for every day worked was a minimum, referring in that context to judgments of the Amsterdam Court of, in which a sum of €100 for every day worked was also adopted. As mentioned above, the court awarded the entire claim and issued a compensation order for the total sum of €105,000".[50]

In the Netherlands, there have been numerous judgements granting compensation to victims of trafficking for sexual exploitation, and the approach illustrated above that is funded on very conservative estimates to calculate material losses has been repeatedly used. There are however variations in the amounts of daily earnings made by victims that courts recognise, and these amounts generally range between €100 and €500. In some cases there are difficulties in substantiating the claims with regard for example to the number of days worked, the number of clients per day; there can be challenges with estimating the amount of money that the victim had to give to the exploiter, or the amount of money that the victim was allowed to keep.[51]

In the former Yugoslav Republic of Macedonia, court practice seems to indicate that each victim of trafficking in human beings is awarded the same amount in compensation regardless of the individual circumstances of the case, the characteristics of the victim, his/her experience, the consequences of the crime.[52] For example in the cases examined, the criminal courts awarded each victim of trafficking €6,500.

Court decisions do not always provide an explanation of their reasoning with regard to the compensation claim. In several compensation claims examined there were considerable differences between the amounts claimed and the awards, and the explanations for these decisions are not always available.[53] However, victims' right to information (Article 6 Victims' Rights Directive and Article 12 European Anti-Trafficking Convention) includes being informed about the court decision and reasoning. This is essential to enable victims' participation in the criminal justice process, to inform their decisions on appeal, to ensure transparency and to inform judicial practice.

[50] National Rapporteur on Trafficking in Human Beings (2012). *Trafficking in Human Beings. Case law on trafficking in human beings 2009-2012. An analysis*. The Hague: BNRM, p. 146.
[51] Cusveller J., Compensation for victims of human trafficking: Inconsistencies, Impediments and Improvements, 2015, p.41.
[52] For example Cases: MKD01, MKD02, MKD03
[53] For example Cases: AT04, AT05, BG02, BG03, BG04.

2.2.4 The issue of 'disproportionate burden on the criminal proceedings'

In a number of compensation proceedings, the criminal court has recognised the damage to the victim, but considered that the evidence of the damage is insufficient and that the assessment of the damage would prolong the criminal proceedings excessively. As a result, the victim is referred to civil proceedings for the evaluation of damage. In this regard, the Explanatory Report to the Council of Europe Convention notes that 'If in proceedings against traffickers, the criminal courts are not empowered to determine civil liability towards victims, it must be possible for victims to submit their claims to civil courts with jurisdiction in the matter and powers to award damages with interest".[54]

For example, in a case of a prosecution of trafficking for sexual exploitation, the victim participated as injured party with a compensation claim for property damage, non-material damage, unjust enrichment and injury to health. The Court held that a decision upon compensation to the victim would require additional evidence that would prolong unduly the criminal proceedings and thus referred the matter to the civil procedure.[55]

In Serbia, the compensation cases examined for this assessment were filed in the course of criminal proceedings for human trafficking in which the victims participated as witnesses and injured parties, and which resulted in convictions of the offenders for trafficking and related crimes. Yet, in all the cases the criminal court referred the victim to civil proceedings for claiming compensation because an assessment of non-material damage would substantially prolong the proceedings.[56] Also in cases in which a forensic expert examination of the victim was submitted providing thorough evidence on the physical and psychological injury suffered by the victim as a result of the crime, the court considered that the information collected through criminal proceedings did not provide reliable grounds to decide on full or partial compensation to the victim.[57] This is a general judicial pattern in Serbia; despite the legal possibilities, the Courts deem that the assessment of non-material damage is to be made in civil proceedings and so far have never decided on a compensation claim made by victims in the course criminal proceedings.[58]

In a case of trafficking in human beings for the purpose of sexual exploitation in Germany, the Court recognised the compensation claim but refrained from ruling on the compensation amount and sentenced the perpetrator in principle. The Court reasoned as follows:

> "The claim is ill-suited to criminal proceedings (…). The decision to refrain from a ruling in this matter takes into account the claimant and the defendant's interest in a rapid termination of the criminal proceedings. The defendant's interest takes priority, e.g. if examining the claim would considerably delay the proceedings (..). Examining the claims regarding the prostitution earnings handed over by the claimant (…) to the defendant would require taking extensive evidence. In view of the fact that the defendant has been

[54] Council of Europe, Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, para. 197.
[55] CZ04, similar reasoning by the Court in cases CZ03, CZ01.
[56] Cases: SRB01, SRB02, SRB03, SRB04.
[57] ASTRA, Position of Human Trafficking Victims in court proceedings. Analysis of Judicial Practice for 2016, 2016, p.24.
[58] ASTRA, Position of Human Trafficking Victims in court proceedings. Analysis of Judicial Practice for 2016, 2016.

in remand since (…), such delays would be unacceptable due to the principle of urgency, even in view of the claimant's interests".[59]

2.2.5 Other critical issues

In many instances, criminal proceedings are initiated for the offence of human trafficking and then the case is dismissed for insufficient evidence. At this stage, if timely informed, the victim's lawyer can appeal the decision of no prosecution and seek a review of that decision in accordance with domestic legal procedures. However, where the legal qualification of the case is changed and the prosecution continues for other crimes, the victim may lose his or her status and the entitlement to a temporary residence permit and be unable to take a civil action for compensation.[60] To exercise the right to a review of a decision not to prosecute, victims of serious crime must receive sufficient information to decide whether to request one (Article 12, Victims' Rights Directive).[61] This information needs to be provided promptly.

Another critical issue with implications for victims' right to compensation occurs in case of plea-bargaining. If the prosecutor negotiates a plea bargaining with the trafficker, compensation for the victim must be sought and the victim must be informed and given the possibility to participate and express her or his views. GRETA has taken a critical view on plea-bargaining in human trafficking cases and has recommended excluding the plea bargaining procedure in human trafficking cases. [62]

2.3. Obtaining compensation from the offender in civil proceedings

2.3.1. Features and critical issues

To obtain compensation from the offender/wrongdoer in civil proceedings, the victim (i.e. claimant) has to file a civil suit against an identified defendant. Such claim can be initiated independently by the victim or it can be appended to a criminal case, or both. The Court decides on defendant's liability and orders for damages to be paid. The focus of the procedure is the assessment of moral and material damages and the onus of proof is on the victim. A civil claim can be submitted also in case the offender is acquitted.

The compensation claims examined suggest that the civil proceedings route was used mostly for one or more of the following reasons:

- there was no other viable avenue to obtain compensation

[59] Case DE07

[60] Focus Group Discussion, Vienna, 7 June 2018.

[61] EC, DG Justice Guidance Document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA Guidance on Victims Directive, 2013, p.31.

[62] See for example Council of Europe, GRETA Report on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Bosnia and Herzegovina 2017(15), p. 46.

- the criminal case was discontinued
- the person was not identified as a victim of trafficking or victim of violent crime
- the civil claim was pursued in parallel with criminal proceedings to increase victims' chances of obtaining compensation

Civil proceedings for compensation were commonly initiated following a criminal case, and usually the facts that were proven in the criminal case were accepted as evidence in the civil case. Hence if the perpetrator had been found guilty, then the victim did not need to prove the offence but the damage. For example, in a case involving a claimant who was forced into prostitution and repeatedly raped by the perpetrator, the Higher Regional Court ruled that to form their opinion regarding whether facts actually occurred or not, courts are entitled to base their judgment on a criminal court ruling.[63]

Compensation claims in civil proceedings were generally lengthy with a duration between three and six years, this period in most cases needs to be added to the years of criminal proceedings that often preceded the case. This time factor can be determinant on a victim's decision about whether investing in the civil action to seek remedy or renounce to this right to rapidly move on with his or her life.

2.3.2 Obstacles and barriers

In civil proceedings, the victim is exposed to direct confrontation with the defendant in an adversarial setting and is not entitled to the special protection measures for vulnerable victims\witnesses that are available in criminal proceedings. This feature alone can constitute a major barrier for a traumatised victim to seek compensation. In addition, the victim may be questioned repeatedly in the course of the proceedings, for example for the purpose of expert examinations.

Another significant barrier is often posed by the victim's irregular residency status or irregular employment situation. Although, international labour standards and European law require that migrant workers enjoy the protection of core labour standards and the right to seek remedies in case of abuse and/or exploitation regardless of their residence status, the reality is that in practice the victim status often matters and may condition their access to compensation.[64] For example, trafficked persons with irregular status may be deterred from claiming compensation for unpaid wages in civil proceedings for fear of being reported for deportation.

There are also very high costs for victims in civil procedures and they constitute a strong barrier hindering victims' access to remedy. These costs can relate to legal assistance and representation, court fees, interpretation, forensic examination etc. In addition, in case the victim loses the case, the court may order him or her to pay all the costs including the cost for the offender's lawyer and the court fees.

[63] Case DE05.

[64] ILO L Declaration on Fundamental Principles and Rights at Work, Article 31 EU Fundamental Rights Charter, Right to fair and just working conditions. The EU FRA has argued that "national legislation adopted as a means of social policy may not exclude third‐country national workers in an irregular situation from rights under such legislation merely on the basis of their irregular residence status". See EU FRA, Severe labour exploitation in the EU, 2015, p. 17.

State funded **legal aid** is not always accessible, it may be available upon certain conditions such as a decision of the judge on its necessity, on a financial means test or on whether the case has a reasonable chance of success. For example, in the Netherlands victims of labour exploitation may be entitled to free legal aid depending on a means test and, in the event that they are awarded more than 10,000 in compensation, the lawyer's cost needs to be reimbursed.[65]

In Serbia, state funded legal aid is not available in civil proceedings but the Court can exempt the victim from the payment of **court fees** where she or he proves to be poor (e.g. submits evidence of evidence of unemployment, lack of property or income). A major barrier for victims is often the cost of a **forensic expert examination,** which is required in civil proceedings; it is extremely expensive and takes a long time. In some cases, if the defendant does not appear in court and cannot be found, the victim has to pay for trafficker's temporary representative too.[66]

Court fees can be an obstacle for victims in the Netherlands too, unless the victim manages to be exempted because of very low or no income through a municipality social welfare scheme.

In the Czech Republic, the victim is required to pay **court fees** to initiate the proceedings within a set timeframe and this may be an obstacle, since she or he usually has no means to pay; the court fees may be reduced depending on the financial situation of the applicant.

In practice, unless NGOs manage to secure funding to support a victim through civil proceedings and to pay for these costs and fees, there are very few possibilities for victims to claim compensation through this avenue.

2.3.3 Establishing the nature of the damage and providing evidence

The compensation claims collected point to various challenges that the victim encounters in proving that he/she has suffered the damage as a result of the offence and in securing evidence as to the extent of the harm suffered. Many challenges are similar to those illustrated in criminal proceedings, for example with regard to the illegal or immoral argument. Proving the employment relationship and its duration (number of days and hours they worked, the type of work, etc.) is also difficult, sometimes photographs at the workplace and worker's testimony describing the work place in detail, are used and backed up with testimonies from other workers. In some countries it is not possible to claim unpaid wages if the worker has no contract or has an irregular status. Another challenge could emerge in cases in which the worker was exploited while being unemployed, in these cases some victims' lawyers have been claiming social unemployment benefits to which the person was entitled under domestic law.[67]

Promising practice

In the Netherlands FairWork has developed small booklets for vulnerable workers to help them maintain a diary of the amounts they have earned and the expenses incurred. These diaries can be very useful in bringing evidence of the damages in terms of unpaid wages and underpayments.

[65] Case NL01.
[66] Cases: SRB01, SRB03.
[67] Focus Group Discussion, Vienna, 7 June 2018.

There are also cases in which victims, assisted by specialised NGOs and lawyers, succeed in their claims, particularly with regard to individual labour law actions to claim compensation for unpaid wages, underpayment (underpayment per hour, no holiday or time off), social security contributions, other breaches of labour law.

Undocumented worker granted compensation for unpaid wages
Javinder was exploited by an employer in a shop in the Netherlands. He had to work 10-12 hours a day, he could not sit during that time and was paid around €10 per day. He lived above the shop in poor conditions with no mattress and hot water. He was undocumented and had no contract, and he had nowhere to go. If he complained about his work situation, he would be told to hand in the key to the shop and sleep on the streets. At some point he managed to exit this situation and file a complaint. He was recognised as a victim of trafficking and referred for support. However, the case was prosecuted as one of illegal employment, not human trafficking. With the assistance of a lawyer, Javinder filed a civil claim for compensation under labour law, he was awarded and paid compensation amounting to about €10,000. Among the factors contributing to the successful claim, was the good cooperation established between the lawyer, the prosecutor, the police and the victim support organization which helped in collecting evidence from the criminal proceedings for use in the civil action, for example with regard to establishing the employment relationship.[68]

Promising practice-presumption of 6 months' employment in cases of illegal employment

In the Netherlands if a migrant has worked in an irregular situation (e.g. no work permit), his /her employer is liable to pay back any outstanding remuneration and a presumption of six months' employment is made. This provision lightens the burden of proof on the migrant claiming compensation for unpaid wages. Moreover, the irregular status of the worker does not constitute an obstacle for the worker to start a civil action.[69]

2.4 Obtaining compensation from the offender via a labour law redress mechanism or via alternative mechanisms

2.4.1 Features and critical issues

In some European countries there are specific labour redress mechanisms for breaches of labour law and labour exploitation. Depending on the country, the worker's irregular residency status or irregular employment situation may impact on their ability to access, seek and obtain redress through these mechanisms.

Labour law procedures are used mostly to deal with financial losses related to breaches of labour law. Depending on domestic law, certain categories of damages may be excluded, for example moral damages, pain and suffering or medical expenses, and also the costs of legal proceedings; there may also be caps or limits on awards. The methods for calculation of financial losses appear to be easier and

[68] Case NL01.
[69] Case NL01, NL02

more straightforward, as competent adjudicating authorities often have parameters or scales to guide their calculation.

Type of losses in labour redress mechanism
Unfair dismissal
Not being provided with a contract
Non-payment of wages
Underpayment (e.g. below minimum wage or collective agreement)
Unlawful wage deductions
Working in excess of 48 hours per week
Not receiving a premium for working on Sundays
Not receiving sufficient rest periods and breaks
Breach of annual leave and public holidays entitlements
Source: Collected cases

2.4.2 Compensation practices using labour redress mechanisms

The case analysis indicates that a labour law redress mechanism constitutes the main route to compensation for trafficking victims and exploited migrants in Ireland, where labour exploitation is involved. In other countries, compensation practice using labour redress mechanisms seems quite limited and often refers to situations in which trafficking prosecutions were discontinued.

For example, in the Netherlands, the Labour Inspectorate SZW has the power to impose penalties on employers that have violated the Minimum Wage Act If the employer does not offer compensation, the Inspectorate SZW can impose penalty payments of up to €40,000 per employee. Limited information is available regarding the use of this mechanism and its effectiveness in compensating exploited workers. In this regard a main question concerns the existence and implementation of a clear firewall between labour inspection and immigration enforcement, which is key to enable undocumented workers to safely report abusive and exploitative working conditions and claim compensation for unpaid wages.[70]

In Ireland, people who have been exploited for work or trafficked for the purpose of labour exploitation can seek legal redress for unpaid wages and other breaches of labour law through the Workplace Relations Commission. This is the main public redress body, which deals specifically with issues related to employment and labour rights. In practice, there are little or no 'other options' for victims of labour trafficking to claim compensation, other than this labour redress mechanism. There have been no

[70] The European Commission against Racism and Intolerance (ECRI) of the Council of Europe has defined the concept of "firewall" as a way to "prevent, both in law and practice, state and private sectors actors from effectively denying human rights to irregularly present migrants by clearly prohibiting the sharing of personal data of, or other information about, migrants suspected of irregular presence or work with the immigration authorities for the purpose of immigration control and enforcement". On the concept of "firewall" in the context of migration see PICUM http://picum.org/firewall/ and also PICUM; Undocumented Migrants and the Europe 2020 strategy, 2015.

prosecutions nor convictions for trafficking in the country, and this precludes victims from accessing compensation for the harm suffered via criminal proceedings.[71] A number of legal and other obstacles make it difficult to prosecute employers/exploiters in Ireland.[72]

Broadly speaking, the procedure requires the employee to lodge a complaint, then the Workplace Relations Commission sets a hearing date for the employee and the employer to appear and put forward their case. An Adjudicator then makes a decision. However, the cases examined indicate that individual compensation cases via this route can be quite complex, involve appeal proceedings before various courts, last for several years and expose victims to re-victimisation.[73]

State-funded legal aid is not provided for this procedure, but is in fact necessary, especially for exploited migrant workers who do not speak the language, are not familiar with laws of the country, and are often vulnerable and destitute. Furthermore, even if a person is recognised as a victim of trafficking and referred to the national referral mechanism, state-funded support is very limited. In most cases examined, the exploited worker was supported by an NGO, which also provided legal aid; however NGO resources are limited and often insufficient to meet all the social and legal needs of the exploited persons. Once the first hearing is over, the victim needs private legal representation to deal with the complexity of the proceedings but usually lacks the resources to pay for this. Sometimes exploited workers are reluctant to lodge a complaint before the Commission, as they are afraid of confronting their employer. For example, in a case of labour exploitation in a car wash, the victim was very reluctant to pursue compensation. He was terrified of seeing the employers again and of potentially being cross-examined by them, either directly or through their lawyers, at the hearing. He was also very scared of possible retaliation against his family.[74]

Fear of confronting the employer

A 34-year-old man was recruited by one of his employers in Romania to work as a car wash operator. He had been promised €300 per month salary in addition to free board and lodging. Once in Ireland he was made to work over 80 hours per week without a contract, no proper breaks and insufficient rest periods. He was paid irregularly and significantly under the national minimum wage. He was forced to sleep in a shed behind the employers' house. There was no bed, only a mattress on the ground. There was also no heating and no toilet or washing facilities.

After a year of living and working in such conditions, the man was assaulted by one of the employers. He ran away from his place of work and, with the help of a local shopkeeper, the police were informed. The man was subsequently referred to the National Referral Mechanism. He was also referred to an NGO for assistance with submitting a claim to the employment redress mechanism. He was reluctant to do so, and very afraid of the employers' possible retaliation against his family, both in Romania and in Ireland (some family members had joined the man in the period since he left his employment). In the end, he did lodge a complaint but the entire

[71] GRETA Report on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland, GRETA(2017)28 para.175.

[72] Social Fieldwork Research (FRANET), Severe forms of labour exploitation, 2014, p.58, http://fra.europa.eu/en/country-reports-selex

[73] See for example case IE02.

[74] Case IE03.

process was extremely stressful and traumatic. The employers did not appear at the hearing before the Workplace Relations Commission and an award was subsequently made in his favour. However, the current whereabouts of the employers is unknown and, even if known, it is unlikely that the victim would pursue them for enforcement of the award due to his concerns for his safety and that of his family. Criminal proceedings for trafficking for labour exploitation were discontinued.

Another significant challenge in labour redress mechanisms relates to the irregular residence status or irregular employment situation of the worker. The well-known Mohammed Younis case is exemplary of these challenges.

Mohammed Younis
"I came to Ireland to work as a tandoori chef in 2002 on a work permit. I worked long hours, 7 days a week for very low wages. For the first few years I earned 52 cents an hour. My employer failed to renew my work permit and I became undocumented in Ireland. I did not know anyone and I speak very little English. I was treated like a slave by my employer for 7 years. I found out about my rights and I took my employer to court. I am still fighting this as I am owed €92,000 which was awarded to me by the Labour Court. I want to get justice for what happened to me but I want to ensure this does not happen to other workers".

Source: statement of Mohammed Younis available at https://www.mrci.ie/our-work/forced-labour-trafficking/

The case of Mohammed Younis was heard before the employment redress mechanism in 2010. The decision was later appealed by the employer but the award was upheld. The employer subsequently appealed to the High Court. In 2012, the High Court overruled the verdict of the Labour Court granting Mohammed Younis compensation for years of severe exploitation, reasoning that where the worker is not legally entitled to work, his contract of work is illegal and therefore unenforceable. The worker appealed to the Supreme Court and won his case. The original award was upheld by the Supreme Court in June 2015. The award has not been enforced to date and bankruptcy proceedings are now being filed in respect of the employer to force payment. The likelihood of Mohammed Younis actually receiving payment is very low due to the multiple barriers faced. The employer is rarely in Ireland so it is extremely difficult to serve him with legal documents. It also appears that the employer's existing debts outweigh his assets so Mr. Younis will be the last in a long line of creditors. Further, due to the length of time the proceedings are taking, even if the court declares the employer bankrupt, Mr. Younis will be out of time to make an application to the special State Insolvency Payments Scheme which was set up to provide protection to employees whose employers become bankrupt.

The case continues to be extremely stressful for the victim who, at the time of writing, remains living in 'limbo' waiting for the case to be concluded so that he can move on with his life and reunite with his family in his country of origin. A number of NGOs and other community-based organisations continue to assist Mr. Younis with a high level of diverse support. [75]

[75] Case IE05, See Hussein v. Labour Court [2012] ILRM 508; [2015] IESC 58, See also summary of the case at http://emn.ie/cat_search_detail.jsp?clog=6&itemID=2875Summary

2.5 Alternative mechanism

The assessment sought to identify whether alternative mechanisms such as third-party interventions, collective claims, mediation and voluntary settlements were being used to support workers in obtaining compensation. However, very limited information was gathered and it may be indicative of the need for more research and also probably of the limited use of these mechanisms.

There are instances in which migrant rights organizations seek to mediate between an exploited worker and employer to foster a voluntary settlement. For example, this was successfully done in a case of underpayment involving two agency workers who were contracted by a private employment agency for cleaning services in a hotel. The NGO sent a letter to the hotel management invoking rules on chain liability of the main contractor and requesting them to pay the workers. The letter from the organization had a positive impact and made the hotel take steps without having to go through formal claim proceedings. The two workers obtained €1200 compensation for underpayment.[76]

Third party interventions and collective claims can be put forward by trade unions to facilitate access to remedy for groups of exploited workers, however a 2015 FRA research on severe labour exploitation found that in many countries these mechanisms are not allowed by domestic law or where they exist they are used too little. [77] In addition, migrant workers often are not members of trade unions, which makes representation by the trade unions more difficult, as they mainly offer services to their members.

Another type of alternative mechanism is claiming compensation through the use of a statutory accident insurance in cases of exploitation and trafficking in human beings. This mechanism was used in an exemplary case of sexual exploitation in Germany. Notably compensation was granted without any involvement of the perpetrator, which protected the victims from risk of further victimisation. This type of mechanism should be used more often where applicable.

Successful claim through statutory accident insurance
A woman travelled to Germany to work in the sex industry. She had seen an advertisement on the Internet stating that the job was legal and promising good work conditions. The deal was that, as the employer, X would keep half of the earnings. The employer would also bear the costs of applying for documents, as well as paying for the flight, advertising, board and lodging. Working times were 24 hours per day, seven days per week. No written contract was signed. Working conditions turned out to be different, the woman was not paid as promised and was constantly supervised by the exploiter. At one point, she was locked in and, she jumped out of a window on the third floor in an attempt to escape. This caused a severe leg injury and several back fractures. The woman was referred for support to an NGO. She received specialised legal aid, and made a claim to have her fall and the ensuing serious injuries recognised as a work-related accident by the accident insurance body. Although there was no work contract, nor work and residence permit, her status was that of an employee with regard to the accident insurance and the court upheld the claim. She was consequently entitled to medical treatment (in Germany), travel costs for medical

[76] CASE NL05.
[77] EU FRA, Severe Labour Exploitation: workers moving within or into the EU, 2015, p.21. The Seasonal Workers Directive foresees third party interventions in Article 25.

treatment, injury allowance of 80% of the regular wages and work income, injury pension depending on the extent of the working (in)capacity and other social benefits.[78]

One area which deserves attention but could not be explored within the scope of this assessment is mechanisms for compensation in cases of exploitation and THB in which businesses are involved. International and European law establish that legal persons can be liable for trafficking offences; however there seem to be very few cases of prosecutions and convictions of companies (legal persons) for these crimes and very little information on compensation awarded to victims, harmed by them. It would be important also to research, which non-judicial mechanisms exist to handle complaints in cases where human rights have been adversely affected by business activities, and explore their applicability in cases of exploitation and THB.

The European Parliament Evaluation Report of the Victims' Rights Directive notes that "victims of corporate crimes, and particularly of corporate violence, and the issue of criminal offences committed by corporations in the course of their legitimate activities harming persons' health, integrity, or life, have not been given enough attention in the debate about the directive".[79]Indeed, recent European research highlights, inter alia, the collective dimension of corporate violence victimisation and the related challenges for victims in obtaining compensation from the offender, given, *inter alia*, the complexity of these cases, the number of victims involved and the lack of effective systems for collective actions.[80]

2.6. Obtaining compensation from the State

2.6.1 Features and critical issues

The Council of Europe Anti-Trafficking Convention, at Article 15, requires States parties to guarantee compensation for victims, in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation. The European Convention on Compensation of Victims of Violent Crimes deals specifically with state compensation for victims of an intentional crime of violence.[81]

The EU Trafficking Directive also stipulates the right of victims of trafficking to access to existing compensation schemes for victims of violent intentional crimes (Article 17). Furthermore, the EU Directive 2004/80/EC on compensation further establishes a system of cooperation between national authorities for the transmission of applications for compensation in cross-border situations but its functioning is challenging.[82] The latter is discussed in the assessment on referral and cross border

[78] Case DE01.
[79]European Parliament, The Victims 'Rights Directive 2012/29/EU. European Implementation Assessment, EPRS, 2017, p. 40.
[80]Forti G. (ed by), Victims and Corporations. Legal Challenges and Empirical Findings, Wolters Kluwe, 2018, p. 261-267.
[81]Council of Europe, Convention on the Compensation of Victims of Violent Crimes, CETS n.116, Article 21.
[82]European Parliament, The Victims 'Rights Directive 2012/29/EU. European Implementation Assessment, EPRS, 2017, p. 21, 24

situations. Here the focus is on existing national schemes and the possibilities for victims to access them and obtain compensation.

Eligibility criteria and access barriers for trafficked persons

The compensation cases collected and the literature on state compensation funds indicate that only few victims of trafficking are compensated through state compensation schemes. A number of barriers hinder victims' access to such schemes; they are mostly connected with the eligibility criteria and rules that govern these schemes.

State compensation schemes exist in most European countries and are generally foreseen for victims of crimes of violence. Most schemes grant financial compensation for material damages only, such as medical expenses, property damages, and, in some cases, lost earnings.

Each country has established its own eligibility criteria for access to compensation schemes for victims of violent crimes. Generally, these requirements concern the type of offence, the status of the person, the role of the victim and the procedure for application.

A first main issue is whether the person has been identified as a victim of trafficking, and whether this crime, or all forms of this crime, are included among the offence types of the scheme and whether other requirements (e.g. violence) apply. Often cases of trafficking for sexual exploitation might be eligible but not cases of trafficking for labour exploitation or forced begging. Moreover, traffickers increasingly use abusive and deceptive means and subtle forms of coercion to exert their control over their victims (e.g. emotional coercion, abuse of a position of vulnerability, debt-bondage). In many trafficking cases there is no overt violence; without proof of violence the trafficked person often does not meet one of the core eligibility requirements of state compensation schemes. In a landmark ruling the German Federal Social Court reasoned as follows.

Court interpretation of intentional violent crime

The European Convention on Compensation of Victims of Violent Crimes does not provide a definition of an "intentional crime of violence" By using the term "unlawful and deliberate assault" in Section 1 para. 1 first sentence of the Crime Victims Compensation Act, the German legislators therefore lawfully decided to make use of the discretion offered by the Convention. However, legislation would also comply with the Convention's aims if the protection offered under the Crime Victims Compensation Act would also extend to victims of psychological violence, thereby going beyond the situations covered by the chosen wording of "assault". Nonetheless, the Council of Europe Explanatory Report to the Convention[83] states the following: "The violence inflicted by the

[83] Council of Europe, Convention on the Compensation of Victims of Violent Crimes, CETS n.116. http://conventions.coe.int/treaty/EN/Reports/Html/116.htm

offender need not be physical. Compensation may also be payable in cases of psychological violence (for example serious threats) causing serious injury or death".[84]
German Federal Social Court, ruling from 7 April 2011 – B 9 VG 2/10 R –, BSGE 108, 97-116, SozR 4-3800 Section 1 no. 19, margin note 50[85]

Proof of violence is not required in the Czech Republic; once the crime is considered to be human trafficking, it belongs automatically to the category of violent crimes, regardless of whether physical violence was used or not.

As previously mentioned, trafficked persons frequently do not have a regular residence status, particularly in cases involving third country nationals exploited in the European Union. This is why GRETA has repeatedly recommended that trafficked persons have effective access to state compensation regardless of their nationality, type of exploitation, and without the need to prove serious bodily injury or physical assault.[86]

In Austria, a positive amendment for access to the state compensation fund was introduced in 2013; hence victims are eligible also in case they have had an 'irregular status at the time of the offence, as long as they have legal residence at the time of the application.[87]

In the Netherlands a very interesting pilot project, which started on January 1, 2018, is looking into the plausibility of victimhood in cases in which victims are not able or not willing to cooperate with the authorities, or in which criminal proceedings have been discontinued (see box below).

Temporary regulation on the plausibility of victimhood of human trafficking victims
The Minister of Justice and Security has given the Violent Offences Compensation Fund the task of implementing the temporary regulation on the plausibility of victimhood of human trafficking victims. With this regulation, the Violent Offences Compensation Fund has been assigned the responsibility of conducting a trial (annual pilot), with a subcommittee of experts on victims of human trafficking for one year starting in January 2018. In practice a victim, social worker or lawyer can file a request to the committee. The task of the committee is to issue a multi-disciplinary expert report on whether it is plausible that an applicant is a victim of human trafficking within the meaning of article 273f of the Penal Code (Wetboek van Strafrecht). The expert report is not a binding decision but it should be seen as an influential opinion. It is the applicant's decision whether or not to make use of the expert report. For example, the expert report can help the applicant in obtaining support as an identified victim of human trafficking, e.g. for the application for a residence permit on humanitarian grounds, for access to municipal

[84] Council of Europe, Explanatory Report to the Convention on the Compensation of Victims of Violent Crimes, CETS n.116. para 18.
[85] Case DE02.
[86] See for example GRETA Report on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Germany 2015, GRETA(2015)10, para. 181; GRETA Report on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium 2013, GRETA(2013)14, para 190; GRETA Report on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Greece 2017, GRETA(2017)27, para. 188.
[87] Report on the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Austria, GRETA(2015)19, 2015, para. 147.

facilities, or to specialist (medical) care or to obtain financial compensation from the regular Violent Offences Compensation Fund.

Source:https://schadefonds.nl/wp-content/uploads/2018/01/Temporary-regulation-on-the-plausibility-of-victimhood-of-human-trafficking-victims-2.pdf

In addition to these obstacles, the cases reveal other barriers related to procedural and/or evidential requirements. In Romania, although victims of trafficking are considered eligible for state compensation, in practice there are few possibilities for them to obtain compensation through such schemes; for example it is necessary to provide proof of the insolvency of the perpetrator within a specific timeframe and this is often not possible. In Ireland, victims who have suffered personal injuries can submit a claim to the Personal Injuries Assessment Board. Victims can potentially be supported by the Legal Aid Board (although no cases to date) but medical report costs are a huge barrier for them.[88]

With regard to evidential requirements, a challenge relates to establishing a causal relationship between the crime of human trafficking and the damage suffered by the victim, particularly in cases in which the person has a difficult personal history prior to the trafficking experience.

The table below summarises some of the most common criteria governing state compensation schemes, building on literature and collected cases.[89]

Most common requirements

Eligibility criteria with regard to offense type

- Violent crime, psychological violence may be excluded
- Serious bodily harm /injury /damage to health
- Rape, sexual crime

Eligibility criteria with regard to victims

- Citizens of the country
- Foreign citizens legally resident in the country
- EU citizens

Other requirements

- Strict timeframe for lodging application
- Presence of victim in jurisdiction at time of application
- Victim obligation to report crime to police in a timely manner, and in some cases victims' willingness to cooperate in the investigation and act as witness.
- Victim's conviction of a (serious) offence may be a ground for exclusion

[88] For more information on the Criminal Injuries Compensation scheme, see http://www.justice.ie/en/JELR/Pages/WP15000110

[89] OSCE/ODIHR, Compensation for Trafficked and Exploited Persons in the OSCE Region (2008); Weerd, E.A.M. de, Compensation for trafficked persons from state funds: Are compensation funds appropriate for trafficked persons? A critical examination of four state compensation funds in Europe. Master International Crimes and Criminology, VU University Amsterdam (December 2011)

- Exhausting all legal means of claiming compensation against the offender

3. Enforcement of compensation orders and asset seizure

Even if awarded, compensation to the victim all too often remains only on paper, the order is not executed which leads to no effective remedy for the victim. This chapter discusses some critical issues that hinder the execution of court orders of compensation to victims, and that emerge from the cases collected and from the focus group discussion with stakeholders.

The cases collected indicate that the criminal or civil court ordered compensation in 40 cases, but only in 11 cases were the compensation orders executed or are very being executed, with very low monthly payments by the convicted offender. This means that, in theory, the victim can obtain satisfaction for the recognition of the harm suffered. However, in practice it is quite seldom that the offender pays the established compensation for damages to the victims, for various reasons including:

- disappearance of the offender, e.g. fled to another jurisdiction, his or her whereabouts are unknown,
- lack of means, the assets are hidden or concealed by the offender,
- default in payment or payment in irregular and small amounts,
- financial investigations for the identification, tracing and seizure of criminal assets have been limited in scope and effectiveness,
- no legal aid to support the victim with execution of the order and/or the victim does not apply for this,
- disappearance of the victim.

3.1 Critical issues: tracing, seizing and confiscating criminal proceeds

The European Anti-Trafficking Convention, at Article 23, requires that state Parties adopt appropriate legislation to confiscate or otherwise deprive offenders (e.g. by so called "civil" confiscation) of the instrumentalities and proceeds linked to or resulting from THB.[90] A similar requirement is foreseen also under Article 7 of the EU Trafficking Directive and in the EU Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime. While legislation to this end exists in most countries, in reality there is very limited practice with confiscation in relation to trafficking offences, or else, where such confiscation occurs it is quite limited in scope. An OSCE report on this matter observed that: "When financial investigations do take place in THB cases, they are usually limited in scope and focus on specific offences that already took place, on the final exploiters and on confiscating funds related to the current case, rather than on the larger THB business and all of its stakeholders. As a result, many financial investigations have a limited disruptive effect on the operations of criminal organizations engaging in THB".[91]

[90] It refers to the offences established under Article 18 and 20 of the Council of Europe Convention on Action against Trafficking in Human Beings. See also Council of Europe, Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, para.252-259.

[91] OSCE, Leveraging Anti-Money Laundering Regimes to Combat THB, p. 19, https://www.osce.org/secretariat/121125?download=true.
See also GRETA 4th General Report p. 54-55, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805aa45f]

The evidence from the cases collected indicates that States face huge challenges in identifying, tracing, seizing and confiscating proceeds of crime. It is striking that even in cases where convictions for THB were obtained, including for trafficking through organised crime and other serious crime, the value of confiscated assets is minimal in most cases. Such failures in States' investigative and prosecuting efforts result in practice in the victim having no real possibility of recovering the awarded compensation.

The examples below show that there are also cases in which criminal assets are seized, perpetrators convicted and ordered to pay compensation, yet the actual execution of the compensation order is not possible.

Compensation awarded, asset seized, execution pending

The claimant was under the age of 21 when she was made to engage in prostitution. She was forced to work for the defendant for several months. During this time, he confiscated her earnings (approx. €40,000). The trafficked person was summoned as a witness; she was granted private accessory prosecutor status and took part in a consolidated civil and criminal procedure. She was granted legal aid and representation by an NGO. The main perpetrator was convicted of human trafficking to a two-year custodial penalty (suspended sentence). His (female) accomplice was sentenced to a custodial penalty for juvenile offenders of 9 months for aiding and abetting. A very valuable watch and assets worth a total of approx. €40,000 were seized from the perpetrator. The claimant's lawyer agreed on a settlement in court, according to which the perpetrator was required to pay €15,000 to the claimants to settle any civil claims. This was included in the terms of probation by the local court. The perpetrator then declared himself unable to pay due to insolvency. Several months after the ruling, the local court annulled this requirement (payment of damages for pain and suffering) without any form of substitution in the absence of the victims and without a prior hearing. Forced execution is to be carried out against the State, due to the perpetrators' insolvency and the fact that the State confiscated the perpetrators assets. At time of writing the victim had still not received any compensation. [92]

In a case involving a minor trafficked for sexual exploitation, two offenders were convicted of human trafficking and procuring prostitution. One of the offender was also found guilty of drug trafficking. The Court awarded compensation of €10,000 to the victim for moral and material damage...The order was not executed. The assets confiscated included a laptop, three phones, and external hard drives; they were not used for paying compensation of the victim.[93]

In another case of international trafficking for the purpose of sexual exploitation involving a young woman who was forced to provide escort services in private homes and to distribute drugs, the Court convicted the perpetrators of THB with the aggravating factor of organised crime, and ordered compensation of €1000 for the woman. The order has not been executed. The assets of the perpetrators could not be traced or confiscated; there were also challenges in mutual legal assistance between the country of origin and that of destination. [94]

It is very important that the criminal investigation includes a financial investigation at an early stage of the proceedings to establish the extent of the illegal financial gain of the offender(s) and of the damage to the victim. When this is done, the prosecutor or the victim's lawyer can request to seize and confiscate early on assets of value that can serve to meet the victim's compensation claim after the

[92] Case DE09.
[93] Case AT01.
[94] Case RO05

perpetrator has been convicted.

A specific challenge, which is not uncommon in trafficking cases given their often transnational character, concerns the recognition and enforcement of judgments in civil matters in a different EU Member State than where judgment was given. These issues are regulated in various European instruments, including the Brussels I Regulation and the European Enforcement Order.[95] The latter, for example, refers to procedures to allow a judgment related to an uncontested claim delivered in one Member State to be easily recognised and enforced in another Member State. These instruments would be helpful to tackle those situations where the convicted perpetrator has left the jurisdiction and moved to another country.[96] Knowledge and use of these instruments seems limited, the issue is discussed further in the assessment on cross border referral.

A further problem is that, where criminal proceeds are confiscated, in many countries mechanisms are lacking to ensure that these are used to pay victims compensation or to contribute to a fund for victims' compensation. The Victims' Rights Directive requires States to promote measures to encourage offenders to provide adequate compensation to victims (Article 16.2). To this end, some countries established a fund that is financed by offenders' assets and which directly benefits victims.[97] Furthermore, criminal courts could make more use of the possibility to order ex officio and as part of the sentence an ancillary financial penalty on the trafficker; courts could also impose specific conditions to ensure the victim receives compensation.

3.2 Critical issues: legal aid and costs for enforcement

It is very challenging, if not impossible, for victims to deal with enforcement procedures without professional assistance. They often lack knowledge of the local language and of the legal procedures. Pro bono legal aid to this end is very necessary but in most countries this is not provided. There seems to be also limited practical experience among the victim support organizations in assisting victims in this phase.[98]

Enforcement procedures can be expensive and victims usually do not have resources. The cost for bailiff services often constitutes a barrier for victims seeking to collect money owed to them. In Romania there is a free bailiff service but often the service requires an advance payment of about 10% of the money owed to initiate the procedure.

In some cases it may be necessary for the victim to pay fees to a debt collector; for example in one case of exploitative labour, the civil court awarded the worker €1000 in compensation, but he had to pay a fee of €500 to a debt collector.[99] In other cases, particularly when the whereabouts of the employers are

[95] Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Regulation (EC) No.805/2004 on creating European Enforcement Order

[96] Case AT06.

[97] For example, in Finland, see European Parliament, The Victims 'Rights Directive 2012/29/EU. European Implementation Assessment, EPRS, 2017.

[98] Focus Group Discussion, Vienna, 7 June 2018.

[99] Case NL04.

unknown, the victim would need to pay the services of a solicitor or investigator to confirm the employer's address and whether they have any assets in the State, but the victim as a rule lacks such financial resources. Even when support organisations do manage to assist trafficked persons in the enforcement proceedings, obtaining the payment of compensation from the exploiter remains quite difficult.

Challenging enforcement

In a case of labour exploitation in domestic work in Ireland, the victim was awarded compensation through a labour redress mechanism in 2011 but the employers failed to pay, despite having initially agreed to do so in instalments. The victim was forced to bring proceedings for enforcement and succeeded in obtaining a court order. However, the victim has yet to receive any money. When the Sheriff/Registrar sought to seize employers' goods to the value of the judgement, he found that they did not have sufficient moveable assets of value in their possession. The employers then left the jurisdiction. The employers are now known to have returned to Ireland so the victim is again trying to push for enforcement. She does not however have the money to pay for searches in relations to the employers' potential assets in the State or for the assistance of a solicitor.[100]

Given the challenges with enforcement, an effective mechanism to ensure the payment of compensation could be a system in which the state advances the payment of the compensation to the victim while being responsible for collecting the money from the offender. This system has been introduced in the Netherlands for criminal cases. Consideration should be given to exploring the possibility of extending the system to civil cases under certain circumstances.

Promising practice - The Dutch Compensation order and the advance payment model

In the Netherlands a criminal court can issue ex-officio a compensation order against the offender requiring the payment of compensation to the victim for the harm suffered, even where the victim has not submitted a claim. The greater advantage of this instrument is that it is executed by the Public Prosecution Service and not by the victim. It foresees an advance payment by the State of the compensation to the victim where the offender has failed to pay compensation to the victim within eight months of the final judgement. [101]

3.3 Factors that contribute to the success of a claim

The analysis of compensation claims cases reveals some key factors that contribute to the success of a claim according to practitioners. These include:

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[101] National Rapporteur on Trafficking in Human Beings, *Trafficking in Human Beings. Case law on trafficking in human beings 2009-2012. An analysis*. The Hague: BNRM (2012), p. 135-136, 146-150. See in particular Supreme Court 20 December 2011, LJN: BR0448.

- The provision of immediate psychosocial support, assistance and shelter as soon as a trafficked person is identified.
- The availability and accessibility of specialised legal aid from the very first contact with the authorities throughout all the proceedings to trial
- Respectful treatment of victims by all criminal justice officials and support organizations to consider their views and create an atmosphere of trust and empower them.
- The awareness, understanding and sensitivity of the judiciary with regard to human trafficking and in appreciating the harm done to trafficked and exploited persons
- Granting victims acting as witnesses the status of protected witnesses, where applicable, and allocating necessary resources to this end.
- Multi-stakeholder cooperation and collaboration between victim support organization, lawyer, police and prosecutor, from police interview to testimony in court and after.
- Making use of medical and psychological expert reports submitted by professionals for the assessment of damage inflicted on the victims.
- The possibility of regularising the residency status of the trafficked or exploited person to enable their access to remedies.
- Successful seizure of assets and a mechanism for using confiscated assets for victims' compensation.
- Availability and accessibility of various different (alternative) mechanisms or ways to grant compensation (e.g. statutory accident insurance, state fund).

4. Challenges in victims' access to effective remedies

The right to an effective remedy in the form of compensation is still out of reach for many trafficked and or exploited persons in Europe. Out of 60 compensation claims assessed, 40 resulted in an award of compensation, but in only 11 cases (i.e. 27%) were the compensation orders executed or are being executed. This means that in theory the victim can obtain satisfaction for the recognition of the harm suffered but in practice it is quite seldom that trafficked persons obtain financial compensation for moral or material damages they sustained.

There are many factors that hinder victims' access to an effective remedy. The assessment of compensation claims reveals that certain criteria, which are necessary to ensure effectiveness under Council of Europe and European law, are not met. There are challenges with regard to the accessibility of remedies, their capability of providing redress in respect of the applicant's complaints, and in terms of providing reasonable prospects of success. In many countries, it is excessively difficult for victims to enforce their rights.[102] This chapter provides and overview of the broad issues that prevent victims from obtaining compensation, as well as the specific legal, financial and practical obstacles that emerge from the analysis of compensation claims.

4.1 General barriers preventing access to compensation

The 2012 COMP.ACT research identified the most common issues that hinder victims' access to compensation. These issues remain relevant and valid.

- **Lack of mechanisms for safe reporting:** Victims are afraid of reporting their situation because of the irregularity of their residence status or of their employment; they are afraid of being deported to their home country and losing even that minimum opportunity of realising their migration project. In other instances, victims are afraid of reporting because of the threats of retaliation by their recruiters and exploiters against them and their loved ones. As part of the obligations under the Victims' Rights Directive (Article 8.5), mechanisms for easy and safe reporting should be established. These mechanisms should be based on a strict separation (firewall) between immigration control and enforcement and the protection of fundamental rights and provision of services, including in the fields of education, health care, housing, social security and assistance, labour protection and justice) as recommended by the Council of Europe's European Commission Against Racism and Intolerance (ECRI).[103]

- **Failed identification or misidentification:** where victims of trafficking or other crimes are not recognised as such or are misidentified as offenders, their rights including the right to obtain

[102]EU FRA Handbook on European law relating to access to justice, 2016, p.95 and p.102; "the level of compensation is not unreasonable in comparison with the awards made by the ECtHR in similar cases".

[103] Council of Europe: European Commission Against Racism and Intolerance (ECRI), *ECRI General Policy Recommendation N°16 on safeguarding irregularly present migrants from discrimination*, 16 March 2016, https://reliefweb.int/sites/reliefweb.int/files/resources/REC-16-2016-016-ENG.pdf

compensation, cannot be protected nor enforced. Failed identification or misidentification may, in certain circumstances, lead to a violation of the State's positive obligations to have in place legislation "[...] adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking".[104]

- **Insufficient and inadequate information to victims:** victims are often not properly informed about their rights and the possibilities to claim compensation. In many instances information is not easily accessible or is provided by using a standard form written in the local language and using a complicated legal terminology that victims do not understand.[105] In a number of cases it is left to the voluntary work of victim support organizations to explain in an appropriate manner to the person what their rights are and what options are available to seek compensation. This is despite the fact that the rationale behind the right to information – as established in European law -is that the onus of providing victims with effective access to information is on the criminal justice authorities.[106]

- **Language barriers:** Victims are often foreigners who do not speak the local language. The quality of interpretation influences the quality of the victim's account, and hence impacts on the investigation, and the victim's access to a remedy. Interpretation and translation of information are not always available during criminal proceedings. This is despite the fact that there are duties under the European Anti-Trafficking Convention, the EU Victims' Rights Directive and the EU Trafficking Directive that require States to provide victims with interpretation and translations of information essential to the exercise of their rights in criminal proceedings in a language that they understand, free of charge.[107] It may be quite difficult finding interpretation for some languages. Language barriers pose even bigger obstacles in civil and administrative proceedings for which there is no obligation to provide free interpretation.

- **Conditionality of support:** in many countries, the victim's ability to access support services is still made dependent upon reporting the crime and the initiation of an investigation, and it may even be made conditional on the qualification of the offense as trafficking. This is contrary to the provisions in the European Anti-Trafficking Convention (Article 12), and the EU Victims' Rights Directive (Article 8 and 9) that provide for assistance to be available from the earliest possible moment, irrespective of cooperation or whether the crime has been reported. Victims' access to justice depends on their effective access to care and support.

[104] *Rantsev v. Cyprus and Russia*, no. 25965/04, ECHR 2010, para. 286-287.
[105] Cases AT, IE, SP, see also European Parliament, The Victims 'Rights Directive 2012/29/EU. European Implementation Assessment, EPRS, 2017, p. 20.
[106] The right to information is established under: Articles 12.1 and 15.1 of the European Anti-Trafficking Convention; Article 11.5 of the EU Trafficking Directive, and Articles 3, 4, 6, 9 and 13, Recital (38) of the and EU Victims' Rights Directive. See also EC, DG Justice Guidance Document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA Guidance on Victims Directive, 2013, p. 13.
[107] The right to interpretation and translation is established under: Article 12.1 of the European Anti-Trafficking Convention, Article 7 of the EU Victims' Rights Directive; Article 11.5 of the EU Trafficking Directive.

- **Limited funding of victim support services.** Victim support services are provided mainly by NGOs, while state funding to guarantee the support measures established in the European Anti-Trafficking Convention, EU Victims' Rights Directive and the EU Trafficking Directive are too often limited or completely lacking in some countries. GRETA has repeatedly requested State Parties to ensure the provision of adequate funding for victim assistance.[108]

- **Discrimination:** Undocumented or irregular migrants are particularly exposed to the risks of violence, exploitation and trafficking. When they seek justice or try to access support, undocumented migrants are discriminated against and face constraints, which other victims do not encounter. For example, they may be excluded from access to state compensation funds because of their irregular status, or they may be denied compensation because of the irregularity of their employment situation. This is contrary to the non-discrimination principle embedded in in Article 3 of the European Anti-Trafficking Convention and Article 1 of the EU Victims' Rights Directive.

- **Victims with an irregular status are often unable to remain for the duration of compensation proceedings**. Judicial proceedings for claiming compensation are often complex and may last for several years; victims with an irregular status may receive a deportation order in the meantime. The absence of mechanisms for temporary stay of victims for the duration of all proceedings for compensation -and not only those in the criminal justice system- may compromise their right to an effective remedy.

- **Low rates of prosecution, and in particular limited number of criminal proceedings for THB for labour exploitation and related offences.** Labour trafficking cases are often discontinued at the stage of the criminal investigation. Lack of sufficient evidence seems to be the main reason. The specific reasons for dismissal are not always communicated to the victim, and this lack of transparency impacts on the victim's ability to seek redress.

4.2 Specific obstacles in claiming and obtaining compensation

- **Limited scope and quality of free legal aid:** State-funded legal aid is often means tested, subject to having legal residence or to other hurdles, and it is not specialised. Specialist legal casework is usually arranged through an NGO but funding for this is often limited.

[108] See for example Council of Europe, GRETA Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Spain, GRETA (2018)7; Council of Europe, GRETA Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Ireland, GRETA (2017)17, Council of Europe, GRETA Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Greece, GRETA (2017)27; Council of Europe, GRETA Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Bosnia and Herzegovina, GRETA (2017)15; Council of Europe, GRETA Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium, GRETA (2017)26; Council of Europe, GRETA Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by "the former Yugoslav Republic of Macedonia", GRETA (2017)39.

- **Uneven application of protection measures:** Measures to prevent secondary victimisation and intimidation are not consistently applied. Victims applying for compensation via criminal procedures are often confronted directly with their perpetrators, despite the obligation to avoid such direct confrontation under the European Anti-Trafficking Convention and the EU Trafficking Directive.[109]

- **Limited awareness, knowledge and sensitivity of criminal justice professionals on critical issues related to human trafficking cases:** The level of capacity and sensitivity to the issues of THB and exploitation varies significantly amongst criminal justice officials.

- **Evidentiary challenges in establishing and quantifying damages to victims:** Criminal courts tend to refer trafficked and exploited persons to civil proceedings for the assessment of damages so as to avoid excessive prolongation of criminal proceedings.

- **Challenges in substantiating the evidentiary basis for the claim:** There are challenges in obtaining expert opinions or medical reports within the timelines of the proceedings or due to the very high costs. There are also challenges in proving that the worker was employed and the duration of employment.

- **Challenges with the use of the illegal and immoral argument to reject claims:** Courts may refuse material compensation for unpaid salaries on the basis that the worker was irregularly employed and such award would constitute an unjustified benefit. Courts may not grant material compensation for loss of earnings from prostitution because of the alleged immorality or illegality of sex work.

- **Judgements without court's explanation concerning the decision on compensation:** When court decisions do not explain their reasoning regarding their assessment of the compensation claim, this has negative implications for victim's right to information and to appeal. The provision of accurate information is key to enable victims to exercise their rights and take an active part in the proceedings.

- **Lack of legal aid and court fees as barrier for victims in claiming compensation in civil proceedings:** State-funded legal aid and interpretation are not provided systematically in civil proceedings for compensation; the costs of the proceedings constitute a strong barrier hindering victims' access to remedies.

- **Ineffective mechanisms for the enforcement of court compensation orders:** All too often offenders disappear, conceal their assets and are insolvent. Costs of bailiff services are beyond the financial capacity of trafficked and exploited persons.

- **Limited recovery of criminal profits**: Only small proportions of the criminal assets deriving from trafficking and related crimes are traced, seized and confiscated. Failures in States' investigative and prosecuting efforts result in practice in the victim having no real possibility of recovering the

[109] European Anti-Trafficking Convention, Articles 11, 28 and 30; EU Trafficking Directive, Article 12.

awarded compensation from the offender.

- **Lack of mechanism to use confiscated assets for victims' compensation:** Where criminal proceeds are confiscated, in many countries mechanisms are lacking to ensure that these are used to pay compensation or to contribute to a fund for victims' compensation**.**

- **Enforcement procedures: challenges with provision of legal aid and payment of fees for bailiff services or debt collector**: Victims have no access to free legal aid or have to bear other costs, to ensure the enforcement of the compensation order.

- **Restrictive eligibility criteria for victims' access to state compensation funds:** Victims of trafficking are unable to access state-funded compensation schemes because they do not meet the eligibility criteria, particularly in relation to residence status. The requirement of physical violence may also be problematic since it excludes victims who have been trafficked by means of subtle forms of coercion.

- **Challenges in international legal cooperation and cross-border referral:** Victims of cross-border crimes often face challenges in pursuing their compensation claims after return to their home countries, for various reasons including issues related to continuity of legal assistance and representation, execution of European Enforcement Orders, transmission of application for compensation from one country to another and lack of knowledge that they can still claim compensation in another European country (See Assessment on cooperation on access to compensation in cross border contexts).

- **Victims may waive their right to compensation and decline assistance or not apply for execution of the compensation order**: Victims lack trust in their ability to get justice and sometimes disappear during the long and complex proceedings. They may wish to move on with their life and forget their traumatic experience.[110] They may be afraid of retaliation from traffickers. They may fear stigmatisation and ostracism in their communities or do not want their families to know what happened to them.[111]They may also have other reasons.[112] In other instances, victims may have received an expulsion order and disappear. There are also cases in which the proceedings have taken such a long time that victims can no longer be located or informed about the outcomes of their claim.

[110] Case CZ03
[111] Case RO05
[112] Case RO02, Case RO03.

5. Recommendations

1. Establish mechanisms to enable all trafficked and exploited persons, in particular undocumented persons, to report easily and safely exploitation, violence or other crime to the police or other authorities as victims or witnesses, without any immigration enforcement action being launched against them, in line with the obligations under the EU Victims' Rights Directive (Article 8.5) and the Council of Europe ECRI General Policy Recommendation N°16 on safeguarding irregularly present migrants from discrimination.[113]
2. Implement measures to improve access to information on how to claim compensation for victims of crime in a language and manner that they understand, and strengthen the capacity of frontline officials to provide such information to victims and to initiate appropriate referrals.
3. Engage in outreach work with potential trafficked or exploited people and recommend them to maintain a diary of the amounts they have earned (e.g. number of working days, number of hours, number of clients etc.) and the expenses incurred as documentation/supporting evidence in case of a compensation claim.
4. Ask questions during intake interviews with trafficked persons to ascertain whether there is any evidence that could be used to support a compensation claim.
5. Demand that sufficient state funding be allocated for legal aid to be provided to trafficked and exploited persons, removing barriers based on means testing, legality of residence and reasonable chance of case success.
6. Provide legal aid and representation for the whole duration of criminal, civil and/or administrative proceedings, from first interview through trial and eventual execution of the award.
7. Support the establishment of a network of specialised lawyers to assist and represent trafficked persons and victims of related crimes in proceedings to claim compensation. Involve lawyers from multiple fields of specialisation e.g. criminal and civil matters, immigration, employment issues.
8. Develop training for victims' lawyers on compensation issues, and in particular on: - how to assist their clients in substantiating their claims and on pursuing compensation through the most suited avenue(s), -on how to cooperate with social workers, psychologists, police and prosecution in preparing victim compensation claims.
9. Advocate that the states allocate sufficient funding for the provision of practical and psychosocial support to enable trafficked persons' access to justice in line with their entitlements under the European Anti-Trafficking Convention, the EU Victims' Rights Directive and the EU Trafficking Directive.
10. Strengthen partnerships between victim support organisations and trade unions with regard to supporting trafficked and/or exploited people in obtaining damages, and in particular back wages.

[113] Council of Europe: European Commission Against Racism and Intolerance (ECRI), *ECRI General Policy Recommendation N°16 on safeguarding irregularly present migrants from discrimination*, 16 March 2016, https://reliefweb.int/sites/reliefweb.int/files/resources/REC-16-2016-016-ENG.pdf

11. Invest in training and capacity building of criminal justice practitioners, particularly prosecutors and judges, on compensation for trafficked persons, facilitating exchange of experience and mutual learning building on case law and international standards. In doing so, encourage criminal courts to use the possibility to order ex officio, as part of the sentence, an ancillary financial penalty on the trafficker to compensate the victim.
12. Foster information sharing and mutual learning between judges, prosecutors, lawyers and victim support organizations within and across jurisdictions on compensation issues.
13. Encourage the Judiciary to explain the basis for their decisions concerning victims' compensation claims including with regard to the amount and type of damages awarded; this is key to ensure victims' right to information and to inform their decisions on appeal.
14. Encourage criminal justice actors, including the Judiciary, to develop criteria for the calculation of damages when dealing with trafficking cases so as to ensure the principles of legal equality and certainty.
15. Invest in training and capacity building for NGOs to strengthen their practices in developing expert reports to contribute to informing court assessment of damage sustained by the victim.
16. Promote promising practices on compensation and seek to adapt them to the national context.
17. Promote the Dutch model of state advance payment of compensation as a tool to improve victims' access to an effective remedy. In the Netherlands, advocate the extension of this model also to cases in civil procedures under certain circumstances.
18. Strengthen investigative and prosecutorial efforts to trace, seize and confiscate illicit proceeds of crime. Criminal justice actors should be trained and motivated to identify, trace, seize and confiscate proceeds of crime at an early stage of the investigation to secure their availability for compensating victims directly, or for contributing to a victim compensation fund.[114]
19. Encourage law enforcement agencies to strengthen their investigative focus on assessing the amount of offenders' illegal earnings and the extent of damage to the victim.
20. Advocate the value of labour stolen from trafficked persons to be returned to those victims who earned the money. Confiscated criminal assets should be used to compensate victims directly.
21. Remove existing barriers concerning eligibility criteria for victims' access to State compensation funds for victims of violent crime in line with obligations under the European Anti-Trafficking Convention (Article 15.3) and the EU Trafficking Directive (Article 17).
22. Conduct research on the issue of criminal offences committed by corporations, on practices concerning liability of legal persons for trafficking in persons (including chain liability) and on the collective dimension of corporate violence victimisation and the related challenges for victims in obtaining compensation.

[114] Articles 15 and 23 CETS N. 197; Recital §13 and Article 7, EU Trafficking Directive 2011/36/EU; Principle 16 UN OHCHR Recommended Principles on Human Rights and Human Trafficking.

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Annex I. Key international and European standards

Legally binding instruments

Both the UN Convention on Transnational Organised Crime (UN TOC) and the Trafficking Protocol oblige States Parties to establish appropriate procedures to provide access to compensation and restitution for victims of trafficking. This may include the use of confiscated proceeds of crime or property to compensate victims.

Organized Crime Convention, Article 14 & 25

- Art. 14.2: Requires States Parties to give priority consideration to returning confiscated proceeds of crime or property to a requesting State Party for compensation of victims.
- Art. 25.2: Requires States Parties to establish appropriate procedures to provide access to compensation and restitution for victims.
- Art. 25.3: Requires States Parties to enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

The term restitution is not defined and has multiple meanings, including compensation. One can therefore assume that restitution in this context covers full damages for all types of losses, including unpaid wages.

Trafficking Protocol, Article 6

- Art. 6.2: Each State Party shall ensure that information on relevant court and administrative proceedings is provided to victims of trafficking in persons.
- Art. 6.6: Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

The Interpretative Notes to the Protocol indicate that this should apply both in the destination State and the country of origin of the victim.

Council of Europe Convention on Action against Trafficking in Human Beings, Article 15

- Art. 15.3: Each State Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators. According to the Explanatory Report compensation may cover material injury (such as the costs of medical treatment) and non-material damage (the suffering experienced).
- Art. 15.4: Each State Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims, in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Art. 23 [monetary sanctions]. In deciding the compensation arrangements, the Explanatory Report refers to the principles contained in the *European Convention on the Compensation of Violent Crimes* (ETS no. 116), which limits the requirement that States pay compensation to cases of "serious bodily injury or impairment of health directly attributable to an intentional crime of violence" (Art. 2.1).

Para 1 & 2 oblige States Parties to ensure that victims have access, as from their very first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language they understand (15.1), and to provide for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law (15.2). In relation to the latter, the Explanatory Report refers to the ECtHR, which held that in certain circumstances there is a right to free legal assistance under Art. 6.1 ECHR (*Airey v. Ireland*, 9 October 1979). Effective access to a court may necessitate free legal assistance if someone is not in a position to present her or his case properly and satisfactorily without the assistance of a lawyer (*Golder v. UK*, 21 February 1975).

European Convention on the Compensation of Violent Crimes (ETS no. 116)

- Art. 2.1 envisages a State funded compensation scheme which, at a minimum, covers nationals and permanent residents who are victims of "serious bodily injury or impairment of health directly attributable to an intentional crime of violence".
- The compensation should be available even where the offender is not prosecuted or punished (Art. 2.2), and should cover at a minimum loss of earnings, medical, hospital and funeral costs, and maintenance for dependants (Art. 4).
- Art. 8 allows limitations on the eligibility of the claimant related to their character and antecedents, e.g. the conduct of the applicant before, during or after the crime, or in relation to the injury or death. This means that, e.g., a claimant can be denied compensation if s/he is deemed to have "provoked" the crime or when s/he has an unrelated criminal record.

ILO Protocol to the Forced Labour Convention, 2014.

- Art. 1 requires States Parties to take effective measures to provide to victims protection and access to appropriate and effective remedies, such as compensation, and to sanction the perpetrators of forced or compulsory labour.
- Art. 4: requires States Parties to ensure that all victims of forced or compulsory labour, irrespective of their presence or legal status in the national territory, have access to appropriate and effective remedies, such as compensation.

ILO Forced Labour Conventions no. 29 (1930) and 105 (1957)

The 1930 ILO Forced Labour Convention does not specify a right to compensation. However, the ILO Committee of Experts issued the following commentary to Art. 25, which deals with penalties for forced labour:

Where a form of forced labour is found to exist, those responsible must be effectively punished in accordance with the penal sanctions established by law. The State has to ensure that the victims of such practices are able to complain to the competent authorities, have access to justice and obtain compensation for the harm they have suffered (ILO Forced Labour Survey 2007, p. 75, para. 139).[115]

The ILO *Guidelines on Human Trafficking and Forced Labour Exploitation*[116] state that (in addition to criminal remedies) the availability of civil, administrative and labour law remedies is critical and that workers will often require assistance to bring claims. In particular, States are asked to use their

[115] See: www.ilo.org/public/english/standards/relm/ilc/ilc96/pdf/rep-iii-1b.pdf

[116] See: www.ilo.org/sapfl/Informationresources/ILOPublications/lang--en/docName--WCMS_081999/index.htm

administrative legal systems to protect foreign workers and provide them with remedies against exploiters (p. 26-29).

The ILO uses a wide definition of work as "any economic activity that people can do or can be forced to do". This means that all ILO conventions related to work (as opposed to employment) cover sex work. This included the ILO's fundamental rights conventions, such as the Forced Labour Conventions, which only speak about work and not about employment. The ILO Committee of Experts has always treated forced prostitution as a form of forced labour.

Other ILO Conventions

- *ILO C 95 on Protection of Wages* regulates a number of areas relevant to the protection of trafficked persons' rights, e.g. wages should be paid regularly, in full, direct to the worker, without unreasonable deductions or conditions as to how they should be spent, and there should be no deductions to pay an intermediary. Art. 15 obliges States Parties to ensure the existence of "adequate penalties and other appropriate remedies" for violations of the laws implementing the Convention. Appropriate remedies would include rights in civil or labour law and/or to negotiate a settlement via a trade union or a similar representative.
- *ILOC 181 on Private Employment Agencies* contains various regulations aimed at regulating such agencies to prevent abuses. These include the prohibition of the need to pay fees to such agencies (Art. 7). Art. 14.3 provides that "adequate remedies" should be in place for violations of the rights in this convention.

Migrant Workers Conventions

- The *ILO Conventions on migrant workers* (no. 97 and 143) set standards to ensure migrants are not deprived of their rights to be paid for work they have performed. These standards are relevant to claims by exploited migrant labourers in civil or labour law for unpaid or underpaid wages and other loss and damage arising from abuse of employment law standards (e.g. health and safety at work, deprivation of holidays, excessive hours and others).
- Similar provisions are contained in the *International Convention on the Protection of Migrant Workers and Their Families* (Art. 25.3). However, both conventions are not widely ratified.

International Covenant on Social, Economic and Cultural Rights, Article 7

Art. 7: Everyone has the right to enjoy just and favourable conditions of work. This includes the right to fair wages and equal remuneration for work of equal value, to safe and healthy working conditions, and to rest, leisure and reasonable limitation of working hours and periodic holidays with pay. Women should be guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.

The convention applies to everybody without any discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

EU law

For Member States of the European Union the following legally binding, documents are particularly relevant:

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims

Art. 12 deals with the protection of victims of trafficking in human beings in criminal investigation and proceedings. Art. 12.2: Member States shall ensure that victims of trafficking in human beings have access without delay to legal counselling, and, in accordance with the role of victims in the relevant justice system, to legal representation, including for the purpose of claiming compensation. Legal counselling and legal representation shall be free of charge where the victim does not have sufficient financial resources. Art. 12.4 requires that, without prejudice to the rights of the defence and in accordance with national law and judicial discretion, Member States shall ensure that victims of trafficking receive specific treatment aimed at preventing secondary victimisation by avoiding, as far as possible the following: a. unnecessary repetition of interviews; b. visual contact between victims and defendants including during the giving of evidence such as interviews and cross-examination; c. the giving of evidence in open court; and d. unnecessary questioning concerning the victim's private life.

Art. 17: Member States shall ensure that victims of trafficking in human beings have access to existing schemes of compensation to victims of violent crimes of intent.

Art. 11 establishes the victims' right to assistance and support before, during and after criminal proceeding. Such assistance shall be provided as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to trafficking. Assistance and support shall not be made conditional on the victim's willingness to cooperate in the criminal investigation, prosecution or trial. This assistance shall include at a minimum at least standards of living capable of ensuring victims' subsistence through measures such as the provision of appropriate and safe accommodation and material assistance, as well as necessary medical treatment including psychological assistance, counselling and information, and translation and interpretation services where appropriate.

Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

The Directive lays down a set of binding rights for victims and clear obligations on EU Member States to recognise and treat victims in a respectful and non-discriminatory manner based on an individual approach tailored to the victim's needs. Article 1 provides that the rights apply to all apply to all people who fall victim to crime in Europe without discrimination of any kind, including with respect to their residence status.

Chapter II of the Directive deals with the provision of information and support to victims and establishes key rights such as: the right to understand and to be understood (Art. 3); the right to receive information from the first contact with a competent authority including on how and under what conditions they can obtain protection, legal advice or compensation (Art.4); the right to support (Art. 8-9), the right to interpretation and translation (Art.7).

Chapter 3 of the Directive deals with the rights in relation to victims' participation in criminal proceedings. It includes inter alia the right to be heard (Art. 10), the right to legal aid (Art. 13). Further Art.11 requires Member States to ensure that at least the victims of serious crimes have the right to a

review of a decision not to prosecute. Art. 16 established the victim's right to obtain a decision on compensation from the offender in the course of criminal proceedings, within a reasonable time. Member States are also required to promote measures to encourage offenders to provide adequate compensation to victims.

Chapter 4 of the Directive articulates the rights to protection of victims and recognises victims with specific protection needs, such as victims of trafficking and child victims. It includes under Art. 22 the right to an individual assessment in order to determine their specific protection needs, and determine measures to protect them from both the offender and from risk of further harm that may arise in the course of proceedings (Art. 23 and 24 deal with the right to protection of victims with specific protection needs and child victim during criminal proceedings.

Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers

Art. 25 deals with mechanisms for the facilitation of complaints. It requires Member States to put in place effective mechanisms through which seasonal workers may lodge complaints against their employers directly or through third parties. Where appropriate, third parties may engage either on behalf of or in support of a seasonal worker, with his or her approval, in any administrative or civil proceedings, excluding the procedures and decisions concerning short-stay visas. Furthermore, Member States are required to ensure seasonal workers' access to measures protecting against dismissal or other adverse treatment by the employer as a reaction to a complaint.

Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals

Art. 6 deals with back payments to be made by employers. In case of infringements of the prohibition on employment of illegally staying third-country nationals, it requires that Member States shall ensure that the employer is liable to pay: (a) any outstanding remuneration to the third-country national in accordance with applicable laws on minimum wages, or collective agreements or in accordance with established practice in the relevant occupational sector; (b) amounts equivalent to taxes and social security contributions, including penalty payments for delays and relevant administrative fines; (c) where appropriate, any cost arising from sending back payments to the home country of the third-country national.

Furthermore, Art. 6 requires Member States to systematically inform illegally employed third-country nationals about their rights before the enforcement of any return decision. It stipulates that Member States are to enact mechanisms to ensure that illegally employed third-country nationals: (a) may introduce a claim for any outstanding remuneration, and eventually enforce a related judgment, including in cases in which they have, or have been, returned; or (b) where applicable may call on the competent authority to start procedures to recover outstanding remuneration without introducing a claim. An employment relationship of at least three months duration should be presumed unless proven otherwise. Where residence permits have been granted under Article 13(4), Member States shall define the conditions under which the permits may be extended until the third-country national has received any back payment.

Council Directive 2004/80/EC relating to compensation to crime victims

- Art. 1: sets up a system of cooperation to facilitate access to compensation for victims of violent intentional crime committed on their territory.
- Art. 12.2: requests States to establish a State-funded scheme for payments in these cases and to establish cooperation structures for individuals from other EU member States to ensure they can easily access the schemes from their home country.

Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA)

The framework Decision contains detailed guarantees that should be provided to all victims of crime in EU Member States, including the right to support and information about proceedings (including on compensation), the right to legal assistance and aid, the right to protection and trauma minimization during proceedings, the right of victims resident in other EU States to be accorded the same rights, and the right to compensation. Art. 9 provides that Member States shall ensure that victims of criminal acts are entitled to obtain a decision within reasonable time limits on compensation by the offender in the course of criminal proceedings (9.1) and that recoverable property belonging to victims which is seized in the course of criminal proceedings shall be returned to them without delay, unless urgently required for the purpose of criminal proceedings (9.3).

Relevant ECtHR Jurisprudence

ECTHR Chowdury and Others v Greece, Application No. 21884/15, 30 March 2017[117]

The applicants are 42 Bangladeshi nationals who worked in Greece as strawberries pickers without work permits. They had been promised a wage of €22 for seven hours' work and €3 for each hour of overtime. They worked every day from 7 a.m. to 7 p.m. under the supervision of armed guards. They lived in very poor conditions without toilets or running water. At a certain point they went on strike demanding payment of their unpaid wages, but without success. One of the armed guards then opened fire, seriously injuring 30 workers, including 21 of the applicants. The wounded workers were taken to hospital. The investigation and judicial proceedings ended with a conviction of the armed guard and one of the employers of grievous bodily harm and unlawful use of firearms; their prison sentences were commuted to a financial penalty.

The Court held that there had been a violation of Article 4 (prohibition of slavery, servitude and forced labour) of the Convention (para. 101). The Court reiterated that the applicants' working conditions, showed clearly that they amounted to human trafficking and forced labour, and fell within the scope of Article 4 of the Convention (para. 100). The Court noted that exploitation through labour was one aspect of human trafficking (para 93). Further, the Court established that there had been a violation of Article 4 § 2 of the Convention on account of the State's failure to fulfil its positive obligations under that provision, namely to prevent the human trafficking situation complained of, to protect the victims, to

[117] *Chowdury and Others v. Greece*, no. 21884/15, ECHR 2017. See also ECHR, Press Release, ECHR 112 (2017), 30.03.2017.

conduct an effective investigation into the offences and to punish those responsible for the trafficking (para.128). Further, under Article 41 (Just satisfaction) of the Convention, the Court held that Greece was to pay each of the applicants who had participated in the proceedings before the assize court €16,000, and each of the other applicants €12,000 in respect of all the damage sustained, plus €4,363.64 to the applicants jointly in respect of costs and expenses (para. 129-134).

ECtHR reference: L.E. v. Greece (no. 71545/12), 21 January 2016

This case concerned a complaint by a Nigerian national who was forced into prostitution in Greece. She had lodged a criminal complaint alleging to be a victim of trafficking but had been required to wait more than nine months before the justice system granted her that status.

The Court held that there had been a violation of Article 4 (prohibition of slavery, servitude and forced labour) of the Convention. The Court further found a number of shortcomings with regard to the effectiveness of the preliminary inquiry and subsequent investigation of the case. The Court found multiple delays and failings with regard to the Greek State's procedural obligations. The Court found a violation of Article 6 § 1 (Right to a fair trial within a reasonable time) of the Convention since the length of the proceedings in question had been excessive for one level of jurisdiction and did not meet the "reasonable time" requirement (para. 95-98). Further, the Court held that there had been a violation of Article 13 (Right to an effective remedy) of the Convention, on account of the absence in domestic law of a remedy by which the applicant could have enforced her right to a hearing within a reasonable time (para. 99-100). [118] Further, under Article 41 (Just satisfaction) of the Convention, the Court held that Greece was to pay L.E. €12 000 in respect of non-pecuniary damage and €3,000 in respect of costs and expenses (para. 104, 107).

ECtHR - Rantsev v. Cyprus and Russia, Application no. 25965/04, 10 October 2010[119]

The case concerns Ms Rantseva, a Russian national, who arrived in Cyprus on a "cabaret-artiste" visa in 2001. Shortly after, she was found dead and an inquest held in Cyprus concluded that Ms Rantseva had died in circumstances resembling an accident. The applicant, father of Ms Rantseva complained against the Cypriot and Russian authorities in relation to the death of his daughter.

The Court found, unanimously, that trafficking in human beings, although not explicitly mentioned in the ECHR, fell within the scope of Article 4 (prohibition of slavery, servitude and forced labour). Trafficking in human beings by its very nature threatens human dignity and the fundamental freedoms of its victims, and cannot be considered compatible with the values expounded in the Convention, and is per se prohibited by Article 4 of the Convention (para. 282). The Court affirmed that Cyprus had violated Article 4 of the Convention failing to comply with its positive obligations. In particular, the Court considered that: "the spectrum of safeguards set out in national legislation must be adequate to ensure the

[118] *L.E. v. Greece*, no. 71545/12, 21 January 2016. See also ECtHR Factsheet on Trafficking in Human Beings, 2017.

[119] *Rantsev v. Cyprus and Russia*, no. 25965/04, ECHR 2010. . See also ECtHR Factsheet on Trafficking in Human Beings, 2017.

practical and effective protection of the rights of victims or potential victims of trafficking. Accordingly, in addition to criminal law measures to punish traffickers, Article 4 requires member States to put in place adequate measures regulating businesses often used as a cover for human trafficking. Furthermore, a State's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking". [120]In addition, the Court found a failure by the Cypriot authorities to take measures to protect Ms Rantseva; the Court stated that: "Article 4 may, in certain circumstances, require a State to take operational measures to protect victims, or potential victims, of trafficking […] In order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention". [121] The Court held that there had been a violation by the Russian authorities of their procedural obligation under Article 4 to investigate alleged trafficking, and in particular "the authorities took no steps to identify those involved in
Ms Rantseva's recruitment or the methods of recruitment used". [122] The Court further held that there has been a procedural violation of Article 2 of the Convention by Cyprus because of the failure to conduct an effective investigation into Ms Rantseva's death (para. 242).

With regard to the assessment of damage, the Court awarded the sum of €40,000 in respect of the damage sustained by the applicant; the Court noted that "the applicant must be regarded as having suffered anguish and distress as a result of the unexplained circumstances of Ms Rantseva's death and the failure of the Cypriot authorities to take steps to protect her from trafficking and exploitation and to investigate effectively the circumstances of her arrival and stay in Cyprus". The Court further recalled that it had found a procedural violation of Article 4 in respect of Russia and awarded the applicant the sum of € 2,000 in non-pecuniary damage in respect of the damage sustained byhim by the conduct of the Russian authorities (para. 343).

Politically binding instruments

ILO Recommendation on supplementary measures for the effective suppression of forced labour, Recommendation, 2014 (No. 203)

Para 12. Members should take measures to ensure that all victims of forced or compulsory labour have access to justice and other appropriate and effective remedies, such as compensation for personal and material damages, including by:

- ensuring, in accordance with national laws, regulations and practice, that all victims, either by themselves or through representatives, have effective access to courts, tribunals and other resolution mechanisms, to pursue remedies, such as compensation and damages;
- providing that victims can pursue compensation and damages from perpetrators, including unpaid

[120] Ibid. para. 284.
[121] Ibid. para. 286.
[122] Ibid. para. 308-309.

wages and statutory contributions for social security benefits;

- ensuring access to appropriate existing compensation schemes;
- providing information and advice regarding victims' legal rights and the services available, in a language that they can understand, as well as access to legal assistance, preferably free of charge; and
- providing that all victims of forced or compulsory labour that occurred in the member State, both nationals and non-nationals, can pursue appropriate administrative, civil and criminal remedies in that State, irrespective of their presence or legal status in the State, under simplified procedural requirements, when appropriate.

Para. 13. Members should take action to strengthen the enforcement of national laws and regulations and other measures, including by:

- giving to the relevant authorities, such as labour inspection services, the necessary mandate, resources and training to allow them to effectively enforce the law and cooperate with other organizations concerned for the prevention and protection of victims of forced or compulsory labour;
- providing for the imposition of penalties, in addition to penal sanctions, such as the confiscation of profits of forced or compulsory labour and of other assets in accordance with national laws and regulations;
- ensuring that legal persons can be held liable for the violation of the prohibition to use forced or compulsory labour in applying Article 25 of the Convention and clause (b) above; and
- strengthening efforts to identify victims, including by developing indicators of forced or compulsory labour for use by labour inspectors, law enforcement services, social workers, immigration officers, public prosecutors, employers, employers' and workers' organizations, non-governmental organizations and other relevant actors.

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN GA Res. 40/34 of 29 November 1985)[123]

Restitution and compensation should be available for crime victims, their families or dependants. Restitution should include the return of property or payment for harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, provision of services and restoration of rights (paragraph 8).

Government should review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions (paragraph 9).

When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes (paragraph 12).

States should encourage the establishment, strengthening and expansion of national funds for compensation to victims of crime (paragraph 13).

Paragraph 4, 5 and 6 contain provisions obliging other assistance that should be provided to victims

[123]See:www2.ohchr.org/english/law/victims.htm

including information on their rights to redress and assistance throughout the proceedings.

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN GA Res. 60/147 of 16 December 2005)[124].
Reparation includes both restitution and compensation.
Restitution should, wherever possible, restore the victim to the original situation and includes restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property (para. 19).

Compensation should be provided for any economically assessable damage, such as physical or mental harm, lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damages (such as pain and suffering, loss of reputation, emotional distress); and costs required for legal or expert assistance, medical, psychological or social services (para. 20).

Only applicable to a limited category of victims, e.g. where State actors are involved in trafficking. The envisaged source in all cases is the State given the inherent State responsibility for human rights violations.

UN HCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking
Principle 16 & 17: States shall ensure that trafficked persons have access to effective and appropriate legal remedies, and that, to the extent possible, confiscated assets shall be used to support and compensate victims.

Guideline 4.4 (ensuring an adequate legal framework): States should consider making legislative provision for confiscation of the instruments and proceeds of trafficking and related offences. Where possible, legislation should specify that the confiscated proceeds of trafficking will be used for the benefit of victims of trafficking. Consideration should be given to the establishment of a compensation fund for victims of trafficking and the use of confiscated assets to finance such a fund.

Guideline 9 (access to remedies): Trafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies. States should consider ensuring that victims have an enforceable right to fair and adequate remedies; providing information as well as legal and other assistance to enable trafficked persons to access remedies; making arrangements for trafficked persons to remain safely in the country in which the remedy is being sought for the duration of any criminal, civil or administrative proceedings.

ILO Migrant Workers Recommendation (no. 151, 1975)
Art. 34: A migrant worker who leaves the country of employment should be entitled, irrespective of the legality of his stay therein, to any outstanding remuneration for work performed, including severance payments normally due.

Council of Europe Recommendation (2006) on Assistance to Crime Victims

[124]See: www2.ohchr.org/english/law/remedy.htm

Art. 8 asserts that compensation should be provided by the state for victims of serious, intentional, violent crimes, including sexual violence (8.1) and, importantly, that State-sponsored compensation schemes should apply "irrespective of the victim's nationality" (8.2). It, moreover, encourages cooperation between CoE member states along the same lines as those required in the EU.

Council of Europe Recommendation (2000) on Action against trafficking in human beings for the purpose of sexual exploitation
Only states that Member States should ensure that "victims can also take their claim to civil courts which are competent to rule ... and award them compensatory damages".

OSCE Action Plan to Combat Trafficking in Human Beings (Decision no. 557, 2003)
Section III, paragraph 1, art 1.5: Recommends considering legislative provisions for confiscation of the instruments and proceeds of trafficking and related offences, specifying, where not inconsistent with national legislation, that the confiscated proceeds of trafficking will be used for the benefit of victims of trafficking. Giving consideration to the establishment of a compensation fund for victims of trafficking and the use of the confiscated assets to help finance such a fund.

Children

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims
Art. 15.2 establishes that Member States shall, in accordance with the role of victims in the relevant justice system, ensure that child victims have access without delay to free legal counselling and to free legal representation, including for the purpose of claiming compensation, unless they have sufficient financial resources.

Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA
Art. 20 2. establishes that Member States shall ensure that child victims have, without delay, access to legal counselling and, in accordance with the role of victims in the relevant justice system, to legal representation, including for the purpose of claiming compensation. Legal counselling and legal representation shall be free of charge where the victim does not have sufficient financial resources.

UN HCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking
Guideline 8 (special measures for the protection and support of child victims of trafficking), paragraph 8: States should consider adopting measures necessary to protect the rights and interests of trafficked children at all stages of criminal proceedings against alleged offenders and during procedures for obtaining compensation.

UN Guidelines on Justice for Child Victims and Witnesses of Crime (ECOSOC 2004/27)
Child victims and witnesses should receive reparation in order to achieve full redress, reintegration and recovery. Procedures for obtaining and enforcing reparation should be readily accessible and child sensitive (paragraph 36) and where possible dealt with simultaneous with the criminal case (paragraph 37). Reparation may include restitution from the offender ordered in criminal court, aid from victim

compensation programmes administered by the State and damage ordered to be paid in civil proceedings. Where possible, costs of social and educational reintegration, medical treatment, mental health care and legal services should be addressed. Procedures should be instituted to ensure automatic enforcement of reparation orders and payment of reparation before fines (paragraph 38).

UNICEF Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe (based on the Guidelines for Protection of the Rights of Child Victims of Trafficking).
Includes the requirement to provide information and assistance to child victims and contains an extensive list of types of damages and loss that should be compensated, including material and moral damages and regardless of the nature of the work.