

JUSTICE AT LAST

Know your rights
Claim compensation

Policy Paper

Publication: La Strada International

Published by La Strada International, Postbus 15865, 1001 NJ Amsterdam The Netherlands, www.lastradainternational.org in the framework of the research assessments done for the Justice at Last project.

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This project is partly funded by the European Union’s Justice Program (2014-2020).

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POLICY PAPER

Claiming and Obtaining Compensation: Barriers and Good Practices

“Trafficking in human beings is a human rights abuse. Compensation has a restorative, preventive and punitive function and is a crucial tool in combating human trafficking. Each trafficked person has the right to an effective remedy, including compensation; however, a range of barriers obstruct the consistent translation of the right to compensation into practice. Consequently, many trafficked persons are left without justice.”¹

Most European countries have legal provisions for victims of crime to claim compensation or to otherwise be compensated for material and non-material damages. However, even when the legal framework is in place, for victims of human trafficking or other related crime to actually seek and obtain compensation remains difficult or impossible to exercise in practice. Evidence shows that very few victims have the information and the means to seek compensation. Even fewer actually receive a compensation payment.

Although compensation is an internationally recognized right of trafficked persons, there are many barriers that prevent them from accessing and enjoying this right. As long as barriers to compensation exist, European Governments fail to fully comply with their obligations, among others under article 15 of the Council of Europe Convention on Action against Trafficking in Human Beings.

The right of victims of trafficking to seek and obtain compensation is established in the most important international and European anti-trafficking instruments, including the UN Trafficking Protocol, the Council of Europe Convention on Action against Trafficking in Human Beings, the EU Directive on Trafficking in Human Beings, the EU Victims’ Rights Directive², and more recently the Protocol to the ILO Forced Labour Convention. European law upholds the right of victims of crime to an effective remedy, including compensation as form of reparation.³ 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”⁴. Several of these instruments also establish minimum standards on the rights of victims of crime, and of trafficking specifically, in all EU Member States without discrimination.⁵ These instruments stipulate many essential procedural safeguards to enable victims’ access to effective remedies.

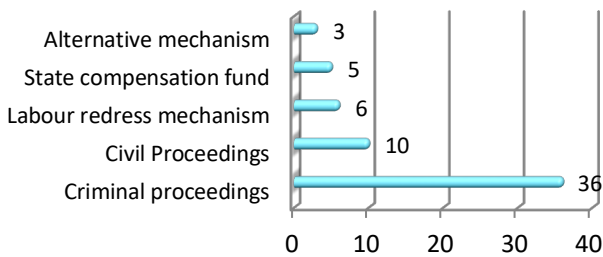
Despite these standards, a number of legal, procedural, financial, and practical barriers hinder the access of trafficked and exploited persons to effective remedies, including compensation. This situation is exacerbated in the case of vulnerable groups who face multiple obstacles, such as undocumented or irregular migrants, who are disproportionately exposed to violence and exploitation because of the challenges they face in accessing justice and support.⁶

Main Findings

From May till August 2018 a threefold assessment effort was made, which examined: a) legal practices in compensation claims of trafficked and exploited persons, b) cooperation in access to compensation in cross border context, and c) victims’ needs related to obtaining compensation. The focus of each assessment was 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.

The present study largely echoes the findings of the COMP.ACT research of 2012. However, clearly, since 2012 the number of claimed and awarded compensation cases has increased significantly. Compared to the COMP.ACT research of 2012, the current Consortium partners were able to provide more cases to inform the research. Nevertheless, similar to the COMP.ACT research, the present assessments found that for victims of crime, although the right to compensation is internationally recognised and well established in EU and national legislation, many barriers remain that prevent them from effectively accessing and enjoying this right. The Justice at Last consortium studied 60 cases concerning victims of trafficking or other related crime. From the cases under study, only two out of three of the victims that claimed compensation, were awarded with compensation. Worryingly, only a quarter of them actually received the awarded compensation amount.

Avenues to compensation



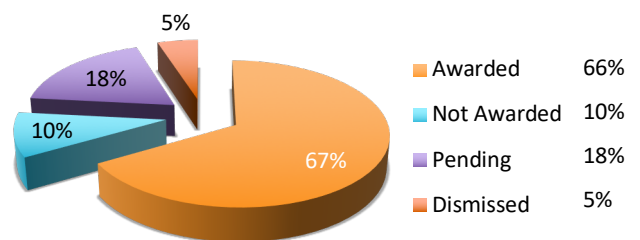
Most (60%) of the compensation claims were addressed in criminal proceedings; these were civil proceedings appended to a criminal case. Civil proceedings were used in 17% of cases. It is worth noting that 60% of the claims in civil proceedings were put forward following a criminal case in which the compensation claim was referred to a civil court for assessment of the damages, 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 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.

Actual awards

The Justice at Last consortium studied 60 cases concerning victims of trafficking or other related crime. These 60 cases related to mostly single victims and a few cases concerned more than one trafficked or exploited person. All 60+ victims in these cases pursued compensation for the harm suffered, via various avenues such as criminal and civil proceedings, labour redress mechanisms, state compensation schemes and alternative mechanisms. In 40 of these cases, the court decided to award compensation. However, only 11 of these cases actually resulted in compensation being paid to trafficked and/or exploited persons. **In the remaining three-quarters of cases, victims did not receive any monetary compensation** in spite of the court decision.

Judicial proceedings for compensation



Among the key findings:

Access to Safe reporting and information

- Access to safe reporting and adequate information, is a prerequisite for both identification of victims of trafficking and severe forms of labour exploitation and their access to protection and support. Often though those in vulnerable situations and or an irregular situation are not able to report exploitation safely, neither receive information on their rights.
- The Victims' Directive states that information on victim rights and compensation needs to be provided at the first contact and in an understandable manner. The research revealed the importance of taking into account that at first contact victims often have limited trust in any officials and may have other urgent concerns that need to be addressed before he or she is able to receive information on compensation.
- Lack of trust in rule of law, awareness of corruption, combined with the complexity and length of proceedings for compensation, may also prevent victims from seeking redress.
- Although the EU Victims' Rights Directive applies to all victims of crime in a non-discriminatory manner, including for those without residence status, many victims still fear to come forward and report being victim of crime. This fear is legitimate. Victims risk arrest and deportation because of their irregular

Promising practices in providing information: Cultural mediators and Pictures.

- Cultural mediators can help to support victims with different background and different languages, and mediate on their behalf with national institutions
- Adapt information materials to cater to the specific needs of certain groups of victims of trafficking.

status; in most countries, the mechanisms for safe reporting are lacking.

- Obstacles to accessing and obtaining compensation further include that police, prosecutors, lawyers, and judges are not always fully aware of the crucial importance of compensation for victims, nor are they always fully informed and sensitised about the rights of victims of crime and the procedures for national and international referral with regard to the compensation claim. This also hampers adequate information provision to victims.

Access to adequate legal aid throughout proceedings

- Trafficked persons require specialist legal aid to pursue compensation in criminal, civil and administrative proceedings. However, State funded legal aid is not always available. It is often not completely free, but subject to a means test. It is also limited in scope, for instance in terms of residence status and domicile of the victim, the type of trafficking, the type of proceedings, and stage of the compensation claim (pre/post trial). This can leave victims without adequate legal aid. Further, in general, the availability of quality, specialised legal aid is limited.

Promising practice – Specialisation of lawyers

In Austria, due to the legally secured funding lawyers are able to focus on trafficking cases to build their knowledge. Also, in the Netherlands, there are specialised lawyers and judges working on the crime of trafficking.

Promising practice – Prosecutor’s obligation to request victim compensation

In Spain, the law on the standing of victims of crime in practice 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.

Length of court proceedings

The cases examined reveal the complexity of compensation proceedings. Proceedings often involve examination before a court of first instance, appeal, and sometimes a higher tribunal. The duration of proceedings varies significantly. Its length depends on multiple factors related to the specific case circumstances, and the country’s legislative and judicial practice. For example, the longest case included in the assessment 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.

Calculation of damages and payment of compensation award

- The cases show that there are 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. So far there are no harmonised guidelines at European level to calculate damages for victims and payments of compensation awards
- In those instances where compensation has been ordered, barriers exist that leave victims without payment. These barriers include for example that victims rarely have the means to ensure the compensation order is enforced, or that the perpetrators are not found, are not prosecuted, have moved their assets abroad, or have declared themselves bankrupt to avoid confiscation of their assets and having to pay compensation. Lacking financial investigations and assets recovery are further barriers to ensure there are funds to pay the victim. In this respect, LSI and the other partners of the project consortium, support the adopted 2018 EU Regulation on mutual recognition of freezing and confiscation orders⁷, which contains provisions to ensure that victims’ rights to compensation and restitution are respected in cross-border cases.

- Access to State compensation funds may be hindered as well, for instance due to a lack of information, lack of means, and lack of access to legal aid. In addition, access to the fund is limited due to the criteria of the fund, for instance on residence status, and its definition of eligible crimes.

Amount of damage recognised and awarded

The 60 compensation cases analysed showed huge differences. 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 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. Both sentences are pending execution. The cases show that there can be significant differences between the amounts claimed in damages and the awards granted.

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 based on the presumption of a minimum of six months' employment. 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. (Cases NL01/02). This provision is based on the EU Employers Sanctions Directive. (Directive 2009/52/EC)

Promising practice:

When submitting a compensation claim, a Dutch lawyer includes the costs incurred for collecting evidence, for example a forensic or medical report.

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.

(Cross-border) cooperation, capacity building and research

- Not all relevant actors are yet sufficiently engaged in supporting trafficked and exploited persons in seeking and obtaining compensation for damage suffered. In particular involvement of trade unions is often lacking. Also, relevant stakeholders might not be timely involved; for instance, to secure proceeds and evidence to substantiate the compensation claim early financial investigation is required.
- There is a general lack of awareness among practitioners about cross-border referral options and possibilities to claim compensation in an EU country other than where the crime took place. Cross-border referral towards compensation claims is an exception rather than the rule. In cross-border cases, cooperation between law enforcement, judicial authorities and victim support services is essential; both in the country where the crime occurred and in the country of residence of the victim. Furthermore, it is essential that competent authorities from both countries cooperate with each other horizontally in a systematic way. Currently, cross-border cases are managed individually, on ad hoc basis.

Recommendations

Promote promising practices on compensation and seek to adapt them to the national context.

In order to improve access to compensation and to lift remaining barriers, the consortium recommends that the following steps are taken:

Safe Reporting and Information at first contact: Pre-Trial Recommendations

No		Target
1.	Ensure that victims receive information on their legal rights including on how to claim compensation in a language and manner that they understand, while taking into account limited trust and possible other urgent concerns at first contact;	CSOs, Lawyers, Law enforcement, including labour inspection
2.	Ensure that well-trained staff inform victims about the possibility to report the crime in an EU country other than where the crime occurred;	CSOs, Lawyers, Law enforcement, including labour inspection
3.	Implement mechanisms for easy and safe reporting by all trafficked and exploited persons, in particular undocumented persons, as part of the obligations under the EU Victims' Rights Directive (Article 8.5)	Law enforcement, policy makers
4.	Allocate sufficient funding for the provision of practical and psychosocial support to enable trafficked persons' access to justice (CSOs, policy makers)	Policy makers

Equality and non-discrimination in access to legal aid throughout proceedings

No		Target
5.	Ensure sufficient state funding for legal aid for trafficked and exploited persons, removing barriers based on means test, legality of residence and reasonable chance of case success.	Policy makers
6.	Provide legal aid and representation for the whole duration of criminal, civil and/or administrative proceedings, including pre- and post-trial: from first interview through trial and eventual execution of the award.	Policy makers, lawyers
7.	Support specialization of legal professionals and the establishment, nationally and internationally, 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.	Policy makers, lawyers
8.	Secure national funds earmarked to combat human trafficking to pay a number of lawyers to work solely on human trafficking cases.	Policy makers, Lawyers, CSOs

Calculation of damages and payment of compensation award

No		Target
9.	Invest in training and capacity building for NGOs to strengthen their practices in	Policy makers, judges,

	developing an expert report to contribute to informing the court assessment of damage sustained by the victim.	prosecutors, CSOs
10.	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), and on how to cooperate with social workers, psychologists, police and prosecution in preparing a victim compensation claim.	Policy makers, lawyers, CSOs, law enforcement, prosecutors
11.	Encourage criminal courts to use their possibility to order <i>ex officio</i> , as part of the sentence, an ancillary financial penalty on the trafficker to compensate the victim, in cases where compensation was not claimed by the victim him/herself.	Policy makers, judges, prosecutors
12.	Encourage the Judiciary to motivate 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 and other victims' decisions on future proceedings.	Policy makers, judges
13.	Encourage the Criminal Justice Actors, including the Judiciary to develop criteria for the calculation of damages when dealing with trafficking cases to ensure the principles of legal equality and certainty.	Policy makers, judges, lawyers, prosecutors, law enforcement
14.	Promote the Dutch model of state advance payment of compensation (awarded in criminal proceedings) as a tool to improve victims' access to an effective remedy	Policy makers, CSOs
15.	Ensure that financial investigation is initiated from the very beginning, together with the criminal investigation, since this is crucial for actual (proof and calculation of) payment of compensation awards. Increase capacity to identify, trace, seize and confiscate proceeds of crime at an early stage of the investigation to secure both sufficient evidence (of profit made from the exploitation of the victim), and their availability for compensating victims directly, or for contributing to a victim compensation fund. ⁸	Policy makers, law enforcement, judges, prosecutors
16.	Remove existing barriers concerning eligibility criteria for victims' access to State compensation funds for victims of violent crime in line with the obligations under the European Anti-Trafficking Convention (Article 15.3) and the EU Trafficking Directive (Article 17)	Policy makers

(Cross-border) Cooperation, Capacity building and Research

No		Target
17.	Provide victims in cross-border situations with access to specialised legal services as soon as possible. It is noted to be essential to stay in touch with one specialized lawyer that would accompany the victim throughout the proceedings, regardless of where the victim is actually domiciled.	CSOs, lawyers, Law enforcement, Policy makers
18.	Share best practices and lessons learned with cross-sectoral and cross-border cooperation in compensation cases to improve the daily practices of various stakeholders and to shape future standardized and harmonized cross-sectoral and cross-border cooperation on victims' access to justice and compensation.	ALL stakeholders
19.	Strengthen partnerships between victim support organisations and trade unions with regard to supporting trafficked and/or exploited people in obtaining compensation for damages, and in particular for unpaid wages through individual or collective action.	Policy makers, CSO

20.	Ensure practical use and implementation of existing tools and instruments to improve the access to justice of victims in cross border situation.	ALL stakeholders
21.	Better monitor return of potential trafficked persons under the EU Dublin regulation, and conduct appropriate risk assessments upon which the return can be suspended, if the conditions upon return may expose a victim to risks of refoulement, or re-trafficking, or do not take into due account the rights, safety and dignity of the person, and the status of any legal proceedings related to the fact that the person is a victim (Article 16 European Anti-Trafficking Convention). In cases where transfers under the EU Dublin regulation are not suspended, secure referrals of potential victims to specialized services.	Policy makers, law enforcement, judges, CSOs
22.	Invest in training and capacity building of criminal justice practitioners, particularly prosecutors and judges, on compensation for trafficked person, facilitating exchange of experience and mutual learning building on case law and international standards.	Policy makers, lawyers, judges, prosecutors, law enforcement
23.	Foster information sharing and mutual learning between judges, prosecutors, lawyers and victim support organizations within and across jurisdictions on compensation issues.	ALL stakeholders
24.	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.	Policy makers, prosecutors, CSOs, academia, research institutes
25.	Research alternative mechanisms to testify, to better support victims to testify in another country than the country where the prosecution takes place	Policy makers, judges, prosecutors

Background

This Policy Paper has been prepared in the framework of the project *Justice at Last – European action for compensation for victims of crime* project: a two-year EU-funded project that aims to enhance access to compensation for trafficked persons and victims of related crimes.

The project consortium is coordinated by La Strada International and exists of partners in Bulgaria (Animus Association), Czech Republic (La Strada), Spain (SICAR cat and Esperanza), Germany (KOK), Austria (LEFO), The Netherlands (FairWork), Ireland (MRCI), Romania (Adpare), Macedonia (Open Gate/La Strada) and Serbia (ASTRA).

This Policy Paper is meant to inform European and national policy makers of the issues – both obstacles and promising practices - playing on the ground; to foster mutual learning among practitioners in NGOs and lawyers working with trafficked persons; and to provide opportunities for NGOs to continue and strengthen their advocacy and action to promote compensation for trafficked and exploited persons.

The project consortium is committed to support access to compensation for victims of crime and to advocate for full and effective implementation of EU law at national European level. All partners aim to collectively work on removing the identified remaining barriers, as well as advocate for adopting good practices to overcome such barriers; to equip professionals with knowledge and skills on providing assistance for obtaining compensation to victims of crime; and to raise awareness about the most effective mechanisms on protection of victims' rights and access to compensation amongst legal professionals, policy makers, service providers and victims of crime in Europe.

¹ COMP.ACT TOOLKIT ON COMPENSATION FOR TRAFFICKED PERSONS La Strada International 2012

² 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.

³ Article 13 of the ECHR, Article 47 of the EU Charter of Fundamental Rights

⁴ EU FRA Handbook on European law relating to access to justice, 2016, p.162.

⁵ Including: The Council of Europe Anti-Trafficking Convention, the EU Trafficking Directive and the EU Victims' Rights Directive

⁶ PICUM's report "Strategies to End Double Violence Against Undocumented Migrant Women: Protecting Rights and Ensuring Justice", available at www.picum.org

⁷ REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the mutual recognition of freezing orders and confiscation orders, adopted on 17 October 2018.

⁸ 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.