

JUSTICE AT LAST

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Claim compensation

Working Paper *Victims' Needs Assessment*

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Publication: La Strada International and
Animus Association Foundation



WORKING PAPER

VICTIMS' NEEDS ASSESSMENT



Published by La Strada International, Postbus 15865, 1001NJ Amsterdam The Netherlands,
www.lastradainternational.org

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Acknowledgements

La Strada International and Animus Association Foundation would like to thank the main author Diliana Markova, for drafting this paper, developed in the framework of the European project Justice at Last – European Action for compensation for victims of crime.



This project is funded by the European Union’s Justice Program (2014-2020) and an anonymous donor.

The content of this paper represents the views of the author only and is La Strada International’s and Animus Association Foundation’s sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

All partners of the Justice at Last Consortium have contributed to this assessments by collecting compensation cases and providing other data and consultation. They and other experts further participated in a focus group meeting held on June 7, 2018 in Vienna, Austria.

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Introduction

This assessment report is written in the framework of the project *Justice at Last – Access to Compensation for Victims of Crime*, a project of La Strada International. 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 cross border context, and c. victims' needs related to obtaining compensation.

The report is based on desk research, 10 questionnaires and 60 case descriptions provided by the project partners,¹ as well as the focus group discussions with 46 participants in the focus group meeting held in Vienna in June 2018.

¹ Project partners are from the following countries: Austria, Bulgaria, the Czech Republic, Germany, Ireland, Macedonia (FYROM), the Netherlands, Romania, Serbia, and Spain.

Methodology

The research comprises desk research, followed by an analysis of collected country and case descriptions. Initial and preliminary findings were validated and elaborated during focus group discussions.

The desk research built on 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 filled in questionnaires and collected case studies. It was not just the approach that was similar, however, but also the majority of the countries under study were the same. Austria, Bulgaria, Czech Republic, Germany, Ireland, Macedonia (FYROM), the Netherlands, and Spain participated in both projects' research. The present Justice at Last project includes additional data from Romania and Serbia, while the COMP.ACT project of 2012 gained information from six other European countries.

The second source of data is the country and case descriptions. Initially, it was planned to prepare a template for the collection of case description to feed solely into the assessment on Legal Procedures, and to prepare a questionnaire for use solely in the other two assessments, on Victim Needs and on Referral. 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 documents. The two documents were prepared by the researchers and La Strada International. Inspiration for the questions was found in the COMP.ACT research template and questionnaires, and the BAN-2 Tool². The case descriptions included a typology of offences, and registered the legal route taken to claim and obtain compensation, the reasons behind this choice, and its outcomes. All project consortium partners provided a questionnaire with country information, and 3 to 10 case descriptions of compensation claims. To prevent any overlap with the COMP.ACT report, only cases of *after* 2012 were used.

Despite the significant number of cases collected (60 cases), these are not necessarily representative for 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, primarily with adults and/or victims of other crimes. The majority of cases hence concern trafficked and exploited men and women, with only a couple of cases involving children. To ensure the privacy of the persons whose case was described, the collected cases were anonymised using numbers.

The third data source was the input of stakeholders gained during the focus group discussions held on 7 June in Vienna, Austria. A total of 46 participants joined the discussions: NGOs, lawyers, prosecutors, and European decision makers. Unfortunately, it was not possible to ensure law enforcement representation to the focus group meeting. This group will be targeted during other activities of the project.

² Balkan Act Now (BAN) II, is the second BAN project coordinated by the Serbian based NGO ASTRA in the period 2014-2016 to stimulate anti trafficking action in different Balkan countries including Macedonia, Montenegro, Bosnia Herzegovina and Serbia. The project developed a monitoring tool to monitor compliance in law and practice of these 4 countries with European anti-trafficking legislation. One part of this tool focusses on the right to compensation on paper and in practice.

The Right to Compensation for Victims of Crime

Compensation is a form of reparation to offset damage sustained as a result of an infringement of legal rights. It is an internationally recognized right of trafficked persons and other victims of violent crimes. Most European countries have legal provisions for victims of crime to claim compensation or to otherwise be compensated for material and non-material damage. However, even when the legal framework is in place, the rights of people who became victim of trafficking or other crimes 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.

Both Council of Europe (CoE) and European Union (EU) law provide for compensation for crime victims. 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”.³

The right to compensation was firstly envisaged under the **European Convention on the Compensation of Victims of Violent Crimes of 1983**.⁴ It aims particularly at introducing schemes for the compensation of victims by the State when the offender has not been identified or is without resources.⁵ The Explanatory Report to this Convention similarly points out that victims rarely obtain compensation from the offender, in particular because of the offender's non-apprehension, disappearance or lack of means – something which the experience of the project partners also confirms. Despite various provisions in Member States to induce offenders to pay compensation, in very few cases is compensation for injury actually paid. This is why the State needs do more to ensure compensation for victims of crime. State intervention is justified on grounds of social solidarity and equity: since some victims are more vulnerable, or unluckier, than others, they must be compensated by the whole community for any injury sustained.⁶

The later adopted **Council of Europe Convention on Action against Trafficking in Human Beings of 2005**⁷ specifically envisages the right to compensation and legal redress for victims of human trafficking (Article 15). The compensation is pecuniary and covers both material injury (such as the cost of medical treatment) and non-material damage (the suffering experienced).⁸ Again it was acknowledged that even though the traffickers bear the burden of compensating the victims, in practice there is rarely (full) compensation paid.⁹ This is why Article 15(4) requires that State Parties take steps to *guarantee* compensation of victims. Paragraph 4 suggests ‘setting up a compensation fund or introducing measures or programmes for social assistance to and social integration of victims that could be funded by assets of criminal origin’.

³ Opinion of Advocate General Lenz of 6 December 1988 in CJEU, C-186/87, Ian William Cowan v. Trésor public, 2 February 1989.

⁴ Council of Europe, Convention on the Compensation of Victims of Violent Crimes, CETS No. 116, 1983.

⁵ Preamble, Council of Europe, Convention on the Compensation of Victims of Violent Crimes, CETS No. 116, 1983.

⁶ Resolution (77) 27 on the Compensation of Victims of Crime (Adopted by the Committee of Ministers on 28 September 1977, at the 25th meeting of the Ministers’ Deputies) accepted equity and social solidarity as the basic principles of compensation.

⁷ CET 197 of 16 May 2005.

⁸ Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, s. 197.

⁹ *Ibid.*

European Union Law also specifically addresses compensation for victims of trafficking or victims of crime in general. Under Article 17 of the **EU Anti-Trafficking Directive 2011/36/EU**¹⁰ Member States must ensure that victims of trafficking have access to compensation. Likewise, Article 16 of the **Victims' Rights Directive of 2012**¹¹ also addresses compensation, and the earlier 2004 **EU Compensation Directive**¹² established a system of cooperation to facilitate access to compensation for victims of crimes in (EU) cross-border situations.

In view of these extensive guarantees for victims' right to compensation as an effective remedy for the damage they have sustained, it is worrying that few victims of human trafficking still actually obtain any compensation in practice.

¹⁰ 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.

¹¹ 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.

¹² Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, OJ 2004 L 26.

General Barriers and Good Practices for Accessing Compensation

Consortium Partners of the project indicated a number of obstacles that victims face in practice when seeking compensation. These vary from lengthy judicial proceedings and insolvency of perpetrators to no access to legal aid for some types of compensation procedures (e.g. civil or before a labour tribunal) or poor quality of state-funded legal aid, or financial barriers such as costs for medical reports or for execution of judgments.¹³

When victims of (severe) labour exploitation are not formally identified as victim of human trafficking, forced labour, or another criminal act, their case is dealt with under labour law. For cases dealt with by labour tribunals, specific obstacles might occur. For example, the burden of proof is on the victim, there is often a lack of sufficient legal aid provided to victims, and employment tribunals do not provide compensation for non-material damages.

Lack of regular status or work permit

In addition, the possible irregular migration/working status discourages victims to report or file formal complaints with police or labour tribunals. 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. Even when the lack of residential/working status is not a hindrance for seeking compensation in theory, there are often no safe reporting mechanisms in place and it is often still the duty of the authorities to report a person, if they gain knowledge of the irregular status of a person. Even if this duty is not always or not automatically executed by authorities, the danger of arrest, detention and deportation persists and might prevent irregular migrants from filing complaints, requesting legal aid and applying for compensation or unpaid wages. Moreover, due to their status as an undocumented worker or irregular citizen, they also lack access in general to adequate information about their legal rights and the possibilities to claim their rights.

Furthermore, in some countries, for example Ireland, there is legal uncertainty whether irregular employed migrants are entitled to redress for employment rights' violations. This is an issue that is currently¹⁴ pending before the Irish High Court.

Obstacles related to legal procedures

In addition, the legal process in general, whether labour, criminal or other procedure, may not help victims as regards to their rehabilitation and may even exacerbate their already precarious condition. Victims sometimes have to face the perpetrator, or disclose personal data that puts at risk their safety and privacy. They are often subjected to retraumatisation be it due to insensitive officials or numerous interrogations. Although this risk in general exists for victims within the legal process, the compensation claim might put more burden and additionally require certain information to be disclosed from the trafficking situation, which intimidates and/or might further harm the person.

¹³ For further information on obstacles when seeking compensation, please refer to the Justice at Last assessment on legal procedures.

¹⁴ Case IE02 and <https://www.mrci.ie/scunapproved/>

Since compensation is intended and expected to assist victims in their recovery process, it is important that it is made available as soon as possible. Therefore, the legal and/or administrative procedures in place should ensure that a decision on compensation is reached within a reasonable time.¹⁵ This is why EU Member States are encouraged to develop ways to speed up proceedings by, for example, applying the adhesion procedure in criminal proceedings¹⁶ for compensation matters (instead of referring the compensation claim to civil proceedings, where victim bears the burden of proof and pays court fees), or compensation orders imposed by judges.¹⁷

The Justice at Last assessment on Legal procedures showed that, though the possibility exists to adhere a compensation claim to the criminal procedure, often the victim's compensation claim is redirected to civil court, arguing with the disproportionate burden on the criminal process, thus forcing the victim to go through the legal process twice. This also puts an additional financial burden on the victim.

Also, the NGO La Strada in the Czech Republic fears that realistically claiming damages within civil procedure (when referred from the criminal procedure) means that all protective measures (obligatory) used in the criminal proceedings will not be employed in the civil proceedings. It means that in criminal proceedings, victims have the right to ask the Court to prevent facing the offender in person, victims can testify in a different room etc. However, when the criminal court refers the claim for damages to the civil procedure, none of these measures will be employed.

When compensation is awarded in a criminal procedure, good national practice in one Member State, the Netherlands, is for the State to pay awarded compensation as an advance payment and then to take up the responsibility to recover the amount from the offender.¹⁸ According to the Dutch NGO FairWork, 'for the victim it is a relief that after eight months the State will pay them the compensation. It avoids them being confronted with the perpetrator every month when they receive the amount that has to be paid by them. Moreover, they do not have to wait for years before they have received the full payment and are no longer dependent on the traffickers' willingness and capability to pay'.

Other obstacles and dilemmas

In general, compensation claims, if awarded, may have some negative financial effects on victims, such as loss of social benefits or an obligation to repay free legal aid. There are also other dilemmas related with claiming compensation from offenders.

¹⁵ 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, December 2013.

¹⁶ Adhesion procedure, adhesive procedure or ancillary proceedings are a procedure through which a court can rule on compensation for the victim of a criminal offence. Rather than pursuing damages in a separate civil action, the victim files a civil claim against the offender as a part of a criminal trial.

¹⁷ DG JUSTICE GUIDANCE DOCUMENT related to the transposition and implementation of the Victims' Rights Directive, section 56.

¹⁸ DG JUSTICE GUIDANCE DOCUMENT, section 57.

In criminal law compensation for victims of crime is mostly to be ensured from the offender. To assist the victims in their recovery process, it seems important that compensation is paid (directly) by the offender.¹⁹ With this in mind, the European Union has stressed the importance for States to envisage mechanisms that give offenders an incentive to pay adequate compensation awards to victims.²⁰ For example, the payment of compensation to the victim by the offender can be taken into account as a condition for early release. In a case from Serbia²¹ the offender paid the awarded compensation in monthly instalments. He was stimulated to do this as in this way he was increasing his chances for early parole. It can be questioned though whether it is positive that incentives are in place for traffickers who are required to pay compensation for criminal deeds, and whether this does justice to the victims of these perpetrators. Besides in fact there also victims who do not want to obtain compensation from traffickers, for example, as they perceive it as “dirty money”.

In addition, claiming compensation by victims can also negatively influence the perception of their victimhood. For example, the NGO KOK in Germany knows cases where victims were advised by lawyers not to claim certain – realistic - amounts of compensation in criminal proceedings for the fear to lose credibility and to prevent to be regarded as ‘profiting from a situation’ (‘She is only after the money’ argument from offenders and defenders) or to make the judge unwilling to honour the requested amount.

Moreover, an unguided payment of an awarded high amount of compensation money may jeopardize the victim, if the cause of vulnerability did not change. The money granted may attract persons keen to exploit the now rich victim. Focus group participants stated that it is important to provide guidance to the recipient of the compensation award, for instance by a lawyer or NGO, to prevent increased vulnerability (see example below).

An interesting case²² of compensation awarded by the Dutch court to a Bulgarian victim of human trafficking illustrates another possible negative effect of compensation, namely heightened vulnerability of the victim. The victim was granted EUR 250,000. She did not have a bank account so the compensation was transferred to her Dutch lawyer’s bank account. The Dutch lawyer contacted a Bulgarian victim support organisation to seek ways to transfer the money to the victim without posing any risk to her, such as taking the money away from her. The victim had returned to Bulgaria and to the same environment where she was exploited in the past.

The Bulgarian victim support organisation assisted the victim in advising her of the high risk that retrieving the compensation may cause. It put her into contact with a lawyer to discuss specific modalities of receiving the compensation. The victim and the lawyer agreed that the victim would be receiving regular monthly sums for her daily expenses. In case she wants to invest money in property or would need any larger amounts, she has to file a written request to that end with the lawyer. All transactions will be dealt with by the lawyer (contracts, other documents, inspection of properties,

¹⁹ This seems to be the case in general for victims of violent crimes. However, for victims of human trafficking this might not always be the case as they may refuse to take money, which they know is earned by abusive and exploitative practises, for example.

²⁰ DG JUSTICE GUIDANCE DOCUMENT, section 57.

²¹ Case RS02.

²² The case was shared by a Dutch lawyer specialised in supporting victims of human trafficking. Further information was provided by Animus Association Foundation, Bulgaria, which assisted the victim in ensuring safe mechanism to receive the awarded compensation.

meeting with potential buyers etc.). This arrangement was laid down in a contract between the victim and the lawyer. A copy of the contract was translated and sent to the Dutch lawyer for approval. The case study shows that long term (legal) assistance might be needed even after the compensation was executed and paid, due to possible specific needs of the individual.

Thus, with little prospects of or incentives for obtaining compensation and a risk to revictimisation/retraumatisation, victims of crime are not particularly encouraged to pursue their rights. **To guarantee victims' right to compensation, therefore, Member States must first guarantee that this right is accessible and effective in practice and that victims may exercise it without any risk of revictimisation.**

Barriers and good practices in Ancillary Rights to the Right to Compensation

Obstacles to claiming the right to compensation also related to a lack of access to other ancillary rights. It is not by chance that the CoE Action against Trafficking in Human Beings (THB) promulgates the right to compensation by requiring firstly States to ensure that victims of trafficking enjoy access to ancillary rights such as the right to compensation, including information in a language that they can understand (Article 15(1)), alongside the right to legal assistance and to free legal aid (Article 15(2)).

Right to receive information

People cannot claim their rights if they do not know them. It is of paramount importance that victims are informed about any procedures they can use to obtain compensation for damage suffered. It is also essential that victims who are irregularly residing in the country are informed of these rights, as well as rights related to the possibility of obtaining a (temporary) residence permit, as it would be very difficult for them to obtain compensation if they were unable to remain in the country where the proceedings take place.²³

Pursuant to Article 15(1) of the CoE Action against THB, victims must be informed of relevant procedures as **from their first contact** with the competent authorities such as the police, the prosecutor's office, the labour inspectorate, or the customs or immigration services. **It does not have to be these services which supply the relevant information to victims.** However, as soon as victims are in touch with such services, they need to be directed to persons, services or organisations able to supply the necessary information.²⁴

The Victims' Rights Directive (Article 4) puts an obligation on the Member States to ensure that victims receive information from their first point of contact with a competent authority how to access the rights they are entitled to, such as the type of support they may obtain and from whom, access to medical and specialist support, including psychological support, alternative accommodation, protection measures, legal advice, compensation, etc.

The Council Directive 2004/80/EC relating to compensation to crime victims also requires Member States to ensure that potential applicants have access to essential information on the possibilities to apply for compensation (Article 4).

Providing information to crime victims in a manner that they can understand is quite challenging in practice. Firstly, there is the language barrier. Many of the partner organisations share that the provision of interpretation and translation services remain a serious challenge for the respective competent authorities. Often information is provided in writing but in the official language of the country (of destination) and in a formal or overly legalistic way.

Secondly, it should be considered that, while one share of victims have fairly enabling backgrounds, another share of victims of trafficking have multiple vulnerabilities. These may include illiteracy, mental

²³ Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, s. 192.

²⁴ Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, s. 194.

challenges, or having a background in a dysfunctional family or a violent society. Explaining the practicalities of a (foreign) legal system, especially if coupled with the language/interpretation problem, may be challenging to the extent not to be able to comply with this requirement.

Thirdly, although often also the NGO or service provider might be the first contact and refer the victim further to relevant stakeholders, the first point of contact may be the police, the prosecutor's office, or the migration authorities at a moment when victims are in a crisis or a severely precarious condition. This, arguably, might not be the best moment to inform a person about rights and procedures that may be difficult to comprehend even for a person in a regular situation. Partner organisations have indicated that the requirement to provide victims with information from their first point of contact may not always be the optimum way to ensure victims' rights are met, as many victims of trafficking, for example, due to the severe trauma they have sustained, are not in a position to comprehend the information they are provided immediately upon exiting the trafficking/crisis situation. Thus, although the victim should be informed in general about the legal procedure and victim's rights, including the right to compensation, as soon as possible, practice shows that to guarantee victim's rights, there should be a possibility to explain the legal details and options at a later stage, and more than once so as to ensure that victims actually understand their situation, rights and venues to proceed.

Fourthly, often victims receive information about their rights, e.g. compensation or legal aid, but not about how to access them in practice (procedures, victim support organisations to help them out etc.).

In spite of the barriers experienced by the partner organisations, the research also brought up several good practices.

A good practice described by the partner organisations is referral by the first point of contact to (specialized) victim support services/organisations where victims are rendered crisis intervention and psychological counselling. After overcoming the crisis situation, social workers/psychologists choose the best moment to inform victims further about their rights, and what there is at stake in terms of legal procedures, victims' involvement, risks and consequences. It should be noted that not all victims are severely traumatized, NGOs can also deal with victims of labour exploitation that show less signs of trauma, but rather have to continue to deal with very difficult circumstances due to lack of work, housing finances or their irregular status.

Those victim support organisations that have an in-house lawyer are of course best equipped and positioned to inform victims about their rights in a tailor-made and understandable way. An in-house lawyer would be experienced in working with victims of crime and trained how to deal with trauma, vulnerability etc. However, to keep an in-house lawyer may turn out to be quite expensive. Nevertheless, even if victim support organisations do not have an in-house lawyer, providing training to social workers and psychologists at the organisation about victims' legal rights would ensure that they manage to send across complex information in an understandable way.

A good practice shared by a Spanish judge²⁵ is to explain to people with mental disabilities their rights through pictures and animated objects. This practice may be adaptable to victims with specific vulnerabilities or limitations (for various reasons such as language barriers, trauma sustained, crisis situation, etc.)

²⁵ Justice at Last Focus group meeting, 7 June, Vienna Austria

Another good practice in relation to the right to receive information and Specialized Legal Assistance and Representation of Victims of abuse with mental disabilities is the service managed by Foundation “A la Par” in Madrid Spain. The service, called UAVDI (Attention Unit to Victims with Intellectual Disability²⁶), has under its main goals the following:

- Assessment of the case (forensic and clinical), advice for decision-making (protection measures, reporting, legal advice, etc.).
- Individual, family and group psychotherapy.
- Facilitator service, whose function is to guarantee access to justice for the victim under equal conditions, proposing the appropriate procedural adjustments to the officers of the Court and providing the victim with the necessary support in the police and judicial process.
- Legal advice providing knowledge and experience to the person with intellectual disability, their relatives and professionals to guarantee that its participation in the judicial process is with all the information, duly adapted and in the best possible conditions.
- Shelter for women with intellectual disabilities victims of violence in the Community of Madrid (including THB Victims).

Another good practice is the use of cultural mediators, especially when dealing with (undocumented) migrants. Cultural mediators can build the bridge between different languages and backgrounds of clients on one side, and national institutions on the other.

However, regardless of how helpful in-house lawyers and interpreters and/or cultural mediators are, it is very hard to ensure their services with public funding. Victim support organisations often have to rely on project funding for such services or must devote valuable resources to secure such help on a pro bono basis or at a lower cost.

To conclude, where there is a good cooperation established between competent authorities (usually the police) and victim support organisations (usually NGOs), police refer victims to the victim support organisations that in turn provide crisis intervention and psychological counselling and inform victims about their rights, including the right to seek compensation, at a moment when they deem most opportune.

Access to Services

The EU Victims’ Rights Directive²⁷ expressly stipulates that Member States must ensure that victims have access to confidential general and specialist victim support services free of charge (Article 8 and 9). In addition, this access should not be dependent on a victim making a formal complaint with regard to a

²⁶ As far as known this service is provided solely in Madrid area and for a specific type of victim – see <https://www.alapar.org/servicios-para-personas-con-di/acompanamiento-terapeutico/unidad-de-atencion-a-victimas-con-discapacidad-intelectual-uavdi/>

²⁷ Applicable only to EU Member States hence not to Serbia and Macedonia. However, participants from these countries in the focus group discussion held in June 2018 in Vienna shared that their respective countries are working on transposing the Victims’ Rights Directive requirements.

criminal offence. This support covers as a minimum information, advice and support relevant to the rights of victims, including on access to national compensation schemes, and emotional and psychological support, as well as appropriate accommodation and targeted support for victims with specific needs (e.g. victims of gender-based violence, sexual or domestic violence).

The effective provision of and access to support services is required, not only for the purposes of complying with the EU Victims' Directive, but also for meeting Member States' obligations under Article 47 of the EU Charter of Fundamental Rights.

According to a study of the European Agency for Fundamental Rights (FRA),²⁸ most Member States provide some form of generic victim support services, and all Member States provide support services to at least some specific groups of victims. The Victims' Rights Directive further requires that funding to support services should be carried out in a transparent and objective manner that ensures access to victim support services for all.

Member States have developed different generic victim support structures.²⁹ Broadly the different models fall in the following main categories: 1. structures that are State-run and funded; 2. those that are NGO-run but rely strongly on public funding; and 3. those that are NGO run and rely mainly on non-state funding sources.

Where victims receive services free of charge, organisations in some Member States may receive financial assistance by the state to cover the expenses incurred. FRA research indicates that "in 10 Member States, at least the largest organisation providing either generic or specialised victim support may be reimbursed by the state for the provision of support. In the remaining 18, organisations do not receive any specific reimbursement. However, the main service provider in 14 of these Member States is both state-run and state-funded, or the NGO relies heavily on state funding. The largest organisations in these countries therefore receive more general operational funding from the state, which can include payment for support services offered to victims free of charge".³⁰

Yet partner organisations in the framework of the project share a less optimistic picture. Even if there is operational funding from the state, it is often scarce or limited and only covers the basic operational costs. Thus, much needed assistance remains uncovered, or organisations have to rely on external (donor) funding to meet specific victims' needs and to comply with EU legislation. These are most often costs related to psychiatric help, medical expenses, forensic reports, interpretation, legal representation or costs for the execution of the awarded compensation (Bulgaria, Macedonia, and Serbia). In relation strictly to compensation, these needs/deficiencies are even further exacerbated as procedures may be lengthy and require continuous and prolonged assistance, respectively costs incurred.

This insufficient public funding sometimes forces organisations to make strategic choices. In addition, state funding might prioritize one type of victims of crime over another, e.g. a representative of one country stated that victims of sexual exploitation seem to receive more extended funding compared to victims of labour exploitation in her country, even though policies and measures do not prioritize this

²⁸ Victims of Crime in the EU: The Extent and Nature of Support Services, FRA (2014).

²⁹ Cf. a map of the different models of generic support services for victims of crime in the EU: <http://fra.europa.eu/en/publications-and-resources/data-and-maps/comparative-data/victims-support-services/models>.

³⁰ Victims of Crime in the EU: The Extent and Nature of Support Services, FRA (2014), p. 61.

group. In some countries, some types of support (e.g. psycho-social assistance) is conditional on whether victims are identified/referred/assisted through official channels. Thus, it may be challenging for victims who are not referred to NGOs for assistance or are not registered with service providers to receive psychosocial support (Macedonia).

Support may further be conditional on whether victims are willing to cooperate with the authorities. If victims are not willing to cooperate, they do not receive assistance or protection in most European countries. Also, the provision of psychological support to victims of trafficking requires firstly a proper identification of their vulnerability especially among migrants and asylum-seekers.

In Spain, partner organisations note deficiencies in the state support for victims of trafficking, both formally and informally³¹ identified, in relation to psycho-social accompaniment, expert reports, psychological assistance and assessment of damages.

It is therefore recommended that the State pays sufficient attention and provides sufficient funding for social support services to guarantee that victims' needs are met in a sustainable way to enable them to exercise their rights and seek redress for the damage sustained from failure of the State to meet its positive obligations.

Individual Needs Assessment

The individual assessment of victims' needs is directly related to the free of charge provision and guaranteed access to general and specialized support services for victims of crime.

The EU Victims' Rights Directive requires EU Member States to ensure that victims receive a timely and individual assessment to identify specific protection needs and determine their particular vulnerability to secondary and repeat victimisation, intimidation and retaliation (Article 22).

Individual assessments are (to be) carried out by the **victim's first point of contact**, typically the police or a victim support organisation, as mentioned above.³² Victims should be referred in a timely manner to specialized victim support services that are able to offer them the support they need.

The purpose of an individual assessment is to determine whether a victim is particularly vulnerable to secondary and repeat victimisation, to intimidation and to retaliation during criminal proceedings. The

³¹ European toolbox Identification of trafficked asylum-seekers' special needs, p. 5: "A major difficulty in many anti-trafficking measures is that trafficked persons are not identified and/or recognized as such. There appears to be some confusion about the meaning of the term. Broadly speaking, there are two kinds of identification, formal and informal identification. Formal identification occurs when a competent state body/authority officially recognizes that a person is a suspected victim of trafficking crime by establishing reasonable grounds for this (in some countries, it is considered sufficient to accessing the relevant support services). **Informal identification** or detection occurs when any practitioner or independent expert or the victim himself/ herself form an opinion that trafficking in human beings has occurred, but this has not been yet corroborated by the relevant competent authorities for recognizing victims of trafficking in the Member State. The importance of this process is that the confirmation of the identification as a victim (formal identification) may lead to certain rights for the victim, which may not be accessible otherwise because different rights are attached to different status (asylum seeker and victim of trafficking).

³² Victims of Crime in the EU: The Extent and Nature of Support Services, FRA (2014).

assessment implies a two-step process (which could be combined). Firstly, to determine whether a victim has specific protection needs against criteria such as the personal characteristics of the victim, the type or nature of the crime, the relationship between the victim and the offender and the circumstances of the crime; and secondly, to determine if special protection measures should be applied, and what these should be.³³

It is important to bear in mind that the individual approach endorsed in the Victims' Rights Directive does not in theory create priority categories or a hierarchy of victims. Nevertheless, in the context of the individual assessment particular attention must be paid to victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, and exploitation or hate crime.³⁴

The DG Justice Guidance Document³⁵ expressly points out that those agencies designated to conduct the individual assessment must undergo specific training to that end. The agency conducting the needs assessment should have experience and knowledge of working with victims in a respectful and professional manner. According to the DG Justice Guidance Document, good practice shows that the police or victim support services are ideally placed to conduct the needs assessment. However, it is questionable how well positioned or equipped the police are to perform an individual needs assessment, even if is specially trained to do so. It is of utmost importance that those conducting the assessment are sensitive to the issue and to the related trauma and situation of victims and are able to refer victims to adequate support services. Training may be helpful in referring victims to support organisations that appear better positioned to perform individual needs assessment based on the consent of the victim. Nevertheless, the timing is crucial since such an assessment will provide victims with required protection and support in any step of the subsequent criminal proceedings and/or compensation procedures. Thus, it is important to perform this needs' assessment at the earlier stage.

SICAR CAT/Proyecto Esperanza: 'It is necessary to ensure correct risk assessments to be able to adopt measures for an adequate protection of the victim and the professional who accompanies. Unfortunately, in practice, on very rare occasions, NGO's and services that attend victims of human trafficking have an adequate risk assessment provided by the police'.

The EU Directive leaves the competent authorities with a margin of discretion to determine how to assess the needs of victims of crime. In practice, there may be an implicit demand to establish internal procedures or protocols for assessing the support needs of victims and their families. The Justice at Last consortium partners clearly stressed the need for the assessments to be carried out by victim support services, based on the consent of victims and opposed formalized assessments of victims needs carried out by law enforcement authorities which have in fact other responsibilities.

In 2017 and 2018 Victim Support Europe has been implementing a large-scale project to assess the implementation of the Victims' Rights Directive in 23 countries. National reports determine the practical implementation of the Directive focusing on policies, funding etc. which enable implementation of rights, potential reasons and drivers for success and failure, good practices, and recommendations.³⁶

³³ Directive, cf. Article 3(2).

³⁴ DG JUSTICE GUIDANCE DOCUMENT, p. 44.

³⁵ Ibid.

³⁶ See for more information <https://victimsupport.eu/about-us/our-projects/vociare/>.

Specialised Legal Assistance and Representation for Victims of Crime

The UN principles and guidelines on legal aid, including victim support, introduced a broad definition of the term 'legal aid', calling upon all states to provide legal advice, assistance and representation – among other categories – “for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require”.³⁷

Access to legal aid is an important part of the right to a fair trial under Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights. The right to legal aid ensures effective access to justice for those who have insufficient financial resources to cover the costs of court cases, such as court fees or costs of legal representation. Under CoE and EU law, legal aid does not have to take a particular form; states are free to decide how to meet their legal obligations. As a result, legal aid systems often vary widely.³⁸ For example, legal aid may consist of free representation or assistance by a lawyer and/or dispensation from paying the costs of proceedings, including court fees.

Pursuant to the Anti-Trafficking Directive, 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 when the victim does not have sufficient financial resources (Article 12(2)).

Access to legal aid, notably access to legal aid free of charge, includes legal advice and legal representation in court (Article 13 of the Victims' Directive). In line with the provision of Article 47(3) of the Charter, which stipulates that “[legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice”, free legal aid is generally available to victims in nearly (26) all EU Member States. In most countries however, victims are subject to an economic means test from which only certain categories of victims are exempt (typically minors, victims of domestic violence or sexual offenses).³⁹ These rules differ per country, for example in the Netherlands the economic means test is applicable only in relation to legal aid in labour law cases. In terms of the financial means test, the ECtHR has said that there will be no violation of Article 6 (1) if an applicant falls outside the legal aid scheme because his/her income exceeds the financial criteria, provided the essence of the right of access to a court is not impaired.⁴⁰ In some Member States, victims' entitlement to legal aid may be restricted to certain categories of victims, offence types or subject to economic means testing.⁴¹

The role of victim support services varies in EU Member States as far as provision of legal aid is concerned, including formal legal aid and more general legal assistance to crime victims. Austria is the only EU Member State where the responsibility to guarantee legal advice and legal representation is transferred to victim support services that are contracted by the state, whereas in 14 EU Member States public

³⁷ The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted in 2012. Source: UN, United Nations Office on Drugs and Crime (2013).

³⁸ Handbook on European law relating to access to justice, European Union Agency for Fundamental Rights and Council of Europe, 2016.

³⁹ Victims of Crime in the EU: The Extent and Nature of Support Services, FRA (2014).

⁴⁰ ECtHR, Glaser v. the United Kingdom, No. 32346/96, 19 September 2000, para. 99. See also ECtHR, Santambrogio v. Italy, No. 61945/00, 21 September 2004, para. 58.

⁴¹ Victims of Crime in the EU: The Extent and Nature of Support Services, FRA (2014).

authorities fulfil this role. In the remaining EU Member States, the responsibility is shared according to various models, such as distinguishing between legal advice that is provided by victim support services and legal representation that can only be provided by legal practitioners sanctioned by the state.

Partner organisations and practitioners in particular have stressed the crucial importance of (specialized) legal assistance and representation for victims of trafficking and crime in general. A lawyer next to a psychologist can make sure that victims' rights are respected throughout the judicial or administrative proceedings. Lawyers will guarantee that the number of interrogations is kept at a minimum, conducted in a manner that poses no risk of revictimization, that victims are not confronted with the perpetrators, and that victims are accorded protection measures if so required. They will further assist victims with related judicial or administrative procedures for obtaining compensation, divorce or child custody, for example.

Regarding state-funded/free legal aid, partner organisations shared that by and large there appear to be more guarantees in place to protect defendants' rights than victims' rights. It was noted that victims seldom receive free legal aid in pre-trial proceedings, for example. Next, certain groups of victims are not eligible for free legal aid, such as those not formally identified as victims of trafficking or other crime, or exploited persons referred to labour court, who are not defined as victims of crime. Furthermore, no free legal aid might be provided for execution of awarded compensation or for civil procedures.

In Ireland, according to MRCI, 'Only recognised victims are entitled to legal aid and the extent of it is minimal. There is also no legal aid for those that seek support for issues related to misuse and exploitation by employers. These cases are referred to MRCI. Also, undocumented migrants are also generally not able to access legal aid, with some exceptions'.

In Spain state-funded assistance prioritises psychological counselling over legal assistance. It must be highlighted that, broadly speaking, there are not enough funds addressed to a comprehensive care for human trafficking victims. Generally, only a scarce quota from the national budget is earmarked for this topic, and usually solely to trafficking in women and girls for sexual exploitation. This is largely due to underestimating, underrating and undervaluing the workload involved in legally assisting victims of trafficking, since it can involve (among others) administrative procedures, criminal procedures, asylum procedure, etc. Besides, (the scarce) funding is normally focused on legal assistance rather than on legal representation.

On the other hand, legal assistance is not limited to a specific time frame: a case can be an "on-going case" for many years, which is something that is often not taken into account by funding structures. Moreover, a long-term case can require a great effort as appeals for higher courts may be in place, notwithstanding the new cases assumed.

Even where free legal aid is provided by the state, partner organizations shared that it is rarely of the required quality. Some legal aid lawyers would simply be present physically in the courtroom or would avail of very limited time to prepare themselves before the case hearing. In general, free legal aid lawyers do not have the necessary expertise to assist and represent victims of trafficking as these are usually very complicated cases and touch upon a number of related issues/areas such as migration, labour and family law, compensation procedures etc.

Unfortunately, the state of affairs as regards access to legal aid and quality of legal aid remains more or less the same as established six years ago in the framework of the European Action for Compensation for Trafficked Persons project: inconsistent and problem-ridden legal advice and representation for trafficked persons, restrictive decisions to award legal aid, little experience with complicated cases, and low levels of awarded legal aid.⁴²

To compensate for these deficiencies, victim support organisations in particular encounter a number of difficulties.

Where victim support organisations themselves fund legal counselling and representation, they often have to devote a lot of resources to comply with the various requirements of the donors that have funded the said legal aid (e.g. Spain). Further, legal assistance in human trafficking cases may extend quite over time, which makes it even more challenging to ensure external/donor funding for a case from the beginning to the end (Spain).

Partner organisations also shared that identifying and securing pro bono attorneys or attorneys charging lower rates to help the victims they support, requires disproportionate resources. In addition, most of the victim support organisations avail of only limited possibilities to hire well-prepared lawyers.

Sustainability of the specialized legal assistance service is difficult to guarantee, and for the most part this is done only through external (donor) funding (Romania). For the purpose of claiming compensation, external legal representation is almost always required, and, due to its lengthy process, it is a challenge for the organisation to ensure sustainable funding. Last but not least, lawyers assisting victims of trafficking may fall victim to human traffickers' retaliation, while especially within NGOs there are no mechanism in place to protect them. This makes victim support organisations consider carefully in which cases they ensure legal assistance for their victim clients (Spain). According the consortium partners SICAR CAT and Esperanza in Spain, it is very important to have protection and security mechanisms for specialized NGOs and professionals who provide legal support and representation.

In Spain, as the Protected Witnesses Legal Act establishes, there are safe reporting mechanisms in order not to reveal identity, avoid visual confrontation with defendant or their environment, be accompanied by police officers, etc for people acting as witnesses or providing expert testimony. In some cases, in which the NGO professionals were called to declare in Court as a witness or expert testimony, the judge called for protection measures in order to not disclose the identity of the professional nor the address of their work place to avoid possible retaliation. This is a good practice that should be taken in a systematic way to avoid confrontation with the traffickers and risks of retaliation. This measure is not applicable for attorneys in criminal proceedings on behalf of the victim.

This is why partner organisations reiterated the importance of **specialized legal assistance and representation for victims of trafficking**.

A number of **good practices** have been shared by partner organisations.

Austria provided for psychosocial and legal assistance in the Criminal Procedural Act. The assistance is formally extended by NGOs specialised for different types of victims. The police inform victims about the

⁴² Findings and Results of the European Action for Compensation for Trafficked Persons, p. 45, accessible at www.compactproject.org.

competent organisation, which then supports the victims during the criminal procedure as well as the civil procedure and employs a specialised lawyer. The advocates who are working in victim's legal assistance and representation are recommended to go through a training focusing on victims' rights, trauma, migrants' issues, etc. This training is offered by the bar association and includes trainers from NGOs on specific topics, like human trafficking.

In Spain, the bar associations have a specialized group of lawyers dealing with human trafficking cases and receive some training. The specialization is justified since trafficking in human being cases require expertise in a number of areas such as migration/asylum, criminal law, human trafficking etc. According the NGOs SICAR CAT and Proyecto Esperanza this is the case in the cities of Sevilla, Córdoba and Madrid, and they state that 'nevertheless, even in these cases, the service cannot be qualified as fully satisfactory due to a range of factors, including insufficient specialized training and insufficient economic resources. Especially those cases which require long term investment and higher specialization and demand a heavier workload'.

To ensure adequate legal assistance, specialisation of lawyers was recommended, as well as sufficient funding to ensure that these specialised lawyers can focus solely on trafficking cases. The use of pro bono services of qualified law firms was further recommended as a possible option.

In the Czech Republic, the NGO La Strada has in-house lawyer that assists attorneys representing the victims of trafficking in the court proceedings. This way, the experience in trafficking cases is combined with the experience of the attorneys. Some victim support organisations established a network/pool of specially trained lawyers to assist victims of trafficking (Bulgaria, Serbia). The Council of Europe is also working on promoting this and establishing a European lawyers network. It launched a first meeting in November 2016 and a second meeting in November 2018 to establish anti-human trafficking lawyers' network to build the capacity of legal professionals and explore ways to improve access to justice for trafficked persons, including access to compensation.

Conclusion

The right to compensation as a redress for the damage sustained by victims of trafficking and crime victims in general is well guaranteed in theory.

However, professionals rendering direct support to victims of trafficking and exploitation point out a number of deficiencies and obstacles to ensuring this right in practice.

To guarantee that victims obtain compensation, firstly states must make sure that the right to compensation is accessible and efficient in practice. This entails ensuring victims' ancillary rights, such as the right to be informed about their rights, the right to be assisted by general and specialized support services that are sufficiently funded by the state, and the right to free legal assistance and representation.

Importantly, these rights must be extended to all crime victims regardless of their working/residence status, as regardless of their status, they have become victims of crime due to omission on the part of the state to guarantee their life, security and health. Next to these ancillary rights, it is also important that identified victims of trafficking obtain the right to residence since often victims have to leave the country (e.g. after criminal proceedings) while compensation claim procedures continue.

Good practices indicate that, to that end, victims must be informed about their right to compensation not only at first contact, but at regular intervals by trained professional, to allow the victim to make a decision at an opportune time. Usually victim support organisations that provide psycho-social counselling are in the best position to do that. Interpretation services and services of cultural mediators should not be ignored or underestimated in this regard. A comprehensive approach combining both access to adequate legal and psychosocial support would be needed.

Secondly, victims must be assisted by trained professionals in accordance with their specific vulnerabilities throughout the duration of criminal, civil or administrative proceedings and to be accorded necessary protection measures if required. To that end victim support organisations must be provided with sufficient funding to render comprehensive support to victims on a case-by-case basis. Supporting victims in accessing compensation must be part of the overall support that victims receive by trained professionals and victim support organisations.

Last but not least, the support of specially trained lawyers competent in an array of legal matters such as migration/asylum, criminal law, compensation and related (usually family law) matters is crucial. They not only ensure respect for victims' rights but help victims' empowerment and successful subsequent integration. In that respect, the victims' involvement and empowerment and consent is of utmost importance when deciding about any steps during the compensation and support procedures.

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