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European Action for Compensation for Victims of Crime

WORKING PAPER

COOPERATION ON ACCESS TO COMPENSATION IN CROSS-BORDER CONTEXT

Author: Irena Ferčíková Konečná

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WORKING PAPER

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THE CONTEXT AND THE SCOPE OF THE STUDY

Good cooperation between all relevant stakeholders at national level is essential to ensure adequate access to protection and support for victims of trafficking, the same goes for claiming compensation. As human trafficking often relates to a cross border crime, also international cooperation between all relevant stakeholders is of utmost importance. This paper describes the in general requested cooperation between stakeholders and examines factors that lead to the success or failure of cooperation between stakeholders, both nationally and internationally, in the referral of victims towards a compensation claim.

The focus is put in particular on the cross-border situation, although the national cooperation and relevance of national referral mechanisms cannot be ignored, if we expect the trans-national cooperation to be functional. In this assessment, an overview of the EU legal framework is provided that is relevant for facilitating access to compensation in cross-border situations.

The co-operative framework through which state actors fulfil their obligations to protect and promote the human rights of trafficked persons, co-ordinating their efforts in a strategic partnership with civil society at the national context- is referred to as National Referral Mechanism (NRM)[1] in the anti-trafficking discourse. The basic aims of an NRM are to ensure that the human rights of trafficked persons are respected and to provide an effective way to refer victims of trafficking to services. This papers in particularly examines those **aspects of the co-operative framework through which the state and non-state actors facilitate access to compensation for victims of crime.**

A Transnational Referral Mechanism (TRM) can be defined as a co-operative agreement for the cross-border comprehensive assistance and/or transfer of identified or potential trafficked persons. (ICMPD, 2010). For the purpose of the assessment the TRM is understood as **trans- national co-operative framework through which the relevant actors of two or more countries facilitate access to compensation for victims of crime.**

With regard to the general framework on the cross- border cooperation, Article 82(2) of the Treaty on the Functioning of the European Union (TFEU) provides for the establishment of minimum rules, applicable in all EU Member States, to facilitate mutual recognition of judgments and judicial decisions, as well as police and judicial cooperation in criminal matters having a cross-border dimension, in particular with regard to the rights of victims of crime.

Article 26 of the EU Victims' Rights Directive stipulates that Member States shall take appropriate action to facilitate cooperation between Member States to improve the access of victims to the rights set out in this Directive and under national law. According to the European Implementation Assessment of the EU Victims' Rights Directive[2], research has shown that administrative mechanisms exist to facilitate cross-border cases, but that this is often not specified in law. This has resulted in a mix of bilateral working agreements and ad-hoc query practices to facilitate the necessary exchange

[1] OSCE/ODIHR: National Referral Mechanism. Joining Efforts to Protect the Rights of Trafficked Persons. A Practical Handbook. Warsaw, 2004. Accessed: 26.7.2018

[2] European Parliamentary Research Service: The Victims' Rights Directive 2012/29/EU European Implementation Assessment, December 2017 Accessed: 25.7.2018

regarding individual cases. The cooperation between judicial authorities as well as victim support services in trans-national cooperation is essential. The European Implementation Assessment of the Victim's rights Directive[3] states however that it remains unclear how provisions of the EU Victim's Rights Directive will be implemented in the specific instances of cross-border crime.

The EU Victims' Rights Directive shall apply in a non-discriminatory manner to all victims of crime regardless of their residence status (Article 1). Thus, third country nationals and stateless persons who have become victims of crime in the EU should benefit from the rights stipulated in the Directive equally. However, reporting a crime and participating in a criminal proceedings do not create any rights regarding the residence status of the victim[4]. According to the European Union Agency for Fundamental Rights (FRA)"…a victim in an irregular situation of residence, when seeking access to justice, faces requirements and restrictions to which other victims are not subjected. Such a differentiation runs counter the non-discrimination principle of Article 1 of the Victim's directive"[5]

Looking at the national cooperative frameworks, chapter 2 examines the safe reporting mechanisms for undocumented victims of crime and safe complaint mechanism for undocumented workers with regard to the 'firewall concept'[6]. This issue was identified as critical as safe reporting enables access to national referral mechanism, to services and to justice, including compensation.

Next to the safe reporting, the national approaches and practices with enforcing or discontinuation of Dublin transfers with regard to victims of trafficking are examined at the national level. Similarly, the cross-border aspect can be clearly seen also here. The so-called 'Dublin transfers' have been identified as an issue of concern by consortium partners and others, through the Focus Group Discussion[7]. Dublin transfers are often realized without adequate risk assessment and referral to specialized victim support services and in fact, render the victims' access to justice and compensation. However, such transfers may even breach the positive obligation of state to protect victim of trafficking and to prevent re-trafficking of a person.

Referral to and availability of legal aid (and particularly legal representation) can be seen as crucial element in accessing justice. This assessment doesn't deal with this issue at national level as other two complementary assessments on Victims' needs and Legal analyses took the issue up. The assessment, however examines procedures and mechanisms enabling access to legal aid in cross- border situation.

As the access to compensation in cross border situations can be very specific, the assignment within this assessment was also to prepare brief overview of the legal instruments at the EU level that can be relevant for accessing compensation. Clearly, the level of knowledge of these instruments amongst

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[3] European Parliamentary Research Service: The Victims' Rights Directive 2012/29/EU European Implementation Assessment, December 2017 Accessed: 25.7.2018

[4] European Comission, DG JUSTICE (2013): Guidance document related to the transposition and implementation of the Directive 2012/29/EU

[5] FRA (2015) Severe labour exploitation: workers moving within or into the European Union ,p.78

[6] A clear separation between immigration enforcement activities and the provision of essential services. Details at: Crépeau, François and Hastie, Bethany, The Case for 'Firewall' Protections for Irregular Migrants: Safeguarding Fundamental Rights (2015). 2-3, European Journal of Migration and Law (EMIL), 157-183. Available at SSRN. Accessed: 7.7.2018

[7] Focus Group Discussion held in framework of Justice at Last project on 7th June 2018 in Vienna, Austria with representatives of consortium partners and other experts on the issue of compensation for victims of trafficking.

NGO practitioners is minimal, due to which much findings are based on desk research and individual consultations with an international civil lawyer and a judge.

The assessment doesn't provide an exhaustive analysis of all factors that may lead to successful cooperation in order to facilitate a successful compensation claim. Each situation requires an individual approach and collaborative environment, where partners can recognise (the often different) roles of all stakeholders in the referral system. Further, the situation becomes even more complicated when two existing (national) cooperation mechanisms, that can be functional on very different procedures, mechanisms and laws, will start to interact in order to facilitate access to justice and compensation across borders.

Various professional horizontal networks at the cross-border level already operate, such as law enforcement cooperating structures aiming to strengthen and facilitate the coordination of investigations of serious and organised cross-border crime in the European Union like Eurojust, Europol, Interpol and CARIN, and also NGO cooperation networks, like Victim Support Europe (VSE) or the La Strada International NGO Platform that has established more or less formalized procedures. It is of utmost importance to ensure horizontal but as well as vertical collaboration and coherence at the international level between police, judicial authorities and victim support organisations, when they are dealing with a victim's case in order to minimize the burden upon the victim in the cross-border context.

TERMINOLOGY

Empowerment is one of the core principles of La Strada International. Language is recognized and acknowledged as a strong tool, and can shape the social construction of reality. It can determine the relationship with or approach to the people whom we talk about.

Trafficked persons are called mostly "clients" or "beneficiaries" by the La Strada International Platform members. The expression "trafficked persons" is used in all its official statements and documents as alternative to the term "victim". The expression "trafficked person" aims to recognise the agency of the person who was trafficked. The expression "victim" on the contrary, is used minimally in the daily practice of La Strada International NGO Platform members, as it is associated with powerlessness, defencelessness or weakness. However, this text does use the term 'victim'. The choice for this term comes from the context: the assessment relates considerably to the position of "trafficked persons" in court proceedings, and elaborates on numerous legislative documents and texts. In this particular assessment, it would be challenging to use interchangeably the terminology of "victim" (as defined by national and international law, and in line with the official terminology of law enforcement authorities), and that of "trafficked persons" and "clients" or "beneficiaries". Therefore, in this particular text the term "victim" is used keep at pace with legal terminology, while it is stressed that the agency of the persons who became victims is very much recognized and that empowerment remains the determining principle.

Further, the terminology used in chapter 2.2 on Complaint mechanisms for undocumented workers strives to be in line with the official position of the Platform for International Cooperation on Undocumented Migrants (hereinafter PICUM)[8]. The text prefers the use of "undocumented" or "irregular" migrant worker, rather than "illegal", as "illegality" is associated with criminality and can be seen as discriminatory. However, where the terminology is in direct relation to the 2009 Employer's Sanction Directive or other legislative documents, the author of this text uses the terminology "illegally staying third country national" as defined in the Article 2 (b) of the Employers' Sanction Directive[9].

[8] See http://picum.org/words-matter/

[9] Directive 2009/52/EC,

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. Not just the approach was similar, but also the majority of the countries under study were the same. Austria, Bulgaria, Czech Republic, Germany, Ireland, Macedonia, 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 were 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 Tool. 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. A draft version was shared with the Steering Group, and with project partners MRCI and KOK who were given this role in the project proposal, for their input. The final version of both documents was sent to all project partners, who each returned the filled in questionnaire with country information, and 3 to 10 case descriptions. To prevent any overlap with the COMP.ACT report, only cases of *after* 2012 were used.

Despite the significant number of cases collected, 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 cases collected from one of the two organisations in Spain were renumbered to avoid confusion during the research phase.

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 50 participants joined the discussions: NGOs, lawyers, prosecutors, and European decision makers. The participants were divided over three groups, which rotated in three rounds of discussions, each group thus discussing each of the three research topics.

Unfortunately, for different reasons it was not possible to ensure law enforcement representatives to participate in the focus group meeting. This group will be targeted during other activities of the project.

The balance in the use of the data sources depends on the research. The assessment report on cooperation on compensation in cross-border contexts noted that there was very limited practical experience, both among the participants in the focus group discussions and among the respondents of the collected cases, with the existing tools and instruments to claim compensation in a cross-border situation in Europe. As a result, desk research was a predominant source of data in the Referral research. The Legal Procedures research made extensive use of the collected case descriptions and is founded on the analysis of the cases.

A draft report was sent to project partners for further clarifications and feedback, after which the report was reviewed. Due to the timeline of the project, the finalizing of the project reports coincided with the summer holidays in European countries. As a result, not all feedback was received as planned. At the same time, the reports are very informative and may be linked to the project evaluation that is in process. Therefore, it was decided to continue work on the research over the course of the project. This underlying report is the version that will be shared with the participants of the focus group discussions and the Advisory Board for their feedback and further input.

1. REFERRAL AND COOPERATION MECHANISM

The client and her or his needs stand in the centre of our efforts. This is often heard form NGOs providing support to or advocating for trafficked persons or victims of crime. However, the needs of persons supported by NGOs may not always be in line with the needs and aims other stakeholders in the system may have. It is broadly recognized, that in order to support victims of crime and provide them access to justice, detect, investigate and successfully prosecute (often organized and sometimes international) crime, coordinated efforts and good cooperation of various stakeholders is essential. The pre-condition of successful cooperation and coordination of a case is understanding and recognition of the roles of various stakeholders in the referral and/or cooperation mechanism.

NGOs supporting victims of crime have the ultimate goal- to accompany their clients on their way to recover, rehabilitate and re-establish their lives. Each client has own expectations on how such process should look like. Whereas some wish to forget and not want to be reminded of their past experience, the other may choose another pathway and fight for justice and claim compensation and remedy. NGOs supporting victims of crime may provide a variety of services including social assistance, psychological assistance or even specialized legal assistance. The very important aspect of assistance provided by NGO support services is that they are experienced at how to interpret and explain to their clients, the often very complicated and complex information about the victim's legal situation, victim's rights and roles of various actors they may encounter on their way to justice. They also clarify in adequate language the role the victim may have during the court proceedings. As empowerment is one of the core principles of work of most NGOs providing assistance to victims, the NGOs psychologists and/or social workers may prepare the victim for the court proceeding not only by equipping them with information, but also by supporting them emotionally. Looking at the work of NGO support services from the perspective of other stakeholders, it can be of utmost importance for successful investigation and prosecution of crime and criminals, to have prepared, empowered and informed witnesses. However, it shall be recognized that the victims' expectations and wishes may not always be in line with what enforcement authorities may consider as important.

Lawyers supporting victims at the court proceedings are recognised by NGO support services, but also by other experts, as crucial for a successful compensation claim. Compensation for victims of crime doesn't come automatically and the claim of the victim for compensation requires particular competences, effort, understanding and devotion. Several times during the focus group discussion, it was mentioned to be crucial that the victims' lawyer needs to be involved from the very beginning of the process, as the compensation claim needs to be submitted as soon as possible. Further, it is very important that there is only one lawyer that accompanies the victim through the whole proceedings.

Police play a very crucial role, as they are often the very first contact for the victim, after police raids or police worksite visit (in case of immigration police) or when a victims reports or a criminal report is filed. The police has the obligation to provide any presumed victim with information on their rights and all relevant procedures, in a language and manner they can understand, including the right to claim compensation, upon the first contact with the victim. The police can play a crucial role in victim's referral. It needs to be noted, that in line with the 2004 Residence permit Directive[10] victims of

[10] Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration,

trafficking must be granted a reflection period in order to recover and make an informed decision, during which (and while awaiting a decision of the competent authority) they are entitled to assistance measures and are protected from the enforcement of expulsion orders.

Further, according the EU Victims' Rights Directive, victims have a right to victim support services regardless of whether she/he made a formal complaint with regard to a criminal offence to a competent authorities (Article 8 (5)). Further, the provisions of the Victims' Right Directive apply to all victims in non-discriminatory manner and particularly are not made conditional on the victim having legal residence status on the Member State's territory[11]. This poses a question, at which extend other than criminal units of police (e.g. immigration/foreigner police) fulfil their obligation while dealing with persons in other context than criminal e.g. undocumented exploited workers that are highly prone to become victims of trafficking in human beings. The ultimate role of police is to maintain public order, make people obey the law and to investigate in case of violation of the law.

The police interact a lot with the prosecutor. Prosecutor is a legal representative that represents the state against the criminal defendant. The role of the prosecutor is to presents the case against the defendant at the criminal trial. Prosecutors and/or police can initiate the financial investigation of the criminal when a crime such as trafficking in human beings was committed. Financial investigation, that is initiated as soon as possible, is crucial for successful compensation of victim. Next to the restorative role of the compensation granted, the criminal investigation may lead to criminal assets confiscation and recovery that can go beyond the mere punishment of the perpetrator in particular cases. Compensation is a significant instrument of anti-trafficking law and policy which serves restorative, punitive and preventative purposes[12].

Whereas the victims' lawyer represents rights and interests of victim, the police investigates in which breach the law was violated and gathers evidence, the prosecutor represents the state (interests). However, at all instances, human rights of the victim shall be respected and protected. Further the interests of defendant and the role of defendant's lawyer that searches for mitigating circumstances and the defendant's rights at the trial shall be taken into account. Judge stands on the top of that and assesses the interests of all involved, examines gathered evidence, hearings and (expert) witness reports and interprets the law. Judges have the mandate to decide, whether the compensation claim of the victim will be decided within the ongoing criminal proceedings or whether the claim will be sent to separate civil proceedings. According to some NGO respondents, in particular the role of judges is crucial for the success of victim's compensation claims.

When the case is sent to civil proceedings, the roles of police and prosecutors are suspended and the burden of proof lies with the victim.

Next to law enforcement authorities and NGOs supporting victims of crime, other stakeholders may play very an essential role, such as labour inspectorates. Labour inspectors may detect and ideally refer presumed victims of trafficking to victim support services. NGO evidence collected however

who cooperate with the competent authorities – See https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32004L0081

[11] Compare Recital 10 of the Victims' Rights Directive.

[12] Doornick. M. Findings and Results of the European Action for Compensation for Trafficked Persons. La Strada International, 2012.

indicates, that referrals from the side of labour inspectorates are very rare in comparison to the number of workplace inspection to sectors prone to exploitation and trafficking in human beings. The missing firewall between the ultimate role of the labour inspectorate and their duty to report immigration offences renders structurally the cooperation with the people to which the labour inspection primarily serves- the workers (although in undocumented position). Evidence of labour inspectors and in some countries mechanisms that labour inspectorate established (e.g. Netherlands) may significantly contribute to recuperate outstanding wages of workers in a vulnerable and undocumented position. Such approach would, in response, empower workers in irregular situation and decrease their vulnerabilities. With regard to the issue of workers' rights, trade unions- as part of civil society structures- are active in protecting workers rights. However only in some countries they are active in supporting also (undocumented) migrants workers who are not member of a Union. . More support from trade unions and alternative worker's rights organisations is needed, as they can support and protect workers directly and interact with authorities responsible for regulating the labour market.

As identified by the Focus Group Discussion participants, the role of migration service officers in charge of examination of asylum claim in detecting, identifying and in properly referring presumed trafficking victims to victim support services is, in light of the increased number of asylum seekers, very important. In line with Article 5 of the Dublin regulation[13], in order to facilitate the process of determining the Member State responsible for examination of asylum claim, the Member State shall conduct a personal interview with the applicant. Furthermore, many Member States screen all applicants for indicators of human trafficking, whereas other Member States screen only specific profiles of the applicants[14]. However, the approach of authorities responsible for asylum claim examination in various Member States with regard to (suspension of) Dublin transfers seems to lack uniformity and coordination. NGO respondents providing support to victims of crime indicated that Dublin transfers of asylum seekers are very often realized without appropriate referrals and risk assessments. This can breach the positive obligation of the state to protect victim from trafficking and to prevent re-trafficking.

In line with the 2005 Council of Europe Anti-Trafficking Convention[15] and the 2011/36/EU Trafficking Directive[16], states shall have in pace National coordinators or equivalent mechanisms at the national level. The national coordinators shall monitor the anti-trafficking activities of State institutions and the implementation of national legislation requirements. Such monitoring plays an important role in having effective strategies to combat human trafficking in place. The counterpart to National Rapporteurs or equivalent mechanisms is the EU Anti-trafficking coordinator responsible for improving coordination and coherence among EU institutions, EU agencies, Member States and international actors and developing existing and new EU policies to address trafficking in human beings. Recently (in

[13] The Dublin Regulation (Regulation No. 604/2013; sometimes the Dublin III Regulation; previously the Dublin II Regulation and Dublin Convention) is a European Union (EU) law that determines the EU Member State responsible for examining an application for asylum seekers seeking international protection under the Geneva Convention and the EU Qualification Directive, within the European Union.

[14] European Commission, Home Affairs: Synthesis Report- Identification of victims of trafficking in human beings in international protection and forced return procedures. European Migration Network, March 2014.

[15] 2005 Council of Europe Convention on Action against Trafficking in Human Beings. Accessed 20.7.2018

[16] 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. Accessed: 20.7.2018

October 2017), a Special EU Advisor on compensation to victims of crime has been appointed in order to explore the possibilities and suggest solutions on how to improve victims' access to compensation.

Functional cooperation, coordination and referral mechanism play an important role in helping governments fulfil their obligations to protect persons within their jurisdictions[17]. According to the OSCE/ODIHR, National Referral Mechanisms are building blocks of effective regional and international co-operation to combat trafficking and assist its victims. International co-operation requires effective structures on a national and local level to forge partnerships in the fight against human trafficking[18].

As mentioned, horizontal international cooperation has been well established in order to serve various actors in fulfilling their mission in cross border contexts - such as Interpol, Europol, Eurojust, European Judicial Network, CARIN (for assets recovery). Civil society organizations and victim support services also established well-functioning cooperation on victims' cross border referral as well as for the purpose of evidence-based advocacy for the rights of their beneficiaries. Although this cooperation, that is often determined by existing bi-lateral or multi-lateral agreements and/or memoranda's of understandings, on horizontal level improved, it must be noted that cooperation in the cross-border context on victims' access to justice is still often solved on an ad hoc basis. The EU Victims' Right Directive clearly articulated and enforced some victims' rights in a cross border situation. Further, the European Commissions' current proposal for an EU regulation on the freezing and confiscation of assets across borders aims at improving the protection of victims of crime in cross-border cases. It addresses victims' needs to get compensation for damages. Particularly, in cases where the victim has been granted a decision on compensation or restitution and the assets have been confiscated in another State following the mutual recognition procedure, the victim's right to compensation or restitution will have priority over the issuing and executing State's interests[19].

It took many years to build successful national cooperation and referral mechanisms in EU countries. It is expected to take some more years till the cross-border cooperation and referral mechanism will start to be operational not only on ad-hoc bases, but based on some level of standardized operational procedures.

[17] OSCE/ODIHR: National Referral Mechanism. Joining Efforts to Protect the Rights of Trafficked Persons. A Practical Handbook. Warsaw, 2004. Accessed: 26.7.2018

[18] Ibid.

[19] European Commission Fact Sheet: Security Union: Regulation on the mutual recognition of freezing and confiscation orders – Questions and Answers Brussels, 21 December 2016

2. REPORTING

Professionals working with victims of crime often experience unwillingness from the side of victims to report a crime, abuse or exploitation including labour law violations. Research of the Fundamental Rights Agency of the EU (hereinafter FRA) underscores the findings that many victims do not report the crime to the police.[20] The main reasons for this are the lack of trust to law enforcement/authorities, fear of re-victimisation or stigmatization, lack of self-identification and, specifically for undocumented victims, the fear for detention and deportation. The threats to denounce their irregular status in cases of undocumented victims/workers is often used by offenders to keep the victims/workers in a trafficking or exploitative situation. According to the Platform for International Cooperation on Undocumented Migrants (PICUM), immigrants whose residence status is tied to an employer or to a spouse may also be reluctant to report their victimisation because of the relationship of dependency- economic, emotional or administrative- with their persecutor[21]. The possibility to safely report a crime or an offence is an entry point to justice and the existence or non-existence of safe reporting mechanisms reflect on how and whether the country values fundamental rights of people in its territory. This chapter will focus on 3 components 1. Safe reporting mechanisms for victims of crime 2. Safe complaint mechanisms for undocumented workers of labour law violations and 3. Reporting of crime in other country than where the crime was committed. Encouraging victims to report a crime or an offence, should be of utmost importance for state authorities in order to detect, prosecute and prevent criminality and labour exploitation in their country/on their territory.

2.1 SAFE REPORTING OF CRIME

The EU Victim's Rights Directive (**Directive 2012/29/EU**)[22] *shall apply to victims* ***in a non-discriminatory manner, including with respect to their residence status.*** **Victims are entitled to victims support services whether or not a formal complaint has been filled** (according to Article 8). In this regard, the PICUM Guide to the EU Victim's directive[23] points out that the rights and protections provided for the Directive are empty **if undocumented victims of crime do not dare to avail themselves for fear of deportation. Safe reporting is** essential for ensuring access to justice.

Similarly, the EU DG Justice Guidance Document[24] states that Member States should ensure that rights set out in the EU Victim's Rights Directive **are not made conditional on the victim having legal residence status** in their territory or on the victim's citizenship or nationality. Thus, third country nationals and undocumented or stateless persons who have fallen victims of crime on EU territory, as well as victims of crime committed extra-territorially while their criminal proceedings are taking place within the EU, must benefit from these rights. According to PICUM[25], ensuring safe reporting means prioritising the safety and rights of victims above the enforcement of immigration rules. International institutions, NGOs and academics, including PICUM and La Strada International call for the concept of

[20] FRA (2015) Victims of Crime in the EU: the extent and nature of support for victims, p.55
[21] PICUM 2015 http://picum.org/wp-content/uploads/2017/11/VictimsDirectiveGuide_Justice_EN.pdf
[22] 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
[23] PICUM 2015 http://picum.org/wp-content/uploads/2017/11/VictimsDirectiveGuide_Justice_EN.pdf
[24] European Comission, DG JUSTICE (2013): Guidance document related to the transposition and implementation of the Directive 2012/29/EU
[25] PICUM 2015 http://picum.org/wp-content/uploads/2017/11/VictimsDirectiveGuide_Justice_EN.pdf

the 'firewall' – a clear separation between immigration enforcement activities and the provision of essential services[26]. In this regard the European Commission against Racism and Intolerance (ECRI) of the Council of Europe published a Recommendation on Safeguarding Irregularly Present Migrants from Discrimination in 2016[27]. Specifically the ECRI recommends that the governments of the (CoE) Member States (33) "Establish safeguards ensuring that irregularly present migrants who are victims of crime are aware of their rights and are able to report to law enforcement authorities, testify in court and effectively access justice and remedies without the risk of the sharing of their personal data or other information with immigration authorities for the purposes of immigration control and enforcement."

The pre-condition of a successful safe-reporting mechanism is awareness of both rights and avenues to claim and obtain these rights for victims of crime. This awareness is often less present among migrants and migrant communities, though they are often more vulnerable to crime and particularly to trafficking in human beings. Language and cultural barriers, or an irregular administrative situation, play a causative role. The measures on how to encourage and facilitate safe reporting may vary country by country. For sure, it should be ensured that front line officers, like law enforcement and labour inspectorates are made more aware of the need of safe reporting and will place rights protection above immigration controls.

Undoubtedly, the role of victim support organizations including NGOs and trade unions in facilitating communication and reporting plays a significant role here. Civil society organizations often act as bridges between the police and communities, helping to create relationship of trust and mutual understanding. This can in turn provide the foundation for more collaborative approach that opens the way to safer reporting.[28] NGOs are in direct contact with potential victims through field work programmes, "walk-in" or counselling programmes and there are hotlines operated in various languages by NGOs for victims of trafficking in most EU countries. Generally, hotlines can be often considered as effective means on how to facilitate reporting of crime, especially for undocumented migrants.

An example of facilitating reporting of crime in a secured way among undocumented migrants was an initiative of the Amsterdam police. The special police unit promoting this, made several regular visits to migrant rights organisations. There, they met with undocumented migrants and answered questions on topics such as 'how to lodge a complaint', 'what are the victim's rights and protection mechanisms' and 'how to take a case to court'[29][30]. This resulted later in an official pilot 2013 – 2014, which later in 2015 received national governmental support for a wider national implementation. In principle it is acknowledged that all victims of crime should be able to safely report without risks for detention or deportation. However in practise there remain a lot of bottlenecks, as well as lack of awareness among police and labour inspection to adequately implement this, due to which there are still a low amount of reports by undocumented persons that became victims of crime. Safe reporting seems mainly

[26] Crépeau, François and Hastie, Bethany, The Case for 'Firewall' Protections for Irregular Migrants: Safeguarding Fundamental Rights (2015). 2-3, European Journal of Migration and Law (EMIL), 157-183. Available at SSRN. Accessed: 7.7.2018

[27] European Commission against Racism and Intolerance (ECRI) of the Council of Europe: Recommendation No 16 on Safeguarding Irregularly Present Migrants from Discrimination adopted on March 16, 2016, available at http://hudoc.ecri.coe.int/eng#{%22ECRIIdentifier%22:[%22REC-16-2016-016-ENG%22]} accessed: 7.7.2018

[28] European Comission, DG JUSTICE (2013): Guidance document related to the transposition and implementation of the Directive 2012/29/EU

[29] Respondents from the Netherlands

[30] PICUM 2015 http://picum.org/wp-content/uploads/2017/11/VictimsDirectiveGuide_Justice_EN.pdf

possible in clear cases of human trafficking, and when persons are assisted and where case is closely monitored by NGO experts or others from the start. It is unclear what happens to persons that report themselves a situation that indicates labour trafficking to labour inspection. It is unknown whether these persons have been subsequently referred to police or support networks like NGOs or lawyers. Currently NGOs indicate that they do not receive direct referrals from the labour Inspection.

Clearly, safe reporting mechanisms, are not in place in all EU countries. The NGO respondent from Ireland explained that there is a lack of 'a clear firewall' and victims of crime are usually afraid that if they report crimes to the police their immigration status comes to light. There is no formal policy on this issue in Ireland, and whether a police officer requests a migrant's status simply depends on which police officer the victim meets on the day. The NGO respondent from Ireland further describes that if they come across victims of crime (other than human trafficking), they try to identify a police officer whom they know is sympathetic to migrants and will not report undocumented migrants to the immigration authorities.[31]

With regard to human trafficking, and specifically trafficking for labour exploitation, there can be a very subtle line between this crime and the act that would be qualified as labour law violation. The identification of whether the act committed against the person is qualified as crime of trafficking in human beings or falls under the non-criminal qualification of labour law violation[32] can pose the question, what will happen when the person is not consequently identified as a victim and how does the safe reporting mechanism deal with such situation? Will those for whom it is considered that the exploitation is not severe enough to qualify it as trafficking or forced labour, but 'only' a violation of labour law, have a higher risk to be deported or detained?

An undocumented victim can receive protection and should have the same rights as a documented victim when they are participating in criminal proceedings. In Spain, for instance, it does not depend on whether the victim is documented or undocumented, if identified as a victim of trafficking. There are mechanisms in place to regulate victims' residence status upon identification. At the same time, when a victim who is in an irregular administrative situation reports against his/her perpetrators and he/she is not formally identified, he/she could be initiated by a procedure of expulsion to the country of origin. The same police unit which investigates trafficking cases also deals with preventing irregular migration.[33]

In the Netherlands, the deportation and expulsion orders are not suspended by any piece of legislation and thus in theory the undocumented person, who is not identified/acknowledged as victim of a crime can be still deported or detained. In practice the deportation and expulsion orders apparently have been decreased over the last years and undocumented persons seem not to be actively deported, including those reporting a crime and not being identified as a victim in the Netherlands.[34] In Ireland, when an undocumented person makes a complaint to the police, but they are not formally identified as victims of trafficking, the situation may arise where they are notified of the State's intention to issue a deportation order. In such cases, the persons are then required to make representations for humanitarian leave to remain. Such applications have been known to take over

[31] Respondents for Ireland
[32] Labour exploitation falls under the criminal justice system in Belgium and France
[33] Respondents from Spain
[34] Respondents from the Netherlands

three years to process and the chances of success are slim. There is a high likelihood that the person will be issued with a deportation order. The possibility of such a consequence is another reason why undocumented people are afraid to report trafficking in Ireland.

In order to ensure that all victims of crime, including undocumented and stateless persons can enjoy the rights ensured by the EU Victim's directive, Member States **should adapt appropriate immigration rules, by suspending deportation orders and issuing temporary residence permits** in relation to on-going criminal proceedings in line with the recommendation of the EC Guidance Document[35]. Moreover, the safe reporting mechanisms for undocumented migrants shall incorporate such 'firewall' that ensures, that persons **are not actively deported** if they are not officially identified as victims or if for whatever reasons the criminal proceedings cannot be initiated or is consequently terminated.

2.2 COMPLAINT MECHANISM FOR UNDOCUMENTED MIGRANT WORKERS

This subchapter will look at the situation, where the undocumented migrant worker actively files a complaint against her/his employer. Further it will look into the possibility to claim unpaid wages from an employer either by the initiative of the undocumented worker or upon worksite labour inspection (very often accompanied by immigration control).

The 2009 Employer's Sanction Directive[36] requires EU Member States in its Article 13(1) to put in place effective mechanisms through which irregular migrants may lodge complaints against their employers, including through third parties. Article 13(2) obliges Member States to ensure that third parties with a legitimate interest in ensuring compliance with the EU Directive may act on behalf of or in support of the third-country national in any administrative or civil proceedings to defend their rights.

Similarly as in the above chapter, 'firewalls' would be necessary also here in order to ensure access to fundamental (labour) rights and practical application of the Employer's Sanction Directive and in order to make the complaint mechanism "effective". The ECRI recommends in the area of labour rights (among others) to its Member States to (30) „establish effective mechanisms to allow irregularly present migrant workers to lodge complaints in respect of labour standards against employers and obtain effective remedies without the risk of the sharing of their personal data or other information with immigration authorities for the purposes of immigration control and enforcement".

The assigned authority to which the complaint shall be filed in most EU Member States is the Labour Inspection. According to the International Labour Organization's Labour Inspection Convention (No 81) of 1947[37] the functions of the system of labour inspection shall be: *to secure the enforcement of the legal provisions relating to* ***conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare****, the employment of children and young persons, and other connected matters, in so far as such provisions are enforceable*

[35] European Commission, DG JUSTICE (2013): Guidance document related to the transposition and implementation of the Directive 2012/29/EU

[36] 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

[37] ILO Labour Inspection Convention (No 81) of 1947 available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C081

by labour inspectors (Article 3 (a)). The second option is that the complaint can be filed directly to relevant (labour/civil) court.

The Implementation of the EU Employer's Sanction Directive in the Czech Republic, Hungary, Poland, Romania and Slovakia[38] reports, that filing a complaint to labour inspection in line with the Article 13 of the Employers Sanction Directive, exposes the undocumented worker at risk of deportation. The labour inspection has the obligation to report the irregular residence status to immigration authorities. The NGO participant[39] of the FG Discussion from the Czech Republic confirms, that the only way to safely report a labour law offence by undocumented worker is to do so anonymously. This option however, to file a complaint anonymously, is not possible all over Europe, e.g. not in Poland, for example.
There is no specific legislation currently in place in the Czech Republic on how to file a complaint, and no possibility for undocumented migrant workers to file a complaint through third parties. Undocumented workers can file a complaint though directly to the labour court.[40]

In Belgium an undocumented worker may go directly to the labour inspectorate and file a complaint without fear of being reported to the police and immigration authorities. However, this undocumented worker often faces the challenge of proving that a working relationship exists between him/herself and the employer. Various types of evidence collected by the worker are often not considered admissible although they might indicate a working relationship. The clearest proof is the labour inspectorate actually witnessing the worker at the worksite. Without the evidence provided by the labour inspection, the labour inspector will rarely pursue the case and the undocumented worker will not be able to claim any outstanding wages. However, when arranging with the labour inspector an inspection at the workplace, s/he risks being reported to the immigration authorities.[41] In this regard the ECRI recommends in the area of labour rights (among others) to its Member States to (29)[42] "ensure an effective system of workplace monitoring and inspection by separating the powers and remit of labour inspectors from those of immigration authorities". The organisation for Undocumented Workers (OR.C.A.)[43] has been involved in 61 complaints within 3 years after the transposition; only one case was successful in recuperating the worker's outstanding wages.[44] As the Employer's Sanction Directive requires Member States to put in place "effective" complaint mechanism, the evidence shows that although the complaint can be submitted without fear of being deported, the effect is minimal.

Similarly, the respondents from the Netherlands stated that if an undocumented person makes a complaint at the labour inspection, she/he runs the risks of being expelled by the immigration police,

[38] The Implementation of Employer's Sanction Directive in the Czech Republic, Hungary, Poland, Romania and Slovakia, Warsaw 2014, available at: https://interwencjaprawna.pl/en/files/employers-sanctions-directive-overview.pdf accessed: 7.7.2018
[39] FG Discussion, Vienna July 7, 2018
[40] PICUM: Summary of findings in Belgium and the Czech Republic on the implementation of the Employer's Sanctions Directive, 2017
[41] PICUM: Summary of findings in Belgium and the Czech Republic on the implementation of the Employer's Sanctions Directive, 2017
[42] European Commission against Racism and Intolerance (ECRI) of the Council of Europe: Recommendation No 16 on Safeguarding Irregularly Present Migrants from Discrimination adopted on March 16, 2016, available at http://hudoc.ecri.coe.int/eng#{%22ECRIIdentifier%22:[%22REC-16-2016-016-ENG%22]} accessed: 7.7.2018
[43] Since March 15, 2018 the organization is called FAIRWORK Belgium
[44] Jan Knockaert: Employer's Sanction Directive- a blessing for undocummented migrant workers? La Strada Newsletter, Issue 43

if not properly identified as a victim and or exploitation is not seen severe enough to qualify for human trafficking for labour exploitation or forced labour. As mentioned above, there is no clear firewall in place. Reporting a labour law violations by undocumented migrants in most EU countries, thus, constitutes a significant risk of deportation and there are very limited safeguards.

The following promising practice was introduced by Austria. The centre UNDOK[45] has been authorized and subsidised by the government to assist undocumented workers in complaints against employers as a measure to implement the EU Employer's Sanctions Directive. In Austria, every worker is by law member of the Austrian chamber of labour[46] and thus entitled to receive legal aid and assistance regardless her/his irregular residence status. After the claim is carefully assessed and if the probability that the plaintiff will win the case, the Austrian chamber of labour (Arbeitekammer) will provide a legal counsel for the court case. According to the respondent from NGO Lefö, the cooperation and facilitation of access to complaint mechanism by NGOs is very vital and functional. Legally there is no obligation for the courts to report to the alien police about the status of an undocumented worker. In practise though employers seek advantage and try to prevent complaints by at least threatening to contact the relevant authorities.[47]

Claiming unpaid wages

According to the 2009 EU Employers Sanction Directive[48], undocumented migrants should not be deprived from unpaid wages. According to Paragraph 6 of this Directive, the employer shall be liable to pay any outstanding remuneration to the illegally staying third-country national[49]. Furthermore, the employer is also liable to pay any costs arising from sending back payments to the country to which the third-country national has returned or has been returned. In order to ensure the availability of effective procedure to apply the above, Member States should enact mechanisms to ensure that illegally staying third country nationals may introduce a claim against their employer.

Denmark, Ireland and the United Kingdom opted out of this Directive and we can see the difference in legislation. In Ireland for instance **it is unclear whether victims who were undocumented during their 'employment' are entitled to recoup any monies/unpaid wages due to the contract being rendered illegal[50].** In the UK, wages paid to undocumented migrants will be seized from undocumented workers as proceeds of crime. This would be impossible for the rest of the EU Member States where the Directive has been transposed.

The NGO respondent from Ireland further clarifies, that normally workers submit claims to the WRC (labour redress mechanism). Undocumented workers have done this in the past and have received awards. However, generally this has been the case only **where the worker's immigration status has not come to light** and where **an employer has not argued** against the making of an award on the basis

[45] www.undok.at
[46] www.ak.at
[47] Respondent from Austria, Lefö-IBF Legal Information leaflet.
[48] 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
[49] The agreed level of remuneration shall be presumed to have been at least as high as the wage provided for by the applicable laws on minimum wages, by collective agreements or in accordance with established practice in the relevant occupational branches, unless either the employer or the employee can prove otherwise, while respecting, where appropriate, the mandatory national provisions on wages
[50] Questionnaire Ireland

that there was no valid legal contract in place given that the person did not have the right to work in the State. This issue continues to be argued through the courts and there is a need for legal clarity around the issue. Employers should not be allowed to exploit vulnerable workers and then seek to avoid their responsibilities by arguing that the person is not entitled to redress because they are undocumented in the State. In 2014, there was a legislative amendment made which allows for undocumented workers to make an application to the civil courts for unpaid or insufficient wages (see S4, Employment Permits (Amendment) Act 2014) however this only covers unpaid or underpayment of wages, and none of the other usual employment rights (holiday pay, breaks, etc.). Also, the worker has to go to the civil courts, which would not traditionally be seen as including the WRC, which is the forum for regular workers. This in itself is a huge barrier (in terms of costs, sourcing legal representation, etc.) for the worker.

Member States should enact **mechanisms** to ensure that illegally staying third-country nationals are able to **receive any back payment of remuneration** which is recovered including in cases in which they have, or have been, returned according to Article 6 (2). The provision of the EU Sanction Directive in many EU countries has not been enforced by introduction of any specific "mechanism for undocumented workers". Existing mechanisms to claim unpaid wages such as civil or labour courts have been recognized by many EU member states as sufficient.

The Communication from the Commission to the European Parliament and the Council on the application of the Employer's Sanction Directive[51] reconfirms that with regard to the right of illegally staying third country nationals to make a claim against their employer, most Member States merely refer to general provisions concerning the right to bring a case before civil or labour courts. According to the above mentioned Communication, very few Member States have explicitly transposed the right of irregularly employed migrants to make a claim against their employer for any outstanding remunerations while present in the member state (only Bulgaria, Cyprus, Greece and Slovenia), or when they have been returned (only Cyprus, Greece, Poland and Sweden). Only four[52] Member States (including Belgium) have put in place specific mechanisms so that irregular migrants can receive any payments owed, including after they have, or have been returned.

The experience of the Netherlands[53] shows that the existing mechanism to bringing the case before civil or labour court to claim outstanding remunerations can be functional, when there is a functional cooperation mechanism in place and mechanism that enables to reimburse costs related to legal aid. The NGO assisting undocumented migrants can facilitate contact of the undocumented worker with a lawyer/attorney that can represent the undocumented worker at court while claiming unpaid wages. The costs of legal aid are subsequently covered by the state, once the representing lawyer provides proof that there are no means on the side on the worker to bear the costs related to legal aid. The lawyer/attorney can be approached also directly by the undocumented worker, but access to the lawyer through NGO ensures a contact with an experienced specialist. The most significant obstacles in this pathway are the court fees that can be significantly reduced upon means test but there is still

[51] http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com%282014%290286_/com_com%282014%290286_en.pdf

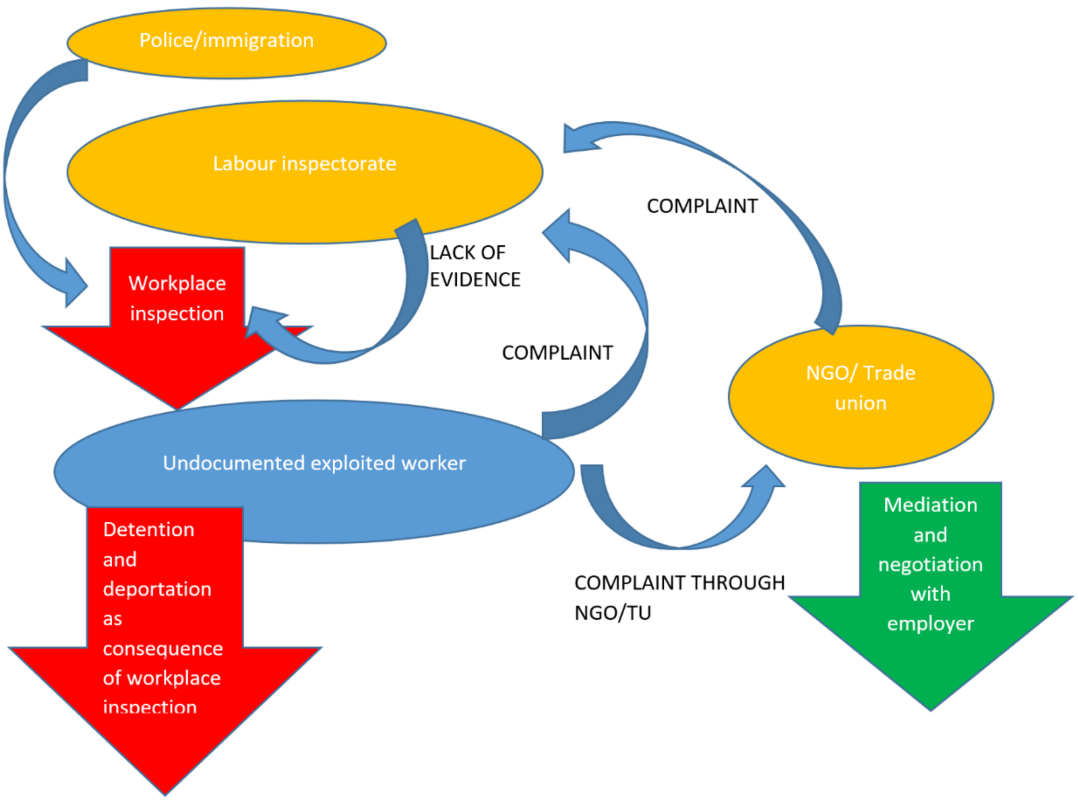
[52] The footnote of the report, however, mentiones only 3 states- BE, FR and EL

[53] FG Discussion, June 7th, 2018, Vienna

the risk of losing the case and be charged to cover all related costs including the expenses of the other party.

Alternatively to the general provisions to bring a claim before the civil court in the Netherlands[54], the Labour Inspectorate SZW can fine employers that have violated the Minimum Wage Act. They can also impose penalty payments to compel the employer to compensate the workers for unpaid wages (i.e. pay the wages that are due). This means that the employer has four weeks to compensate the employees and offer proof of this to the Inspectorate. If the employer does not offer compensation, the labour inspectorate (Inspectorate SZW) can impose penalty payments of up to 40.000 euros per employee. According to FairWork Netherlands in practise this remains invisible and it is difficult to control if indeed employees were paid and or penalties were imposed. '.

PICUM findings on the implementation of Employer's Sanction Directive[55] reveal that in Belgium, 99 percent of complaints filed by the undocumented workers with the help of CSC trade union get dropped by the labour prosecutor after 1 to 2 years. The majority of undocumented workers that they assist therefore often prefer to negotiate directly with the employer, to recover their outstanding



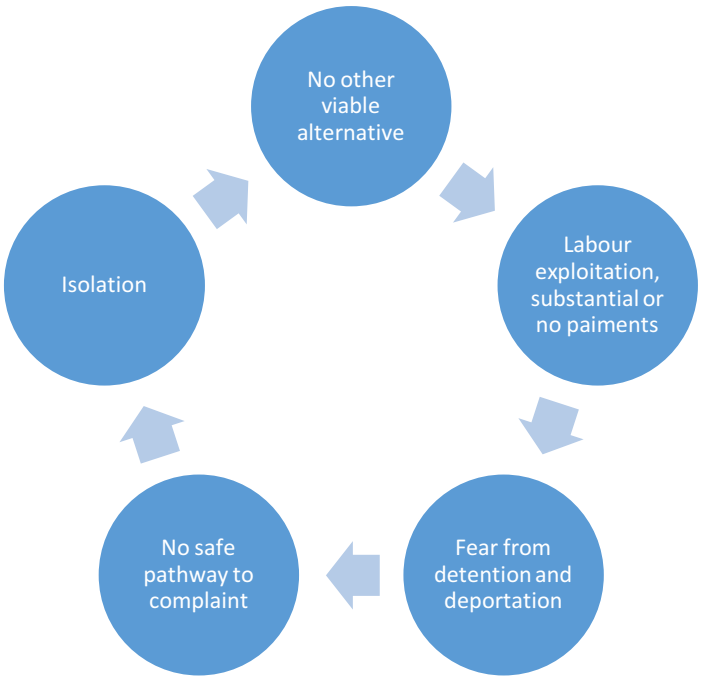
wages as they have better chance of actually receiving some compensation without the risk of being deported. The systematic obstacles lead undocumented workers and third parties to not involve state authorities (that are in charge to protect labour rights) into recovery of outstanding wages.

[54] See CoE Greta Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands- First evaluation round Adopted on 21 March 2014 Published on 18 June 2014.

[55] PICUM: Summary of findings in Belgium and the Czech Republic on the implementation of the Employer's Sanctions Directive, 2017

The existing evidence and findings show, that there exists a structural cooperation barrier between the state authorities on one side and the undocumented worker who would like to claim her/his rights (and supporting third parties such NGOs, trade unions and possible representing lawyers) on the other side. If there are firewalls in place for undocumented workers to complain against their employer, these are often insufficient. Undocumented workers are not willing to seek justice through state authorities assigned, as they may face risks of detention and deportation. Prioritising the enforcement of immigration rules above the safety and labour rights is the prevailing approach in the EU.

The *Communication of the Commission to the European Parliament and the Council on the application of the Employer's Sanction Directive*[56] concludes that in many Member States, the lack of specific mechanisms to remedy and the difficulties that irregular migrants may face in having access to justice and in enforcing their rights may be counterproductive to the fight against illegal employment. In the current situation, a complaint to relevant state authorities would expose undocumented workers to the risk of being detained and deported, and besides does not ensure that outstanding wages for work they perform would be paid. As a result there is less information on the actual situation, due to lack of reports and formal complaints.



2.3 REPORTING OF CRIME IN OTHER COUNTRY THAN WHERE THE CRIME WAS COMMITED

The EU Victim's Directive enables victims to file a complaint in their country of residence if they are not able to do so in country where the crime was committed.

[56] http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com%282014%290286_/com_com%282014%290286_en.pdf

Specifically, according to art.17 (2) of the EU Victim's directive Member States shall ensure **that victims of a criminal offence committed in Member States other than that where they reside may make a complaint to the competent authorities of the Member State of residence,** if they are unable to do so in the Member State where the criminal offence was committed or, in the event of a serious offence, as determined by national law of that Member State, if they do not wish to do so.

The flexibility of this provision in the EU Victim's Rights Directive should respond to the protection of the legitimate interests of the victim in complex cross-border situations, as explained in the DG Justice Guidance document[57].

The provision, however, requires very well coordinated and cooperative approach among law enforcement authorities in both concerned countries as well as good cooperation and communication between victim support service and law enforcement authorities and victim support services in country of residence of the victim and victim support services in country, where the crime was committed. The Article 17 (3) of the Victim Rights Directive stipulates only that the complaint should than be transmitted from the state of residence to the state where the crime occurred without delay. The Victims' Rights Directive doesn't pre-scribe any kind of specific cooperation mechanism in this regard. The European Implementation Assessment of the Victims' Rights Directive[58] refers to bilateral cooperation agreements, including memoranda of understanding between the various Ministries of Justice that are determinative for ensuring the protection of victims residing in another Member State. A positive example of cross-border reporting of crime is a case coordinated between Austria and Spain[59].

The victim, residing in Austria, reported a crime committed in Spain. The communication and cooperation was very well established from the very beginning. The Spanish police attended the report of the victim in Vienna. Once the case was transferred to Spain, the communication with the Spanish police in the beginning went through the Austrian NGO LEFÖ-IBF, which provided complex services to the victim, as well as through the Austrian Federal Police. Specifically, their NGO representative acknowledged the approach of law enforcement concerning a newly reported threat against the victim´s family in her hometown. Subsequently, the case was well managed jointly by the Austrian NGO LEFÖ-IBF that provided psychological support and the Spanish NGO Proyecto Esperanza that provided information through LEFÖ-IBF to the victim on criminal proceedings and the state of criminal proceedings in Spain. The case was successful mainly, thanks to involvement of trained and specialized stakeholders both on the side of law enforcement authorities and NGOs/ victim support services.

As mentioned above, when relevant stakeholders are well aware and adequately trained on victim's rights and legal procedures to follow, this can mean a major difference in the outcome of a compensation case. In a specific case, in 2016, the Spanish NGO SICAR was acknowledged about the daughter of a victim assisted by SICAR cat (NGO) who was being exploited in Italy. The Spanish police (in this case a regional police) recommended the Spanish NGO to go to Italy to report the crime with the victim. The Spanish Act related to Victim Status (Law 4/2015, 27th of April - Estatuto de la víctima

[57] European Comission, DG JUSTICE (2013): Guidance document related to the transposition and implementation of the Directive 2012/29/EU

[58] European Parliamentary Research Service: The Victims' Rights Directive 2012/29/EU European Implementation Assessment, December 2017 Accessed: 25.7.2018

[59] Austrian NGO representative at FG Discussion in Vienna, June 7, 2018

del delito) is however in line with Article 17 of the Victim Rights Directive and allows reporting a crime from abroad.

During the FG Discussion, as a reaction to the case above, the judge from Spain was concerned of who should be liable for the expenses resulting from the travel of the victims in order to provide testimony at court in a country where the prosecution takes place.

The Recital 51 of the EU Victim's rights Directive clarifies that if the victim has left the territory of the Member State where the criminal offence was committed, that Member State should no longer be obliged to provide assistance, support and protection **other than in direct relation to any criminal proceedings it is conducting regarding the criminal offence concerned**. Further the Article 14 of the Victims' Rights Directive stipulates that Member States shall afford victims who participate in criminal proceedings, the possibility of reimbursement of expenses incurred as a result of their active participation in criminal proceedings, in accordance with their role in the relevant criminal justice system. The conditions or procedural rules under which victims may be reimbursed shall be determined by national law.

Looking at the cooperation mechanism within the EU, the crime should be reported (either with or without help of victim support organization) to law enforcement authorities of the country of residence. The law enforcement authorities of the country of residence transfer the report to their counterparts in the country of jurisdiction. Law enforcement authorities of the country where the crime occurred shall inform the victim about her/his rights including the right to claim compensation and access to legal assistance.

With regard to the possibility to report the crime that occurred in the EU by third country nationals in their home country, the options are more limited and determined by existing bi-lateral cooperation agreements. Although, the role of consulates as stipulated in the Article 5 (j) of the Vienna Convention on Consular Relations (1967)[60] consists (among other duties) in *transmitting judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State*. However, according to the representative of the Ministry of Foreigner Affairs of the Czech Republic, the consulate doesn't facilitate the criminal report filed by the third country national (the physical person) directly, but only trough official/diplomatic way. In case of existence of a bi-lateral cooperation agreement on criminal matters, the consulate will explain the process in line with the bi-lateral cooperation agreement and what would be the way in line with the agreement. There are, however, limited options to report a criminal offence by a victim from her home country directly, if not stipulated in any bi-lateral agreements between the states.

If an international organized crime (involving two or more countries) such as human trafficking is committed and reported by the victim to relevant authorities in her/his home country and international cooperation on investigation of the trans-national crime is required, bi-lateral or multilateral cooperation agreements will determine the cooperation. In case there is any cooperation agreement on criminal matters, the consulate may be involved in line with the above Article 5 (j) of the Vienna Convention on Consular Relations to transfer the request of the law enforcement authorities of a third country (authorized by the Ministry of Foreign Affairs of the third country) to

[60] 1967 Vienna Convention on Consular Relations

relevant authorities (police or judicial) of an EU country. Alternatively, support from Interpol can be requested directly by national police in order to seek for investigation cooperation between two (or more) countries in case of trans-national crime.

The EU Victim's Directive provides with minimum standards that need to be in place. Next to the Victim's Rights Directive, the Bilateral cooperation agreements, including memoranda of understanding between the various Ministries of Justice should ensure the protection of victims residing in another state and go beyond the minimum ensured by the Directive. Trained and informed stakeholders and their cooperation is a precondition for success.

3.RESIDENCE PERMIT

A very important aspect of accessing compensation is the fact whether a state enables the third country national (victim) to stay legally in the country, during the length of the legal proceedings (criminal, civil or administrative). According to FRA "…a victim in an irregular situation of residence, when seeking access to justice, faces requirements and restrictions to which other victims are not subjected. Such a differentiation runs counter the non-discrimination principle of Article 1 of the Victim's directive, which states: The rights in the Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status." The FRA report[61] also points out that helpful instruments are implemented only to fairly limited extent. These include the reflection and recovery period and the residence permit for victims of trafficking set out by the Residence permit Directive 2004/81/EC[62] (Art. 6-8), and the granting of permits of limited duration to third country nationals subjected to particularly exploitative conditions in accordance with Article 13 (4) of the Employer Sanctions Directive[63].

However, next to the above mentioned Directive 2004/81/EC on the residence permit issued to third country nationals who are victims of trafficking in human beings and who cooperate with law enforcement authorities, some Member States grant residence permit in accordance with the Directive 2004/81/EC even without cooperation with law enforcement authorities in exceptional cases (e.g. ES,FI, IT, NL)[64].

Numerous European countries provide for the possibility of granting refugee status to victims of trafficking in human beings on the ground of them being a victim of crime.[6566] However, the refugee status is not granted automatically. For example in the case of Estonia, Finland, Ireland and Poland refugee status can be granted on ground of trafficking in cases where the applicant has been judged to be persecuted by his/her traffickers due **to being a member of a particular social group** and there is a recognised risk of future persecution from the traffickers upon return in the form of e.g. re-trafficking and/or assault from exploiters against which state protection or internal relocation do not provide a remedy.[67]

The other forms of residence permits and international protection that may be granted to third-country national victims of trafficking in human beings in the EU are further the Subsidiary protection[68] (e.g. AT, NL, DE, EE, FR,IE,FI) or various residence permits on compassionate/ humanitarian grounds (e.g. BE, DE, EL, FI, NL). There are other instruments available to regulate residence permit to victims of trafficking in human beings in the national legislation of the EU Member States.

Some Member States[69] provide the possibility to applicants to simultaneously apply for international protection and to be granted a residence permit under Directive 2004/81/EC or permission of stay

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61 FRA (2015) Severe labour exploitation: workers moving within or into the European Union ,p.78

62 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al33187

63 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0052

64 European Commission, Home Affairs: Synthesis Report- Identification of victims of trafficking in human beings in international protection and forced return procedures. European Migration Network, March 2014. Accessed: 25.7.2018

65 Ibid. The Synthesis Report was prepared on the basis of the contribution of only 24 states.

66 Ibid. AT,BE,DE,EE,FI,FR,IE,NL, PL,SE, SK,NO

67 ibid

68 Subsidiary protection is granted when an applicant is assessed as facing a real risk of suffering serious harm if returned to his or her country of origin / former habitual residence. See Article 2(f) of Directive 2011/95/EU

69 CY, EE, ES, FI, FR, HU, IT, LV, LT, LU, MT, PL, SE, UK

under equivalent national measures[70]. In at least two Member States (NL, PL), the procedure under Directive 2004/81/EC is temporarily suspended until a decision on the international protection application is issued first[71].

In some (Member) States (e.g. AT, BE, EL, IE, NL, SI, SK, NO)[72] it is not possible for applicants to remain in international protection procedures whilst accessing rights and services provided by Directive 2004/81/EC or equivalent national procedures. If, following withdrawal, the victim is not granted a residence permit under Directive 2004/81/EC or equivalent national procedures, s/he can re-open the asylum procedure in some of these Member States (e.g. AT, BE, EL, IE, SI)[73].

3.1 Dublin regulation

The previous paragraphs clarified a bit the relation between the international protection and the residence permit for victims of trafficking under the Directive 2004/81/EC. This subchapter will further look at conflicting situations of the Dublin III Regulation with protection measures for victims of trafficking, and at problematic cases of enforcement or suspension of Dublin return as identified by the respondents during the Focus Group Discussion held in Vienna on June 7, 2018.

The EU asylum acquis comprises four Directives and two Regulations controlling different aspects of the international protection procedure[74]. The recast Qualification Directive and Reception Conditions Directive explicitly recognise victims of trafficking as vulnerable persons[75] whose situation should be assessed to see whether they are in need of special reception needs.

Article 1 of the so-called Dublin III Regulation[76] lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

These criteria for determining who is responsible for examination of an application for asylum are applied in the order in which they are set out in the regulation and can be separated into several groups: 1. Family ties: Responsible is the state in which a member of the asylum seeker's family is staying legally. 2. Visa or residence permit: Responsible is the state that has issued a residence permit or visa to an asylum seeker. 3. Irregular entry and residence: Responsible is the state whose borders the asylum seeker crossed irregularly coming from a third country, 4. Visa waiver: Responsible is the state that the asylum seeker entered and in which the need of the asylum seeker to have a visa is

[70] European Commission, Home Affairs: Synthesis Report- Identification of victims of trafficking in human beings in international protection and forced return procedures. European Migration Network, March 2014. Accessed: 25.7.2018

[71] Ibid.

[72] Ibid. The Synthesis Report was prepared on the basis of the contribution of only 24 states.

[73] Ibid.

[74] Revised Dublin Regulation, Revised Eurodac Regulation, Revised Qualification Directive, Revised Asylum Procedures Directive, Revised Reception Conditions DIrective, Temporary Protection Directive. Further the Family Reunification Directive also applies to refugees.

[75] See Article 20(3) of Directive 2011/95/EU (Qualifications Directive) and Article 21 of Directive 2013/33/EU (Reception Conditions Directive)

[76] REGULATION (EU) No 604/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)

waived 5. First application for asylum lodged: Responsible is the state in which the asylum seeker first lodged an application for asylum.

Where another Member State than the one in which the applicant (for international protection) is currently residing is found to be responsible for processing the asylum application, the applicant will usually be transferred (back) to this Member state. This is the so-called "Dublin" transfer, or return.

It is important to note that according to paragraph 17 each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in the Dublin III Regulation.

In cases where a victim has been exploited in the first (Member) State in which s/he sought asylum, it can be traumatic for them to return to the (Member) State, even though in accordance with the Dublin Regulation they should be transferred there[77].

In accordance with a 2011 ruling of the EU Court of Justice[78], Article 3 (2) of the Dublin III Regulation recognises that situations can occur, where it is impossible to transfer the applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, **resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union**[79]. In particular, asylum seekers frequently challenged the operation of the Dublin Regulation, asserting that, in practice, it resulted in individuals being exposed to risks that they would experience inhuman or degrading treatment or even death. In essence, they argued that the Dublin Regulation's premise that all EU member states are safe countries for asylum seekers was faulty[80].

Other challenges focused on the inadequacy of the reception conditions in the EU state to which the asylum seeker would be transferred, arguing that the asylum seekers would face inhuman or degrading treatment within the EU. Such cases have been dealt with by the ECtHR, see Hussein and others vs. Netherlands and Italy[81]

If there is no other Member State that can be designated as responsible according the criteria set by the Dublin Regulation, the country where the persons is residing can become responsible.

The recast Dublin III Regulation introduced new provisions on the consideration of safety and security of unaccompanied minors "in particular where there is a risk of a minor being a victim of trafficking"

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77 European Commission, Home Affairs: Synthesis Report- Identification of victims of trafficking in human beings in international protection and forced return procedures. European Migration Network, March 2014. Accessed: 25.7.2018

78 For more information on the background see: http://ec.europa.eu/dgs/legal_service/arrets/10c411_en.pdf

79 Article 4 of Charter of fundamental rights of the EU: Prohibition of torture and inhuman or degrading treatment or punishment No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

80 Maryellen Furrelton: Asylum Crisis Italian Style: The Dublin Regulation Collides With European Human Rights Law. 2016, accessed: 25.7.2018

81 ECtHR Hussein and Others v the Netherlands and Italy, Application No. 27725/10 - Admissibility Decision, accessed: 25.7.2018

(Article 6 (3c)). The regulation, however, doesn't introduce provisions relevant to adults. Further, in line with Article 8(4), the unaccompanied minor's application for international protection in an absence of any relatives in the EU territory shall be examined in the Member State, where the application was lodged, provided that is in the best interest of the child.

The case concerning minors was referred by the Austrian NGO IBF Lefö:

A victim of human trafficking entered Europe through Italy, then entered Spain, where she was exploited. Fleeing from the traffickers, she came to Austria seeking for asylum. Considering the fact that she was under 18 at this time, Austria is –in line with Article 8 (4) of Dublin Regulation the country responsible for examination of the asylum application. After a first negative decision on her asylum application, the Administrative Court decided that the case should be referred to the very first instances, because her experience of human trafficking had not been considered at all. Austria then re-considered whether the case would be dealt with in Austria or would be transferred to Spain. Today it is clear that the case is considered in Austria. The consequences of this outcome on the residence right of the victim are not clear yet.

Another case referred to, during the focus group discussion was as follows: a third-country national was trafficked to an EU Member state (country of entry) where she was exploited. However, the victim managed to escape and left the country of entry for another EU country, where she reported the human trafficking crime and applied for asylum. The criminal proceedings in the country of entry have been initiated, which is also the country responsible for examining the application for asylum. As the exploitation did not occur in the current country or residing and also the criminal procedure takes place in another country (in the first country of entry where the exploitation took place), the victim now risks to lose her residence and might face a Dublin return. Whether it is possible to suspend the Dublin III regulation in this case and on which grounds is yet unknown.

There is an obligation for EU Member States to **conduct an individual assessment of the victim's personal circumstances and risks**, provided for by Directive 2011/36/EU (Art. 12(3) and (4)). This provision thus further reinforces victim's protection. If the individual assessment is conducted - as even though this is an obligation in practise this might not happen - and indicates whether there might be significant risks related to return, this can constitute grounds to suspend a Dublin return of a presumed victim.
Further, according to the EU 2011/36/EU Trafficking Directive, Member States have an obligation to ensure that a presumed trafficked person is provided with assistance and support **as soon as the competent authorities have a reasonable-grounds indication** for believing that the person might have been subjected to trafficking (Article 11(2)). Member States are also obliged to establish appropriate **mechanisms aimed at the early identification of victims** (Article 11 (4)), but it does not state exactly what form these mechanisms should take.

Explicit mechanisms for the identification of victims of trafficking are not outlined in the existing asylum acquis, although the following stages of the international protection procedure may feasibly allow for the detection of victims[82]:

[82] European Commission, Home Affairs: Synthesis Report- Identification of victims of trafficking in human beings in international protection and forced return procedures. European Migration Network, March 2014. Accessed: 25.7.2018

- The **assessment of facts and circumstances** (Article 4 of Directive of 2005/85/EC);
- **Personal interview** on the application (Article 12);
- **Special needs assessment** (Article 17(2) of Directive 2003/9/EC).

The respondents from the FG Discussion pointed out, that there is rarely any kind of risk assessment conducted among asylum seekers that have to return due to the Dublin regulation, even if there are indicators of human trafficking. Often they are also returned without appropriate referral to specialized victim support services.

According to the NGO respondent from Spain, if a victim of trafficking escaped from the traffickers from the country of destination to another EU Member State, applying Dublin regulations without doing a proper risk assessment is victimising and can lead to re-trafficking of the person when she/he is sent back to the country of exploitation/country responsible for examination of her/his asylum application. From NGO evidence collected it is clear, that this happens especially in those cases where the authorities from both member states don't coordinate adequately the transfer of the victim, who then is not referred to specialized support services at her/his arrival in the country where she/he was exploited. Such practices are considered very problematic and not consistent with a victim centred approach.

They may be in breach with the positive obligation of the Member States to take protective measures and the positive obligation to operate an effective administrative framework to prevent trafficking in general[83]. The Court decision in the Rantsev vs Cyprus and Russia emphasized "the prevention of trafficking, protection of victims, and prosecution and punishment of traffickers". According to the ECtHRs, states have an obligation to take operational measures to protect victims or potential victims of trafficking in the circumstances where the state authorities knew or should have known that an identified person had been or was at real and immediate risk of being trafficked or exploited within the meaning of Article 3 of the Palermo Protocol. It also established a **duty to cooperate amongst States in cases where events related to trafficking might happen outside of a State's own territory**, referring to the Palermo Protocol[84].

In the Netherlands it is possible to press charges on human trafficking committed in another EU country. The police cannot investigate or prosecute in such situations , but will refer the case to the country where the crime is committed. Since in The Netherlands pressing charges in a human trafficking case is automatically an application for a residence permit for victims of human trafficking and the Immigration Department has to take a decision within 24 hours, this victim will be given a residence permit. This permit will be withdrawn if the police/ public prosecutor decides not to prosecute because of a lack of authority. If a Dublin claim has been made against such a victim or even has been accepted by another country then this means that the Netherlands are responsible for the asylum claim under article 1. 2 of the Dublin convention. Such a victim then has two options: applying for extended stay as a victim of human trafficking, this is a residence permit on humanitarian grounds or ask for asylum. There are two problems arise; if the police refers the case to another country it hardly results to prosecution and the victim is not able to claim compensation and since pressing

[83] Compare the decision of ECtHR Ranstev vs. Cyprus and Russia, 2010. Accessed: 26.7.2018
[84] UNODC Case Law Database. Accessed: 29.7.2018

charges is a way to make the Netherlands responsible for the asylum request, the police is very mistrustful that it is a false statement only made for the purpose of breaking the Dublin claim[85].

3.2 DECISION NOT TO PROCEED WITH A DUBLIN TRANSFER

Being a victim of trafficking in human beings doesn't provide sufficient ground for suspending a Dublin return itself. However, there are number of obligations set up by the EU Trafficking Directive as described in the previous subchapter, that may establish grounds for suspending a Dublin return. Often, the reason is mainly based on an **individual assessment of the victim's personal circumstances and risks** (Article 12 (3)and(4))

The other reason can be grounded in the situation, where **reception conditions** for the victim/asylum applicant in country of entry, **may result in a risk of inhuman or degrading treatment** as a consequence of trafficking in human beings while taking into account the trafficking in human being is often an organized international crime and the offenders or their counterparts may expect the victim to be returned due to the Dublin Regulation. With regard to this argument there is a jurisdiction of EU Court of Justice and ECtHR.

In a standard identification procedure, where there is a reasonable ground to believe that the person is a victim of human trafficking, the reflection period shall be granted (in accordance with Article 6 of Directive 2004/81/EC or Article 13 of 2005 CoE Convention on Action against trafficking in human beings), allowing the person to recover and escape the influence of the perpetrators of the offence, and reflect so that they can take an informed decision as to whether to cooperate with the competent authorities. During the reflection and recovery period (and while awaiting a decision of the competent authority) the (presumed victim) is entitled to assistance measures and to be protected from the enforcement of expulsion orders. Return due to the Dublin Regulation, thus, should be also suspended until after the reflection and recovery period. According to a synthesis report on Identification of victims of trafficking in human beings in international protection and forced return procedure[86] countries such as BE, EE, FI, FR, LU, SE, NL, UK and NO confirmed that the **reflection and recovery period and residence permit for VoTs constitute ground for discontinuation of Dublin transfers**.

Further, according to national responses reflected in the National Reports for the Synthesis Report[87] the reasons for discontinuation of the Dublin Return on the ground of Article 17[88] mentioned are as follow:

- Initiation of a criminal investigation (DE, EE, FI, FR, IE, IT, LU, NL, SE, UK and NO). Where discontinuation of the Dublin transfer is dependent on the initiation of a criminal investigation, this can be highly problematic when the crime occurred in a different (Member) State or

[85] A Duthch lawyer, specialized in criminal court cases of human trafficking. FG Discussion Vienna 7.6.2018.

[86] European Commission, Home Affairs: Synthesis Report- Identification of victims of trafficking in human beings in international protection and forced return procedures. European Migration Network, March 2014. Accessed: 25.7.2018

[87] European Commission, Home Affairs: Synthesis Report- Identification of victims of trafficking in human beings in international protection and forced return procedures. European Migration Network, March 2014. Accessed: 25.7.2018. The Synthesis Report was prepared on the basis of the contribution of only 24 states.

[88] Each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in the Dublin III Regulation

indeed another country, as the host (Member) State would not have jurisdiction and therefore would not be able to start a criminal investigation in the first place.

- In France, the initiation of the official identification process of victim of trafficking provides the ground for a Dublin transfer suspension.
- Humanitarian reasons at the discretion of the authority responsible for granting residence permits are applied in BE, FR, SE and UK. Such reasons, according to the Synthesis Report, may result in a more 'victim centred' approach.
- The discontinuation of the Dublin transfer on the bases of case-by-case assessment is applied in AT, CY, CZ, EL, ES, EE, FI, MT, NL, PL
- In Slovakia, a confirmed indication of victimisation by competent Migration Office staff and/or cooperation of a non-profit organization gives a ground for a Dublin return suspension.

There appears to be little standard practice and or protocols in place for the decisions to discontinue Dublin transfers in cases of human trafficking. Victims of trafficking identified in one (Member) State may be transferred to the other without first receiving support, even not during the obliged unconditional reflection and recovery period.

The La Strada International NGO platform[89] called upon harmonization of anti-trafficking and asylum frameworks in order to ensure that these complement each other. Further, the LSI NGO Platform reconfirmed that any standardized practice to discontinue Dublin transfers in cases where victims of trafficking have been identified is missing. In many European countries this also means that there is an urgent need for further exchange of practices and learning how to legally challenge the return of victims of trafficking under Dublin procedures, when this is done without proper risk assessment and consideration for the risks of re-trafficking and without the necessary and required safeguards.

Further the recommendations by LSI NGO Platform were among others:

- To make more use of significant jurisprudence from the ECtHR to ensure better rights protection of trafficked persons under Dublin procedures.
- To ensure more and closer cooperation of NGOs to strengthen referral in Dublin cases to improve the protection of trafficked persons.
- To further identify reliable partners and common procedures to handle cooperation in such cases.
- Further advocacy and awareness to promote better harmonisation of anti-trafficking and asylum frameworks.

[89] LSI NGO platform rerport from the workshop held on FRIDAY 27TH OF OCTOBER 2017, Skopje, Macedonia - WORKSHOP ROUND II Early identification of presumed trafficked persons among migrant and refugee.

4. ACCESS TO LEGAL ASSISTANCE for victims IN CROSS-BORDER SITUATIONS

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice, according to Article 47 of the EU Charter of fundamental Rights.[90] The EU regulates access to legal aid for suspects and accused persons[91] in the EU and access to legal aid in cross-border disputes in civil and commercial matters. There is not any specific directive[92] that would regulate access to legal aid for victims of crime in the EU within the criminal proceedings. The provisions on access to legal aid can be found in crime- specific directives (e.g. 2011/36/EU Trafficking Directive, Directive (EU) 2017/541 on combating terrorism) or in the Directive 2012/29/EU on victims of crime. Further the 2005 CoE Convention on action against trafficking, which is ratified by all EU MS, provides in its Article 15 (3) for obligation of the state to provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.

4.1 ACCESS TO LEGAL AID IN CRIMINAL PROCEEDINGS

The Victim Rights Directive 2012/29/EU imposes a concrete obligation, by stating that victims have access to legal aid '*where they have the status of parties in the criminal proceedings*'. But not '*when it is possible for them to have the status of parties*'.[93] Further the conditions or procedural rules under which victims have access to legal aid shall be determined by national law.

According to Article 12 (2) of the 2011 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 where the victim does not have sufficient financial resources.

When it comes to referral to legal aid in cross border situations, the Recital 51 of the EU Victim's rights Directive explains that if the victim has left the territory of the Member State where the criminal offence was committed, that Member State should no longer be obliged to **provide assistance, support and protection other than in direct relation to any criminal proceedings** it is conducting regarding the criminal offence concerned. Legal representation is directly linked to criminal proceedings and thus shall be guaranteed when the victim left the territory where criminal proceedings takes place. If the victim resides in another state than where the criminal proceedings takes place, the Member State in which the victim resides should provide assistance, support and protection required for the victim's need to recover (as stated in Article 9). The DG Justice Guidance

[90] http://www.europarl.europa.eu/charter/pdf/text_en.pdf

[91] DIRECTIVE (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

[92] Please note that Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (Legal Aid Directive); covers only civil proceedings, not criminal.

[93] European Comission, DG JUSTICE (2013): Guidance document related to the transposition and implementation of the Directive 2012/29/EU

document reconfirms that the obligation to provide support for non-resident victims is 'shared' between the two Member States.

There can be two kinds of situations with a cross-border nature. Scenario 1: the victim, residing in the state where proceedings take place, decides to return to her/his home country. Scenario 2: the victim reports the crime from another country than where the crime occurred, or has left before the legal aid was facilitated.

With regard to the **first scenario**, NGOs consulted for this assessments, did in principle not see it as a problem that the victim leaves the territory. The NGO from the Netherlands reported a case where the group of victims returned to their country, stating that this is not per definition a bottleneck, as long as the NGO can stay in touch with the client. Similarly, for civil proceedings, return not necessarily causes difficulties, as long victims stay in contact with an NGO or a lawyer[94]. The GRETA[95] report on the Netherlands confirms that, if the victim stays in touch with the person or organisation that is claiming or arranging compensation on their behalf, be it their lawyer, the public prosecutor or the Criminal Injuries Compensation Fund (Schadefonds Geweldsmisdrijven), or gets in contact with such a person or organisation, then they are able to claim compensation also after their return. Similarly, the respondent from the Czech Republic confirmed that one possible way, could be an attorney representing the victim on her/his behalf, based on the power of an attorney. This would ensure that the procedure and the compensation claim will continue, even in a case of voluntary/involuntarily return[96]. In Austria, which is the only EU Member State that fully delegated the responsibility for providing legal aid to victims to victim supports services run by NGOs, the respondent confirmed, that upon the return of the victim, or in case of a victim residing in other country, where she/he reports the crime that was committed in Austria, the victim support services have the autonomy to provide legal assistance in such a cases.

The NGO respondent from Romania shared a positive experience with cooperation on case of trafficking for sexual exploitation in Sweden that was referred to their services in Romania. The Romanian victim that was assisted in Sweden by specialized victim support services, voluntarily returned to Romania. She was here referred to the specialized victim support services of ADPARE in Bucharest, Romania. Consequently, the Swedish police demanded her return to Sweden for a new hearing, for not more than 2 days. The safe travel, stay in Sweden and psychological counselling for a new hearing, were conducted by service providers in both countries. The victim's lawyer in Sweden had inquired ADPARE to make a clinical psychological assessment of the victim's condition for use in the criminal investigation phase and the trial. The victim's lawyer from ADPARE, based in Romania and knowing the procedural rights, did so and requested for this a hearing in a separate room in Romania, to ensure that the victim could freely speak[97] and information was protected, while the lawyer could also provide the victim with all information for a financial compensation claim.

[94] Questionnaire Netherlands

[95] CoE Greta Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands- First evaluation round Adopted on 21 March 2014 Published on 18 June 2014.

[96] Questionnaire Czech Republic

[97] Apparently her family was not aware of the trafficking situation and interrogation at her home would have put her in a difficult situation where she would not have been able to openly speak.

Legal assistance was provided in both countries in the case above. Although the ADPARE lawyer was not trained in the Swedish criminal law, the lawyer requested rights for its client that are ensured in the EU Victim Rights Directive as well as the EU Trafficking Directive.

The **second scenario** is related to the situation, when the legal aid is facilitated from abroad. The scenario is much related to case described above in the chapter on Reporting. Going back to the case described in the Chapter on Reporting and looking at it with the lens of how legal assistance was facilitated the experience was as follows:

The victim is living in Austria but since the crime was committed in Spain, the prosecution of the case is undertaken in this country. The victim cooperates on the criminal procedure supported by LEFÖ-IBF, which provides the victim with psychosocial support. Even though the first steps of the criminal case have been taken in Austria, it was then transferred to Spain. Thus, in February 2018 LEFÖ-IBF has started to contact and coordinate the case with Proyecto Esperanza (NGO based in Madrid), to enable the legal assistance and representation of the victim, especially regarding the compensation claim. Once Proyecto Esperanza received the details about the case from LEFÖ-IBF , it´s juridical department required the authorities to get to know the status of the case and continued to monitor the case in close cooperation with the Spanish prosecutor. Since the victim is still receiving the support of LEFÖ-IBF the communication among the three parts (Austria, Spain and the victim herself) works perfectly well with the purpose of ensuring the access to justice to the victim.

In this particular example, legal assistance was facilitated by two non-governmental organizations that provide assistance – including legal assistance - to crime victims.

Another case[98], where legal assistance was facilitated from abroad was the case of Hungarian victims trafficked in the Netherlands. Female victims were identified in The Hague (NL), reported the crime in the Netherlands (not all of them), and returned to Hungary. The Dutch police went to Hungary to talk to them, whether they could be heard as witness in the Netherlands by the judge commissioner. In advance, the police had asked lawyers for support, to represent the victims. So the police offered the victims free legal assistance, that supported the victims during the witness interrogations. Thanks to this, the lawyers were able to put in a claim for compensation for them during the substantive treatment of the case. As victims of trafficking, they were entitled to a free lawyer. In this particular case the police played a significant role in the facilitation of legal assistance for the victims, who were already abroad.

4.2 ACCESS TO LEGAL AID IN CROSS-BORDER DISPUTES IN CIVIL AND COMMERCIAL MATTERS

The chapter will not analyse the national schemes for access to free legal aid in civil and commercial matters, but will look into the framework for access to legal aid in civil and commercial matters in cross-border situation outlined by the Directive 2003/8/EC.

The earlier mentioned FRA report on Severe labour exploitation[99], found that compensation claims attached to criminal proceedings are still rare and, where they are submitted, they are often

[98] Case brought in during Justice at Last Focus Group meeting, Vienna 2018.
[99] FRA (2015) Severe labour exploitation: workers moving within or into the European Union, p. 82

transferred to civil courts. The LSI legal assessment on the compensation cases[100] in contrast indicates, that most compensation claims (36 out of 60) were attached to criminal proceedings and only 10 out of 60 have been claimed in civil proceedings. This finding may indicate a positive change in practice of the courts. Preparing a civil claim requires significant assistance from specialized lawyer, and according to 2014 FRA report, legal aid for civil proceedings is rarely available or not accessible to workers who have moved within or into the Europe.

The Council DIRECTIVE 2003/8/EC [101] to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes seeks to promote the application of legal aid in cross-border disputes for persons who lack sufficient resources where aid is necessary to secure effective access to justice.

Scope:
According to the Article 1 (2) the Directive shall apply, in cross-border disputes, to **civil and commercial matters** whatever the nature of the court or tribunal. The Directive also defines cross-border dispute as one where the party applying for legal aid in the context of this Directive is **domiciled or habitually resident in a Member State other** than the Member State where the court is sitting or where the decision is to be enforced.

Main characteristics:

- Applies without discrimination to Union citizens and third-country nationals residing lawfully in a Member State (Article 4).
- Recipient of the legal aid in the Member state where the court is sitting is further eligible to receive free legal aid in the Member State where the recognition or enforcement of the court decision is sought (Article 9)[102]. For example, if the court will decide in country A, and the defendant has property that are subject of the court decision in the country B, the recipient of the legal aid should be further eligible to receive legal aid also in the country B.
- Application for free legal aid can be submitted both- either to the competent authority of Member State in which the applicant is domiciled **transmitting authority** or to the competent authority of the state in which the court is sitting or where the decision is to be enforced **receiving authority**- Article 13 (1). The applicant may choose whether she/he will apply directly to receiving authority (state where the court is sitting or where the decision is to be enforced) or with the assistance of transmitting authority.
- The directive provides for two standard forms, one for legal aid applications (to be sent directly to receiving authorities) and one for the transmission of legal aid applications. Both forms can be filled and submitted online on E-Justice Portal of the EU[103].

[100] Sorrentino, L – Legal Assessment – Compensation Practises, La Strada International, 2018
[101] Council DIRECTIVE 2003/8/EC to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid, accessed: 20.6.2018
[102] With regard to the Article 9 the 2012 Report from the Commission to the European Parliament reports that although the interpretation concerning the determination whether the grant of such legal aid is automatic or whether the recipient must make an application in the Member State of enforcement is not uniform among the MSs. Accessed: 22.6.2018
[103] Online submittion of the application: https://e-justice.europa.eu/content_legal_aid_forms-157-en.do

- The competent **transmitting authority shall provide free of charge assistance to the applicant for legal aid including assistance in providing any necessary translation** of the supporting documents.
- The transmitting authority shall transmit the duly completed application to receiving authority within 15 days. Transmitted documents shall be exempt from legalization or any equivalent formality. Art 13 (4) and (5).
- The applicant has a right to information of the processing of the application. In case of rejection, reasons must be provided. Review or appeal mechanism against the rejection shall be in place. Article 15 (3).

Extend of the benefits provided by this Directive:
Under certain conditions, the national (of either transmitting or receiving) systems covered by the Directive provide:

Transmitting authorities (competent authority of the Member State where the applicant is domiciled):

- Assistance of the applicant for free legal aid, bearing the costs associated with the assistance of a local lawyer for the applicant until the application for legal aid has been received in the Member State where the court is sitting.
- Translation of the application, including any necessary translation of the supporting documents.
- Keep the applicant informed about his or her application.

Receiving state (state where the deciding court is sitting):

- Exemption from or assistance with all or part of the court costs. Art.1(2)
- The assistance of a lawyer who will provide pre-litigation advice and will represent the applicant either in court, if necessary, free or for a modest fee. Article 1(2)
- Travel costs where the physical presence of the recipient is required in court by the law or by the court of the Member State where the court is sitting. Article 7 (c)
- Interpretation costs.
- Translation of the documents required by the court or by the competent authority presented by the recipient which are necessary for the resolution of the case.

The Directive provides EU-Member States citizens, but as well as third country nationals, legally residing in the territory (Article 4), who lack sufficient resources with access to existing national schemes (available to all nationals as well) for provision of free legal aid in civil and commercial matters when the court is sitting in other EU Member State than where the said persons are habitually resident. The national schemes of access to free legal aid as well as the information on competent authorities is available at the European Judicial Network in civil and commercial matters Portal of the EU[104].

[104] http://ec.europa.eu/civiljustice/index_en.htm however, the information from the portal are going to be migrated to European E-justice Portal soon.

The Report from the Commission to the European Parliament on the application of the Directive 2003/8/EC[105] from 2012 states that, during the period 2004-2009, the number of persons benefiting from cross border legal aid has increased only to a limited extend. The report explains that it can be caused by lack of knowledge of the instrument also among legal professionals[106] and by the fact that the scope of the application of the Directive is limited to civil and commercial matters.

The Report from the Commission to the European Parliament on the application of the Directive[107] further states that, it can be reported that arrangements for the choice and designation of such an advisor differ significantly between Member States. The professionals in many Member States indicate lengthy payment terms and the very low fee level for provided legal aid and representation. However, this situation is not specific to the Directive and relates equally to the national legal aid system for domestic cases. The question remains to which extend such conditions have direct implications on the quality and time availability of the assigned lawyer.

[105] Report from the Commission to the European Parliament on the application of the DIrective 2003/8/EC from 23.2.2012, accessed 22.6.2018

[106] Ibid, only 30% barristers are better informed of the right to cross-border aid, according to the survey realized within the scope of the Report

[107] ibid

5. POSSIBILITIES TO CLAIM COMPENSATION IN CROSS-BORDER SITUATIONS

5.1 ACCESS TO MEMBER STATES COMPENSATION SCHEMES FOR VICTIMS OF (VIOLENT) INTERNATIONAL CRIME

According to information gathered from the partners through cases collected, questionnaire and FG discussion, the access to national compensation schemes for victims of violent crime are used by limited scope. The eligibility criteria to access State compensation funds differ greatly among the EU. According to the Directive 2011/34/EC Article 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.

The criteria to access State compensation fund for victims of violent crimes set by each Member State can be accessed at the E-Justice portal of the EU[108]
The access to state compensation schemes for victims of violent crime in the cross border situation is regulated by the Directive 2004/80/EC.

Scope:
The Directive 2004/80/EC relating to compensation to crime victim **sets up a system of cooperation to facilitate access to compensation to victims of crimes in cross-border situations, which should operate on the basis of Member States' schemes on compensation to victims of violent intentional crime**, committed in their respective territories.

Main characteristics:

- Each Member State shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims. (Art.12 (2))
- The Member States must ensure that the potential applicants have access to essential information on the possibilities to apply for compensation (Article 4). In this regard, consular services should lead on advising on Assisting Authorities and their role.
- The compensation has to be paid by the competent authority of the Member State on whose territory the crime was committed (Article 2)
- Administrative formalities should be kept to a minimum (Article 3(3))
- The Member States shall designate responsible authorities- both for the submission of the application for compensation in her/his Member State of residence (Assisting authorities) and responsible for deciding upon applications for compensations (Deciding authorities). (Article 3)
- Hearing of the applicant or any person as a witness or expert can be held directly by the deciding authorities, through the use of in particular telephone- or video- conferencing or by the assisting authorities upon the request of deciding authorities, which will subsequently submit the report to the deciding authorities. The hearing may only take place in cooperation with assisting authorities and on voluntary basis. (Article 9)

[108] E-Justice portal of the EU Compensation schemes available in the EU countries

- Standard forms should be used for the transmission of applications and decisions (Article 14)
- Central contact points in each Member State cooperates with assisting and deciding authorities and provides assistance and seeks solutions to any difficulties. Central contact points meet regularly to discuss and share experience and best practices.

Facilitation of access to compensation under this Directive:

In order to pursue Article 1 – right to submit an application for compensation in the Member State of residence of the victim, the member states should establish or design authorities to be responsible for applying Article 1. The competent authority in the Member State in which the applicant is currently residing- the "**Assisting Authority**"- is responsible for:

- Informing potential claimants about the compensation scheme (Article 4);
- Assisting claimants in filling in the compensation application (Article 5);
- Transmitting the application to the Deciding Authorities (Article 6);
- Providing guidance to the applicant in case additional documents are required (Article 8);
- Organising a hearing if requested by the Deciding Authority (Article 9).

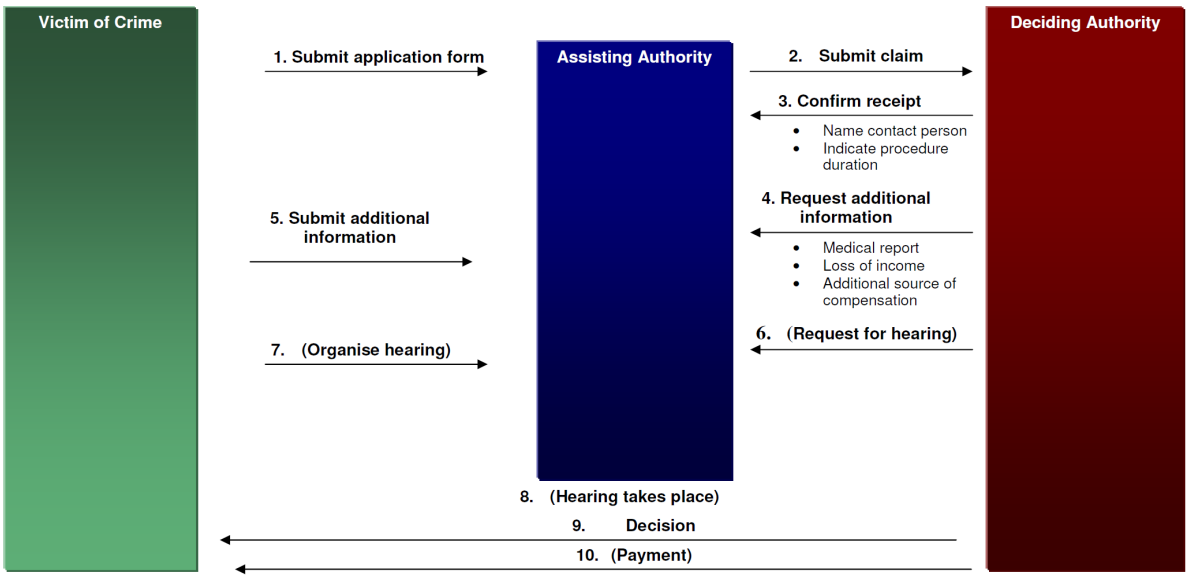
The Assisting Authority does not make any assessment of the application (Article 5(3)).

This assessment is left to the authority of the Member State under whose compensation scheme the victim is applying (the "Deciding Authority").

The **Deciding Authorities** is responsible for:

- Acknowledging the receipt of the application;
- Providing a contact person in charge of handling the matter;
- Indicating an estimated time for the decision to be taken (Article 7);
- Informing both Assisting Authority and claimant about the decision (Article 10).

Table: Typical compensation procedure according to the Directive[109]



[109] Matrix Insight: Analysis of the application of Directive 2004/80/EC relating to compensation to crime victims, SYNTHESIS REPORT, 12 December 2008, EC DG Justice, Freedom and Security, accessed: 23.6.2018

The Communication from the Commission to the Parliament on the application of the EU Directive from 2009[110] stated, that only in a very few cases the mechanism set up by this directive has been used in between 2006-2008. Further, the report reflected the opinion of the claimants, who found the process of applying complicated and time-consuming. Language barriers, lack of information and legal advice were rated as major problems. It seemed therefore that despite the requirements of Article 11 of the Directive, language barriers – and communication in general – was defined as a major problem in the application process by the report. More recent 'Meeting Minutes of Central contact points in October 2016'[111] reconfirmed, that language and translation requirements are reported by a majority of Member States as one of the biggest obstacles. Further the Minutes state, that research has shown that in some countries the costs of translation of documents, received in foreign languages by the deciding authority, or even the translation of the application form, are to be incurred by the victim. The victims don't have to pay translation costs in line with the approach under the Victims' Rights Directive, as stated in the Minutes by the representative of the EC.

Among the other topics requiring attention discussed by the Central contact points were issues of:

- Considering/recognizing foreign documentation, especially medical evidence, assessment of disability or injury by the deciding Authority in cross-border cases
- Pro-active involvement of consular services and Embassies
- Promoting practical contacts, referrals and cooperation of Central contact points with Victim Support organizations.

According to the Focus Group discussion of June 7, 2018, the respondents were aware about the Directive of 2009 but there was very low interaction with victims that would be applying in the cross-border context. The access to national compensation schemes is seen as long, with many requirements even at the national level. However, as some countries reflected there are also bottlenecks in accessing state compensation fund at national level. For more information on bottlenecks related to state compensation fund, see also legal assessment on compensation cases.[112]

According to the respondent from Germany, in the case of benefits claims under the Crime Victims Compensation Act, the claimant can receive support from the "assisting authority" (Directive 2004/80/EC) in their home country and apply there for compensation. However, according to evidence of German NGOs, 'assisting authorities' in countries which criminalise prostitution often discourage victims to access compensation funds in foreign countries, where the person became a victim related to work/engagement in the sex-industry. This can be seen as a result of remaining prejudices among authorities, who mistakenly consider consent to sex work as consent to coercion, abuse and exploitation. Such prejudices exclude this group from protection against trafficking and exploitation.

5.2 CIVIL PROCEEDINGS IN THE CROSS-BORDER CONTEXT IN THE EU

[110] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0170&from=EN

[111] Minutes: Meeting central contact points to Directive on Compensation to Crime Victims (EC/80/2004) organized by the European Commission, 5 October 2016. Accessed: 13.7.2018

[112] Sorrentino, L – Legal Assessment – Compensation Cases, La Strada International, 2018

The legal bases for harmonization of cross-border civil procedure is found in the Title V of the Treaty of Functioning of the EU (TFEU) devoted to the Area of Freedom, Security and Justice (Article 67(4)), further the rule is developed in the Article 81 of the TFEU, which gives the EU power to promote judicial cooperation in civil matters with cross-border implications. As member states' procedural regimes are considerably divergent, EU institutions intervene more and more often to ensure EU law is effectively enforced in an equivalent manner across the EU. This process can be called as Europeanization of civil procedure.

5.2.1 FREE MOVEMENT OF JUDGEMENT IN CIVIL AND COMMERCIAL MATTERS

Within the EU law the most important instrument of cross-border civil procedure is the **Brussel I Regulation (recast)**[113][114]. Chapter II simplifies the procedure for a court chosen by the parties to commence proceedings. Chapter III regulates recognition and enforcement of judgements in different member state than where a judgment was given. The framework set up by the Brussel I Regulation provides for the **free movement of judgments in civil and commercial matters** within the EU.

- The most significant contribution of the Brussel I Regulation is that it no longer provides for so-called *exequatur*. That is a procedure whereby a foreign judgement needs to be formally recognized.
- Instead the Brussels I Regulation provides in its Chapter III Section III for so called "*reverse exequatur*", whereby the defendant-debtor, upon learning of the foreigner judgment, may commence proceedings aimed at rendering it ineffective in the state of enforcement **on a limited number of grounds**[115].
- One of the reasons for refusal of recognition or enforcement of the judgment is the situation, when the recognition is manifestly contrary to public policy in the Member State addressed (Art.45 1(a)). The different approaches to prostitution across EU Member States can give a ground for not recognition or refusal to enforce a judgment for example.
- The court of origin shall, at the request of any interested party, issue the certificate using the form that is set out in the Annex I of the Brussels I Regulation. The form shall be than translated into the official language or language indicated by the state where the judgment shall be enforced or recognized.
- The relationship with other instruments is described under the Chapter VII of the Regulation and the Regulation shall not prejudice recognition and enforcement of judgments in specific matters as well as it shall not affect the application of 2007 Lugano Convention bilateral conventions and agreements between a third state and the Member states and other.
- It is necessary to cooperate with specialized lawyer in order to pursue the recognition and enforcement of the judgment in civil matters in cross-border situation on case-by-case bases.

[113] Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

[114] Rafal Manko: Europeanisation of civil procedure- Towards common minimum standards? European Parliamentary Research Service, June 2015, accessed: 26.6.2018

[115] Rafal Manko: Europeanisation of civil procedure- Towards common minimum standards? European Parliamentary Research Service, June 2015, accessed: 26.6.2018

5.2.2 OPTIONAL INSTRUMENTS

Before the Brussel I Regulation, the exequatur[116] was abolished already in the so called second generation of optional instruments. These instruments are **'optional' as the claimants can use the procedures described therein, but may still prefer to use domestic procedures**.[117] Within the civil law procedure, there are several relevant optional instruments: European Enforcement Order, European Small Claims Procedure, European Order for Payment and European Account Preservation Order.

5.2.2.1 EUROPEAN ENFORCEMENT ORDER

Regulation (EC) No.805/2004 on creating **European Enforcement Order** for uncontested claims is a simple procedure that allows a judgment in an **uncontested** claim delivered by one Member State to be easily recognized and enforced by other Member State. It is a form of certification procedure of national judgment to enable their automatic recognition and enforcement across the EU in uncontested claims. It is an optional Regulation that exists parallel to certification within the Brussels I Regulation. The EEO is mainly used for court decisions issued before Brussel I Regulation came into force in 2012.

5.2.2.2 EUROPEAN SMALL CLAIM PROCEDURE

Scope:

Regulation (EC) No 861/2007 establishing **European Small Claims Procedure** (ESCP)[118] and amending Regulation (EU) 2015/2421 (Amendment)[119] that came into force on July 14, 2017 is available only for cross-border civil law claims of value not exceeding 5000 Euros.

Characteristics:

- It excludes some type of claims in its Article 2 such as for instance labour law disputes. However, this avenue could be used to claim injuries or damages from the defendant if the amount doesn't exceed 5000 Euro.
- The ESCP is a simplified fast-track procedure, lasting maximum of 5 months.
- It is predominantly written and if an oral hearing is necessary it shall be held by making use of technology such as video-conferencing in order to limit unnecessary travel.
- Prescribed standard forms are generally used that are available online on E-justice portal or should be available at the court.
- The ESCP also doesn't require a representation of a lawyer.
- Further the Article 11 establishes for free of charge assistance in filling in the forms and provision of all necessary information on ESCP by relevant national authorities.
- The court fees have to be proportionate to the value of the claim and shall be covered by the party that lost the case- similarly as costs for translation of the documents.

[116] Exequatur- a procedure whereby a foreign judgement needs to be formally recognized in the country of enforcement.
[117] ibid
[118] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32007R0861
[119] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015R2421&from=EN

- At the E-justice[120] portal there are two detailed Guides available for users of ESCP that haven't been yet harmonized with the Regulation 2015/2421 up to date.

The simplified procedure according to the European Commission's Fact Sheet[121] looks as follow:

5.2.2.3 EUROPEAN ORDER FOR PAYMENT

Another optional instrument is the Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a **European order for payment procedure**, amended by the Regulation (EU) 2015/2421 of December 2015 that aims to simplify, accelerate and reduce the costs of cross- border civil litigation concerning **uncontested claims of money**[122]. The procedure is relevant as long as the claim remains uncontested. Once a defendant files a statement of opposition, the EOP automatically loses its force and the case is transferred to standard civil proceedings. The practical Guide is available at the E-justice portal[123].

5.2.2.4 EUROPEAN ACCOUNT PRESERVATION ORDER

Scope:

The European Account Preservation Order (EAPO) Procedure[124] is a relatively new tool that came into force in January 2017. The provisions under the regulation can be used in cases, when the compensation is claimed in civil proceeding. The EAPO is an optional procedure, applicable only in civil and commercial matters with cross- border nature. Similarly as procedures to freeze assets in the criminal matters, the EAPO lets a court in one EU country **freeze funds** in the bank account of a debtor in **another EU countr**y.

[120] https://e-justice.europa.eu/content_small_claims-42-en.do
[121] European Commission DG for Justice and Consumers: The new fast-track court for smaller purchases, Fact Sheet, July 2017
[122] Rafal Manko: Europeanisation of civil procedure- Towards common minimum standards? European Parliamentary Research Service, June 2015, accessed: 26.6.2018
[123] https://e-justice.europa.eu/content_order_for_payment_procedures-41-en.do
[124] REGULATION (EU) No 655/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters

Characteristics:

- The EAPO applies to pecuniary claims that prevent the debtor transfer or withdraw funds from his/her bank account maintained in a Member State.
- Similarly as ESCP it excludes certain claims (Article 2) such a matrimonial and quasi-matrimonial, but type of cross-border claims covered by the EAPO procedure could in this case include also labour law claims or damages and injuries.
- The preservation order can be available even before the creditor (the claimant) initiates proceedings in a Member State against the debtor or at any stage during such proceedings up until the issuing of the judgment or court settlement (Article 5 (a)).
- Similarly, the Preservation Order can be available after the creditor (the claimant) has already obtained a judgment (Article 5 (b)).
- The debtor in line with the Article 11 shall not be notified of the application for Preservation Order or to be heard prior to the issuing of the Order.
- The application procedure for a Preservation Order is described under the Article 8 and the Commission Implementing Regulation (EU) 2016/1823[125] sets up the content of the forms (there are 9 forms) necessary for the EAPO Procedure that are available at the E-justice Portal[126].
- However, in a case where the creditor (the claimant) has not yet obtained a judgment or court settlement, the court shall require the creditor (the claimant) to provide a security for an amount sufficient to prevent abuse of the Procedure and to ensure compensation for any damage suffered in the extent of the creditor's liability for damage caused to the debtor by the Preservation Order due to fault on the creditor's (claimant's) part. (Article 12 (1))
- There can be exceptions, when the court may dispense with the requirement to provide the security.
- The Article 14 describes how request for the obtaining of account information shall be processed
- Article 18 sets up time-limits for the decision on the application of the Preservation Order.
- The Chapter 3 of the EAPO deals with recognition, enforceability and enforcement of the preservation order, with regard the implementation of EAPO in Member State other than where the Preservation Order has been issued.
- Representation by a lawyer shall not me mandatory in the EAPO proceedings unless, under the law of Member State of the court or the authority with which the application for remedy is lodged requires such representation in its national law. (Article 41)
- The court fees for the EAPO Procedure shall not be higher than the fees for obtaining an equivalent national order.
- However, there can be additional costs related to the EAPO Procedure, such translation fees, as any translation made shall be done by a person qualified to do translations in one of the Member States (Art.49 (3)), fees charged by the enforcing authorities which are involved in processing of EAPO or in providing account information pursuant to Article 14. Such fees, however, shall be set transparently on the basis of a scale of fees or other set of rules

[125] Commission Implementing Regulation (EU) 2016/1823.
[126] https://e-justice.europa.eu/content_european_account_preservation_order_forms-378-en.do?clang=en

established in advance by each Member State. Further, the costs incurred by the banks for implementing the preservation order shall be taken into account.

- The debtor may appeal against the EAPO to the competent court of the Member State of origin, but there are limited possibilities to appeal against enforcement of the EAPO before the competent enforcement authority of the Member State of enforcement. (Chapter 4)

5.3 RECOGNITION AND EXECUTION OF FREEZING AND CONFISCATION ORDERS

The legal assessment[127] - clearly shows, that the situation of access to compensation significantly improved since La Strada International's earlier project on compensation was conducted (Comp-Act 2009 – 2012); compensation is now granted to victims by the courts. The assessment showed that judicial proceedings for compensation concluded with a decision to award compensation to trafficked or exploited person was present in 67% of the cases (i.e. 40 cases). However, only 27% (i.e.11 cases) of the awarded executory titles 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 actual payment of the granted compensation.

Criminal investigations of trafficking in human beings still rarely include in depth financial investigations, although in order to disrupt organized criminal activities and to demonstrate that the crime doesn't pay off, this is essential. According to the survey of statistical information 2010-2014 conducted by Europol[128], only 2,2% of the estimated proceeds of crime were provisionally seized or frozen, however only 1,1% of the crime profits were finally confiscated at the EU level. The study further estimates that the annual value of provisionally seized/frozen assets in the EU is around €2,4 billion, with about €1,2 billion finally confiscated each year at EU level.

5.3.1 TRACING OF THE ASSETS

Proceeds from trafficking in human beings are often acquired in other countries than where the organized group operates or where the criminal proceedings takes place. Often the proceeds are found in the country of origin of the perpetrator. Cooperation and swift exchange of information among national authorities are in this regard essential.
The Camden Assets Recovery Interagency Network (hereinafter CARIN) an informal network of law enforcement and judicial practitioners, is specialist in the field of asset tracing, freezing, seizure and confiscation. It is an interagency network, established in 2004, with the purpose to increase the effectiveness of its members' efforts, on a multi-agency basis, to deprive criminals of their illicit profits. The CARIN permanent secretariat is based at Europol headquarters in The Hague. Currently CARIN has 54 registered jurisdictions, including of 28 EU Member States.

Scope:
The cooperation mechanism for the purpose of tracing and identifying proceeds of crime and other criminal related property, has been established by the Council decision 2007/845/JHA of 6 December

[127] Sorrentino L, Legal assessment compensation practises, , La Strada International, July 2018
[128] Europol Criminal Assets Bureau: Does crime still pay? Criminal assets recovery in the EU. 2016

2007 concerning cooperation between Asset Recovery Offices (ARO) of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime[129].

Characteristics:

- The Decision recognises CARIN by providing a legal basis for exchange of information between AROs of all Member States.
- The Council decision requires Member States to establish or designate "Asset Recovery Offices", whose function is to facilitate effective cooperation and exchange of information in the asset recovery area.
- The key function of the AROs is to trace and identify assets on their national territory.
- The ARO offices have been established by all EU member states as a part of administrative, law-enforcement or judicial authority.
- The Article 2 of the Decision requires the AROs to exchange information and best practices, both upon request and spontaneously.
- The most significant problems faced by AROs according to the Report from the Commission to the European Parliament and the Council[130] are related to limited access to all relevant databases at the national level, that would allow them to perform their task more effectively. The limited powers of assets recovery offices are also identified by Transparency International[131] as one of the difficulty that prevent effective application of the European legal framework in the area of confiscation of instrumentalities and proceeds of crime.
- The ARO Platform was established in 2008 which meets 2 times a year in order to discuss asset recovery and asset management related issues and exchange best practices.

The Europol Criminal Assets Bureau (ECAB) was established in 2007 in order to assist financial investigation in tracing criminal proceeds worldwide, in cases where assets have been concealed beyond their jurisdiction. The ECAB also hosts the CARIN secretariat. The Commission also encouraged the ECAB to play the co-ordination role between national AROs.[132]

5.3.2 FREEZING AND CONFISCATION OF CRIMINAL ASSETS

5.3.2.1 FREEZING OF CRIMINAL ASSETS

A **freezing order** is a judicial decision issued to freeze an asset or funds in order to provisionally prevent the destruction, transformation, moving, transfer or disposal of property. The freezing order can be followed by a confiscation[133].

Scope:

[129] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:332:0103:0105:EN:PDF

[130] Report from the Commission to the European Parliament and the Council concerning cooperation between AROs from 12.4.2011 accessed: 29.6.2018

[131] Transpatency International Bulgaria, Romania, Italy: Policy Paper- Confiscation of Criminal and Illegal Assets: European Perspective in Combat Against Serious Crime, 2015. Accessed: 29.6.2018

[132] Report from the Commission to the European Parliament and the Council concerning cooperation between AROs from 12.4.2011 accessed: 29.6.2018

[133] European Commission Fact Sheet. Security Union: Regulation on the mutual recognition of freezing and confiscation orders, Brussels, 21 December 2016, accessed:29.6.2012

To allow competent judicial authorities to seize property on request of another Member State's judicial authorities the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence was adopted in 2003. The main objective is to establish the rule under which a Member State shall recognize and execute in its territory a freezing order issued by a judicial authority of another Member State (Article 1).

Characteristics:

- The mutual recognition should also apply to pre-trial orders according to recital 2.
- Any further formality being required and by the same way as for a freezing order made by an authority of the executing state (Article 5).
- The Title II of the Decision sets a procedure, where the freezing order of the issuing state together with translated certificate (according to Article 9) shall be transmitted directly to the competent judicial authority of executing state.
- The judicial authorities of issuing state shall make all necessary inquires, including via the contact points of the European Judicial Network, if the competent authority for execution is unknown. (Article 4 (3))
- The decision on the freezing order and communication of the decision by the judicial authorities of the executing with issuing state shall be as soon as possible and, *whenever practicable*, within 24 hours of receipt of the freezing order. (Article 5 (3)).
- The Framework Decision further provides (limited) grounds for non-recognition or non-execution as well as for postponement of the execution. (Articles 7 and 8).

5.3.2.2 CONFISCATION OF CRIMINAL ASSETS

A **confiscation** means a final deprivation of property ordered by a court.
There are different types of confiscation orders[134]:

- *Classic confiscation order*: following a criminal conviction the direct proceed of a crime is confiscated. For example: the confiscation of a car from a person convicted for car theft.
- *Extended confiscation order:* following a criminal conviction, the authority can issue a confiscation order on a criminal asset which is not the direct proceeds of the crime for which the person was convicted. For example: the confiscation of a large villa bought with money from drug trafficking.
- *Third party confiscation order:* to deprive someone else than the offender (person or company) from criminal property transferred to him by the offender. For instance, a criminal who buys a house under the name of his wife or another family member.
- *Non-conviction based order:* confiscation measure taken in the absence of a conviction and directed against an asset from illicit origin/ Example: the suspect is not convicted, because he is sick or has escaped.

Scope:
The Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders[135] establishes the rules according to which the judicial

[134] European Commission Fact Sheet. Security Union: Regulation on the mutual recognition of freezing and confiscation orders, Brussels, 21 December 2016, accessed:29.6.2012
[135] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:328:0059:0078:EN:PDF

authorities of one Member State will recognise and execute a confiscation order in its territory issued by competent judicial authorities of another Member State is established.

Characteristics:

- The Framework Decision establishes for the rule that the value of confiscated property is shared equally between the issuing and executing State.
- Competent Issuing authorities and executing authorities must be indicated by each Member Stare (Article 3).
- It also indicates, how the transmission of the confiscation order should look like from issuing to executing state, the forms required and the level of authentication (Article 4 and 5)
- The Decision also provides for reasons for non- recognition and non-execution (Article 8).

However, the current EU legislation on mutual recognition of both, freezing and confiscation orders is outdated and according to the EC[136] is no longer aligned with the latest national and EU rules on freezing an confiscation, which creates loopholes that are exploited by criminals.

The recent Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union[137] enhances the ability of EU states to confiscate assets that have been transferred to third parties. The Directive 2014 stipulates in its Article 3 (i) that it applies also to criminal offence covered by the Directive 2011/36/EU on preventing and combating THB.

5.3.2.3 THE WAY FORWARD

Whereas the 2014 Directive on the freezing and confiscation makes it easy for authorities to seize and confiscate assets at national level, the 2016 Proposal for a Regulation on the mutual recognition of freezing and confiscation orders[138] shall improve the cross-border aspect. On June 20, 2018 the provisional political agreement reached by the European Parliament and Council on the Commission's proposal for an EU regulation on the freezing and confiscation of assets across borders was confirmed by Member States[139].

The new regulation for instance limits number of reasons on which recognition and execution of freezing and confiscation orders can be refused. It will also introduce a new Certificate based on which the executing state may facilitate recognition. The Regulation will cover mutual recognition of **all types of above mentioned freezing and confiscation orders** for which minimum rules are set in the 2014 Directive[140]. The Regulation will cover only confiscation orders issued within the framework of criminal proceeding. The regulation will also set up clear deadlines for freezing and confiscation orders.

Among all above mentioned benefits, the most relevant contribution within the scope of this assessment is that the Regulation **aims at improving the right of victims of crime in cross-border context to compensation**. According to the proposed Article 31 of the Regulation, the victim's right to

[136] European Commission Fact Sheet. Security Union: Regulation on the mutual recognition of freezing and confiscation orders, Brussels, 21 December 2016, accessed:29.6.2012

[137] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0042&from=EN

[138] Proposal for a Regulation on the mutual recognition of freezing and confiscation orders, Brussels 21.12.2016, accessed 29.6.2018

[139] European Commission's' Statement, http://europa.eu/rapid/press-release_STATEMENT-18-4238_en.htm

[140] Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union

compensation or restitution will have priority over the issuing or executing state interest. The Article 31 (4) further regulates on how to deal with victim's compensation, when property other than money have been confiscated and lastly the paragraph 5 of the Article 31 states that when the procedure to compensate or restitute the victim is pending in the issuing state, the executing state will withhold the disposition of the confiscated property until the decision on compensation is communicated to the executing authority.

6. RECOMMENDATIONS

Recommendations shall include:

- To strengthen the rights of undocumented victims and their access to compensation by introducing Safe reporting mechanism. Although the Victims' Rights Directive applies in a non-discriminatory manner, there are still many structural problems why many victims fear to report themselves as victims. The risk that deportation orders are not suspended once the victim is not formally recognized as a victim or in cases when for whatever reasons the criminal proceedings cannot be initiated or the perpetrator is unknown, plays a crucial role.

- The "Firewall" concept must be in place for undocumented workers in order to enable them to safely complaint against abusive employers. The fact that labour inspection is often accompanied by immigration officers, or has a duty to report an undocumented status of workers, puts a structural barrier for labour inspector, that should be able to detect exploitative situations and serve all workers, including undocumented worker, in need of help and support.

- To create awareness about the possibility for victims to report the crime from other EU country than where the crime occurred and to train all relevant stakeholders to support the victims in court procedures and claiming compensation.

- Alternative mechanisms should be introduced to better support victims to report crime and to testify in another country than the country were the prosecution takes place, including support of video testimonies etc.

- To coordinate Dublin returns of asylum seekers. To conduct appropriate risk assessments upon which the return can be suspended, if the reception conditions of the asylum seeker upon the Dublin return may expose him or her into risks of re-trafficking. In cases where Dublin transfers are not suspended, referrals of potential victims into specialized services are necessary. Otherwise, the states may breach the positive obligation of the Member States to take protective measures and the positive obligation to operate an effective administrative framework to prevent trafficking in general[141]

- To provide victims in cross border situations with access to 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.

- The cooperation on the cases and facilitation of access to compensation in the cross-border context requires harmonized cooperation at horizontal level, as well as vertical cooperation among various stakeholders (NGOs, police, prosecutors…). Currently each case is managed individually, on ad hoc bases. Sharing best practices and lessons learned with cross-border cooperation may improve the daily practices of various stakeholders and shape future standardized and harmonized cross-border cooperation.

- There have been introduced numerous provisions within the EU Victims' Directive that foster the rights of victims in cross border context. Further, there are optional instruments in place on cross border civil proceedings, that can be alternatively used in order to claim compensation for victims cross borders. There has been consensus by the EP and the Council

[141] Compare the decision of ECtHR Ranstev vs. Cyprus and Russia, 2010. Accessed: 26.7.2018

on the proposal of the regulation on mutual recognition of confiscation orders, that strengthens the position of victim by prioritizing her/his claim above the states' interests. The practical use and implementation of the existing tools and instruments may significantly improve the access to justice of victims in cross border situation.

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