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## Joint NGO call to EU leaders: Measures to improve victim's rights are needed for the revision of the EU anti-trafficking directive to be meaningful, and not actually harmful for victims and those at risk

**Joint civil society recommendations for the triologue negotiations on the revision of the EU 'Anti-Trafficking Directive' (2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (COM/2022/732 final)).**

Ahead of the planned triologue meeting on 12 December 2023, we call on the European Commission, the European Parliament, and the Council of the EU to find meaningful compromises to ensure that the revised anti-trafficking directive will indeed strengthen the rights of victims of trafficking and enable their access to justice.

In particular, the negotiating institutions must draw on suggested amendments of the European Parliament to improve, at a minimum:

- effective implementation of the non-punishment principle, through further guidance and legal provisions (Article 8)
- compensation via prefinancing by States and the use of recovered assets and fines (Article 17 and Art 7)
- unconditional access to support for all victims (Article 11)
- linkages to the right to international protection (Article 11a)
- adequate complaints mechanisms (Article 18)

We also support the proposals of the European Parliament to improve data collection (Art.19).

**Advancements in all of these areas are the only reason that can justify the revision of the legal framework.**

We further strongly urge the Council and Commission not to extend the criminalisation of consumers of services and clients of sex workers, nor extend the definition of trafficking in a way that risks to create more confusion instead of more clarity. We call on EU governments not to compromise at all, and fully reject the amendments made by the Parliament on articles 1 (2) and 18. **Should provisions criminalising the unknowing and unintentional use of services of trafficked people, or encouraging the criminalisation of clients, be included in the revision, the revision of the directive will be harmful for anti-trafficking efforts and human rights.**

Further detail on these amended articles is set out below:

## AMENDMENTS TO BE ACCEPTED:

### Article 7 Seizure and confiscation (EP: Freezing and confiscation)

We strongly support the EU Parliament amendment to art 7 ***“Member States shall take the necessary measures to ensure that frozen and confiscated proceeds derived from, and instrumentalities used for the commission, or contribution to the commission, of the offences referred to in this Directive are used, as a matter of priority, to provide victims support, assistance and protection, including through direct compensation of victims and further invest into investigation and prosecution of trafficking cases.”***

Currently financial resources for direct support to victims are very limited and access to compensation remains in practice nearly fully dependent on the availability of frozen and confiscated proceeds. A strong requirement for the use of frozen and confiscated assets for victims’ support, assistance and protection will enhance victims’ rights and their access to justice. It has been strongly recommended for years by various high level experts<sup>1</sup>, and is currently also embedded in the (negotiated) Directive on Assets Recovery and confiscation; article 17 of this directive calls upon EU Member States to ‘consider taking measures allowing the use of confiscated property for public interest or social purposes.

### Article 8 Non-prosecution or non-application of penalties to the victim

We strongly support the EU Parliament changes to article 8:

***1. Member States shall take the necessary measures, including criminal law provisions and procedural guidelines, to ensure that victims of trafficking in human beings are not held liable for the irregularity of their entry into or stay in a Member State, or for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2. Member States shall take the necessary measures to discontinue any proceedings against the victim, terminate any restriction of victims’ rights, including deprivation of liberty, to annul any related penalties and to expunge their police and criminal records where competent authorities have failed to apply the non-prosecution and non-application of penalties.***

***2. Member States shall take the necessary measures to ensure that non-prosecution and non-application of penalties to the victims is not made conditional on the victim’s cooperation in the criminal investigation, prosecution or trial, without prejudice to Directive 2004/81/EC or provisions of national law transposing that Directive.***

***3. Member States shall take the necessary measures to ensure that any decision concerning the non-prosecution and non-application of penalties to the victims is taken following an individual assessment of the case by trained and qualified officials.***

***4. Member States shall raise awareness and enhance capacities concerning the implementation of the national provisions adopted pursuant to this Article among professionals likely to come into contact with victims, including law enforcement, the judiciary, legal representatives, border management and labour inspectors.***

***5. Member States shall prohibit any deprivation of liberty, prosecution and application of any penalties in the case of children for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.’***

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<sup>1</sup> See for example recommendation no 38 of the report [“Strengthening victims’ rights: from compensation to reparation,”](#) written by Joëlle Milquet, Special Adviser to President Juncker on compensation for victims of crime, March 2019 and or page 22 of the Council of Europe [Recommendation CM/Rec\(2022\)21 of the Committee of Ministers to member States PREVENTING AND COMBATING TRAFFICKING IN HUMAN BEINGS FOR THE PURPOSE OF LABOUR EXPLOITATION](#) - adopted by the Committee of Ministers of the Council of Europe on 27 September 2022 at the 1444th meeting of the Ministers’ Deputies

The principle of non-punishment of the victim for crimes they have been involved in as a consequence of their trafficking is an essential guarantee to ensure that trafficked persons are not detained, prosecuted or punished for crimes they have committed in the context of human trafficking. In practice we see that the principle is very often not applied by judicial authorities and legal practitioners, leading to devastating outcomes for victims. A clear obligation upon States to adopt specific penal provisions and prosecutorial guidelines can ensure a better application and interpretation of the principle. Currently only a few EU Member States have introduced specific provisions in their criminal codes. In other Member States, general provisions such as the defence of necessity have been applied, and only in cases of offences usually related to minor violations of immigration laws.

Competent authorities must have the obligation to apply the non-punishment provision as early as possible, and thus to discontinue any proceedings and any measures implying restrictions of victims' rights including but not limited to detention, as soon as relevant grounds have been found. When the grounds for the application of the non-punishment provision have not been appropriately assessed by competent authorities, and such grounds are subsequently found, any proceedings against the victim must be promptly terminated, and all their consequences cancelled, before and after an eventual conviction. This implies that criminal records must be cleared, and any other sanctions cancelled including fines or other administrative sanctions. The aim is to avoid a situation where victims, although exempted from criminal liability, are obliged to bear negative consequences – including but non-limited to expulsion or deportation orders – deriving from a failure of the authorities to comply with their due diligence obligations to ensure non-punishment.

It is further essential that the application of the non-punishment provision is totally unconditional, and should not be in any way made dependent on the victim's ability or will to cooperate with authorities in criminal investigation, prosecution and trial. In other words, it should not be used to obtain information in exchange of immunity.

### Article 11 Assistance and support for victims of trafficking in human beings

We generally support the changes made by the Parliament related to article 11, and in particular strongly support, the proposal for the addition of Article 11a (see further below) but regret that none of the institutions have been willing to promote more access to residence for victims of trafficking, in addition to enhanced access to unconditional support, which is urgently needed. In nearly all EU countries, the access to support for victims of human trafficking remains closely tied with the criminal justice system. Assistance and protection are still made dependent upon reporting the crime and to victims' participation in legal proceedings; as well as the initiation of an investigation, continuation of a prosecution or a successful prosecution of perpetrators for human trafficking. Making assistance conditional on cooperation with a criminal justice process harms the rights of trafficked persons and related vulnerable groups. Moreover there are only few possibilities for victims to obtain residence on personal grounds. Granting victims residence in a range of situations, such as the victim's safety or vulnerability, state of health and family situation, would significantly increase victims' incentives to cooperate with the authorities.

#### Victims of trafficking in need of international protection

***1. Member States shall ensure compliance with the principle of non-refoulement and with the right of victims to apply for international protection or equivalent national status, including when the victim is receiving assistance, support and protection referred to in article 11 and notwithstanding the irregularity of entry into the territory of the Member States or stay paragraph 3. To that effect, the tasks of the national referral mechanisms referred to in article 11 paragraph 4 shall include close cooperation with asylum authorities and establishing protocols to ensure that assistance, support and protection, is provided to victims of trafficking who are also in need of international protection, taking into account the victim's individual circumstances, including whether they experienced discrimination based on grounds such as gender, sex, race or ethnic origins, disability, age, sexual orientation, gender identity, gender expression and sex characteristics, or a combination of those.***

**2. Member States shall dedicate appropriate resources and shall take the necessary measures to ensure the rapid and accurate detection and identification of victims of trafficking in human beings, and their referral to international protection procedures by competent authorities, relevant civil society organizations and other relevant stakeholders involved in the identification, reception and processing of irregular migrants. The victims shall be informed of their right to apply for international protection, in a language they can understand and at the earliest opportunity.**

**3. Member States shall take the necessary measures to ensure that the principle of non-prosecution or non-application of penalties to the victim under Article 8 is applied to victims of trafficking in need of international protection.**

**4. Member States shall ensure complementarity and coordination between international protection systems and procedures for the protection of victims of trafficking. In doing so, appropriate and effective referral mechanisms shall be in place between the authorities involved in anti-trafficking activities and those responsible for granting international protection.**

**5. Member States shall ensure that the examination of applications for international protection of victims of trafficking and the assessment of the merits of the application is not linked to a victim's willingness or ability to cooperate with the authorities in the criminal investigation and prosecution of trafficking without prejudice to Directive 2004/81/EC or provisions of national law transposing that Directive.**

Compliance with the principle of non-refoulement and with the right of victims to apply for international protection and ensuring complementarity and coordination between international protection systems and procedures for the protection of victims of trafficking, can strongly support victims access to rights and enhance early identification and referral of victims. We currently see all over the EU that few persons are identified as victims of trafficking among those looking for international protection. Identification among this group can be enhanced by ensuring that it is not only State authorities alone who are in charge of identification. Bodies in charge of identification and referral could consist of multidisciplinary teams established at the local level, in which relevant support organisations including civil society anti-trafficking organisations and trade unions should be represented, in addition to institutional actors such as police authorities and labour inspection services.<sup>2</sup> Civil society organisations have an essential role in the first assessment of victims' personal situations and their preliminary or formal identification.

## **Article 17 Compensation to Victims**

We strongly support the changes made by the European Parliament related to art. 17 on compensation:

**a. Member States shall ensure that the victims of trafficking have the right to an effective and in due time legal remedy under national law in the event of a breach of obligations deriving from this Directive.**

**1. Member States shall ensure that all victims of trafficking in human beings have access to effective schemes of compensation regardless of whether a judicial process has been initiated.**

**1a. Member States shall take the necessary measures to ensure that compensation awarded to a victim of trafficking in human beings as a result of a decision adopted in criminal or civil proceedings is paid in due time after the adoption of the decision by the Member State concerned to the victim. The Member State concerned shall pursue those liable for that compensation to reimburse the compensation advanced by the State to the victim.**

**2. Member States shall establish a national victims fund or a similar instrument according to their national legislation, with the frozen and confiscated proceeds derived from, and instrumentalities used for the commission, or contribution to the commission, of the offences referred to in this Directive in order to pay compensation to victims.**

<sup>2</sup> Report of the UN Special Rapporteur on trafficking in persons especially women and children on Early identification, referral and protection of victims or potential victims of trafficking in persons in mixed migration movements, 2018. [A/HRC/38/45](#)

Although the right to compensation is embedded in all international instruments on trafficking, including Directive 2011/36/EU, research shows that victims in the vast majority of cases do not receive compensation, even when it is awarded by Courts. It is important that trafficking victims have access to any victim compensation schemes, not only to the schemes for victims of violent crime of intent, taking into account that trafficking is not always committed by the use of violence but also by means of deception and coercion. Therefore, trafficked persons should have regular access to other existing schemes for victims of crime, and to new schemes that national authorities would eventually establish for victims of crime.

As highlighted above, one of the obstacles to effective compensation is the lack of confiscated assets, as perpetrators usually hide their patrimonies. Ensuring early freezing and confiscation of the proceeds of crime will enhance the access to compensation for victims. Further the Parliament's proposal for prefinancing of compensation is essential to guarantee that victims that are awarded compensation can effectively access it. This proposal is in line with the current Commission's proposal for the revision of the Victim Rights Directive (of 12 July 2023).

### Article 18 - Prevention

We strongly support the following amendment by the EP related to article 18 (5)

***5. Member States shall put in place effective, accessible and independent complaint mechanisms. Such mechanisms would contribute to the early detection, identification of, assistance to and support for victims of trafficking. Complaints may be put forward by trusted third parties, such as NGOs, trade unions, or migrant workers' organisations, on behalf of the victim under the condition that the victim has given consent. Coming forward with a complaint shall not lead to any reprisals for the victim, particularly in relation to their immigration status.***

***Safe reporting and complaint mechanisms are essential to enhance identification of victims of trafficking.*** Safe reporting and effective complaints mechanisms for undocumented workers to report exploitation and access justice, are lacking in most European Member States.<sup>3</sup> As a result, people who are undocumented face arrest, detention, and deportation if they approach the police to report violence or abuse. Rather than offering help, authorities frequently deny their right to protection and assistance, and enforce – or threaten to enforce – punitive measures instead. A clear 'firewall' will allow workers to safely file a complaint to police or labour authorities and courts, and to get access to services and justice, all without facing immigration enforcement as a result. This would empower workers, uphold fundamental rights, tackle abuses, and promote fair business practice. It would also ensure that all cases are properly investigated, that perpetrators are held to account, and all victims can come forward. In order to support reporting for victims, it is important to offer a wide variety of complaints/reporting mechanisms to cater to the multiple needs and circumstances of victims, including third-party reporting. The EU Fundamental Rights Agency (FRA) has highlighted the untapped potential of third-party reporting, as an alternative reporting option for victims that do not trust law enforcement.<sup>4</sup>

### AMENDMENTS TO BE REJECTED

#### **Art 1 (related to current article 2) Offences concerning trafficking in human beings**

We strongly oppose the following amendment by the European Parliament:

***2.3. Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs, forced marriage, illegal adoption, surrogacy for reproductive exploitation, exploitation of children in residential and closed-type institutions, or the recruitment of children to commit or participate in criminal activities.***

<sup>3</sup> [https://picum.org/wp-content/uploads/2017/11/WorkerComplaintMechanismLeaflet\\_EN.pdf](https://picum.org/wp-content/uploads/2017/11/WorkerComplaintMechanismLeaflet_EN.pdf)

<sup>4</sup> Fundamental Rights Agency, 2023, [Underpinning victims' rights: support services, reporting and protection](#)

We strongly oppose the additions by the European Parliament to the definition of human trafficking, as these seem r to create confusion instead of more clarity and will likely not promote a more uniform application of the definition at EU level. Human trafficking for the purpose of forced surrogacy can already be criminalised under the current definition of trafficking in persons. The proposed text related to surrogacy for reproductive exploitation could be interpreted to imply that all instances of gestational surrogacy are a form of 'reproductive exploitation', and a form of human trafficking. We strongly reject this interpretation. The term reproductive exploitation is a term which is not legally defined. Moreover, surrogacy in and of itself does not constitute a form of exploitation. Surrogacy covers many different situations, from human trafficking for the purpose of forced surrogacy, to consensual surrogacy, including cases of altruistic surrogacy. It is essential to distinguish between these situations. They cannot be tackled in the same way, but should each be addressed individually as appropriate.

Moreover allegations or cases of women being trafficked for the purpose of forced surrogacy are extremely rare in Europe.

We also see no need for the addition of "the recruitment of children to commit or participate in criminal activities", as forced criminality is already part of the current definition and thus already criminalised.

Lastly we believe that the reference to exploitation of children in residential and closed-type institutions can be embedded in the recitals, but would be too specific for inclusion in the definition.

### Article 18a

We strongly oppose the proposal for article 18a to be inserted

#### **Offences concerning the use of services which are the object of exploitation extracted from a victim of an offence concerning trafficking in human beings**

***1. In order to make the preventing and combating of trafficking in human beings more effective by discouraging demand, Member States shall take the necessary measures to establish as a criminal offence the use of service of people which are the objects of exploitation of the prostitution of others or other forms of sexual exploitation as referred to in Article 2.***

***1a. Member States shall also consider taking measures regarding those who solicit, accept or obtain a sexual act from a person in a situation of prostitution in exchange for remuneration, the promise of remuneration, the provision of a benefit in kind or the promise of such a benefit.***

***1b. For other cases of exploitation referred to in Article 2, Member States shall take the necessary measures to establish as a criminal offence the use of such services when the user knew or could have reasonably known that the person was a victim of such exploitation.***

***2. Member States shall take the necessary measures to ensure that an offence as established in accordance with paragraphs 1 and 2 are punishable by effective, proportionate and dissuasive penalties and sanctions.***

There is currently no evidence that criminalising the knowing or unknowing use will have any impact on the prevention or prosecution of human trafficking or that it will strengthen the rights of victims. On the contrary, such a provision is likely to harm the rights of sex workers, including persons trafficked and exploited in the sector.

Law enforcement actors – who already struggle with limited capacity to investigate and prosecute human trafficking – would have to use their scarce resources to focus on users of services, instead of perpetrators of human trafficking. Such measures are expected to significantly weaken efforts to enhance identification of trafficked persons and their referral to support services. Victims can be worse off too, having to testify against the users of their services, while not necessarily being entitled to adequate protection and support. There have already been inconsistencies as to whether a victim is

entitled to the same rights when the “user” is prosecuted, as when a trafficker is prosecuted. Currently, two-thirds of the EU Member States have already introduced provisions for criminalising the (knowing) use of services in national legislation and there is only very limited prosecutorial activity and few convictions across the EU. Evaluations conducted, including by the European Commission, have shown the absence of any proven positive impact of such a provision.

Furthermore, it is surprising and counterproductive to differentiate, as the committees’ proposal does, between (the users of) different forms of human trafficking. This risks suggesting that there is a hierarchy between different types of human trafficking, and that some forms of human trafficking are “worse” than others. This has no basis in international or European law.