

# Joint NGO Statement on recast EU Anti-Trafficking Directive

25 April 2024

On 23 of April, during its last plenary meeting of this mandate, the EU parliament adopted the final text of the recast of the EU anti-trafficking Directive<sup>1</sup>. We, the undersigned non-governmental human rights organisations, welcome some progress that has been made in the revised Directive. It is positive that sanctions for legal persons have been strengthened for those liable for misconduct; that the non-punishment clause now applies to all unlawful activities that victims have been compelled to commit as a direct consequence of being subject of trafficking and that the right to international protection is strongly recognised in the text.

Overall, however the final legislative text demonstrates a lack of commitment of the European institutions to advance the rights of trafficked persons.

We have advocated for binding measures for EU Member States to ensure real access to rights and justice for victims of trafficking, both on paper and in practice, including their access to safe reporting, non-punishment, compensation and unconditional access to adequate support and protection, as well as residence. However, most of the provisions in the Directive related to these rights have not been meaningfully or effectively strengthened. Moreover, the use of services of trafficked persons is now criminalised, while there is no evidence that this will be effective or strengthen victims' rights. In fact, it is likely to cause human rights violations instead.

Also, we raise concern that article 19 no longer encourages EU Member States to establish National Rapporteurs. This runs counter to the fact that independent Rapporteurs have proven to be essential to scrutinize and raise awareness about violations of victims' rights and to provide recommendations to States to enhance victims' rights.

Now that the Directive will soon be enforced and EU Members States have two years to transpose it, we call upon the European Commission and EU Member States to still show their commitment and ensure that the rights of victims are prioritised during the transposition and implementation process.

Clear guidance by the Commission and full implementation of the Directive by EU Members States would already go a long way towards this. Below we outline our strong recommendations for the transposing period and beyond, based on a do no harm and strong human rights approach.

<sup>1</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

## DEFINITION/ Offences concerning trafficking in human beings.

*Article 2* - The definition of the Directive has been extended and now includes 'the exploitation of surrogacy, of forced marriage, or of illegal adoption'. We have raised concern especially about the addition of surrogacy into this EU law, which seem more based on political interests, instead of adequate data and evidence.

- The Commission and Member States should conduct thorough research and collect the necessary evidence for the exploitation of surrogacy or exploitation of illegal adoption in relation to human trafficking, to provide for an adequate debate on facts and evidence and ensure further guidance on the application of these forms of trafficking.
- It is also important for Member States to ensure that all new forms of trafficking in human beings are only considered trafficking in human beings if the conduct fulfils all the elements of the definition of trafficking in human beings. The addition of new forms of trafficking does not automatically imply that all illegal adoptions or all surrogacy, should be automatically considered as trafficking in human beings.
- Member States should further ensure that measures to prevent human trafficking, will not restrict or infringe on existing rights for persons to marry, adopt a child or create a family.

## USE OF TECHNOLOGY

*Article 4* - The Directive text now foresees that the use of information and communication technology is an **aggravating circumstance**, when it has facilitated or committed the dissemination of images or videos or similar material of a sexual nature involving the victim. While we can support this change, we regret that the text only speaks of materials of a sexual nature and not takes a broader 'all forms of human trafficking' approach, in line with the Directive and underline that measures related to technology should safeguard people's rights to and when using such technologies.

- Member States should ensure that measures addressing online recruitment and exploitation – including the extension of powers for law enforcement bodies to collect and monitor data – should not negatively impact the rights of (certain groups of) people and should be based on respect and protection of human rights of all. Anti-trafficking measures targeting online trafficking should not adversely affect and compromise the safety and privacy of sex workers and creators of online intimate content.

## SANCTIONS FOR LEGAL PERSONS

*Article 6* - Sanctions for legal persons, that have been liable for misconduct have been strengthened and now may include the exclusion of access to public funding, tender and grants, or the removal of business permits and authorisation. We can support these measures, as it remains very difficult to hold legal persons accountable. We highlight that:

- Member States should engage workers and workers representative organisations in the development and monitoring of these legislative measures and ensure that the impact of these measures on all potential affected workers is well-evaluated. Measures taken to address the misconduct, should not negatively impact the rights of workers.
- Recovered assets and fines paid by legal entities/companies should be used to compensate workers and victims for damages including for back wages.

## NON-PUNISHMENT

*Article 8* - The scope of the non-punishment clause has been extended and now applies to all unlawful activities, that victims have been compelled to commit as a direct consequence of being subject of trafficking. This includes administrative offences related to prostitution, begging, loitering or undeclared work, or other acts which are not criminal in nature but subject to administrative or pecuniary sanctions, in accordance with national law.

We welcome this change. However, we highlight that for the non-punishment principle to be effectively applied,

- Member States should ensure that the non-punishment provision is appropriately assessed and applied as early as possible by competent authorities. Further, it should be ensured that 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.
- States who have not done so yet should establish national provisions and procedural guidelines on non-punishment, next to ensuring awareness raising and training of relevant stakeholders, to ensure an effective implementation of the non-punishment clause.

## (UNCONDITIONAL) ACCESS TO PROTECTION, SUPPORT AND RESIDENCE

*Article 11* - We welcome the small amendments made to Article 11, which refer to 'specialised' services and clarifies that appropriate and safe accommodation' (already part of the 2011 Directive) should include 'shelters and other appropriate interim accommodation', which 'shall be provided in sufficient numbers and easily accessible for presumed and identified victims of trafficking. They shall assist them in their recovery, by providing adequate and appropriate living conditions with a view on a return to independent living'.

However, the unconditional access to support and residence permits has unfortunately not been improved in the text of the Directive. While the Directive makes clear that the assistance to victims should not be dependent on the willingness to cooperate in criminal investigations etc., the text still reads "without prejudice to Directive 2004/81/EC or similar national rules". A real human rights-based approach detaches victim's identification and assistance from participation in criminal proceedings and places their interests and their support and protection of their rights at the centre. Such an approach will ultimately lead to reduced vulnerabilities, fewer re-trafficking cases, more credibility of State protection systems, and safer communities.

- Member States should ensure that there is access in practice to 'unconditional support' for every person in need, regardless of their status or engagement with authorities or legal proceedings, or a 'social path', to ensure a positive impact on access to justice for victims of trafficking, in relation to their access to identification, residence, compensation, non-punishment and long term integration, including victim's access to the labour market.
- The granting of a residence permit on personal grounds should be enhanced in law and practice, considering a range of situations, such as the victim's safety or vulnerability, state of health and family situation. This would also significantly increase victims' incentives to co-operate with the authorities.

- Member States should ensure that the provision of services should be: (a) accessible to victims through in particular, sufficient proximity of services to victims, opening hours, and delivery of services through multiple channels including face to face, online, helplines and itinerant/mobile services; coordinated in particular through referrals in accordance with their specific needs; (b) be free of charge; (c) be confidential; (d) act in the interests of the victims; (e) remain fully operational in times of crisis, such as health crisis or other states of emergency;

### INTERNATIONAL PROTECTION & DUBLIN RETURNS

*Article 11* - The revised Directive mentions that victims of trafficking, should be enabled to exercise their right to apply for international protection or equivalent national status and States should ensure complementarity and coordination between the authorities involved in anti-trafficking activities and asylum authorities, ensuring appropriate and effective referral mechanisms to be in place between both authorities. Recital 10c reads: "Member States are further requested not to transfer victims to a Member State where there are substantial grounds for believing that the victims, because of the transfer to that Member State, would face a real risk of violation of their fundamental rights that amounts to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union". We welcome both text additions and would like to highlight that:

- When transposing the Directive, EU Member States should ensure that victims of trafficking also in practice do not have to choose between the different mechanisms in place and can always apply for international protection.
- EU Member States should take measures to enhance identification among people applying for international protection and those denied protection.
- EU Member States should develop and implement a risk assessment process for Dublin returns and evaluate the impact on returned victims and their access to justice and adequate care. Before initiating removal proceedings, EU Member States should conclude the identification process and provide individuals with a specified period for recovery and reflection.
- EU Member States should comply with the non-refoulement principle.

### SAFE REPORTING & FIREWALL

*Article 13a* - This article refers to 'General provisions on assistance, support, and protection measures for child victims of trafficking in human beings' and their need for safe reporting mechanisms. We strongly regret that reference to safe reporting and complaint mechanisms is not embedded in the text for adult victims.

- EU MS should ensure that safe reporting and complaint mechanisms beyond the minimum requirements set out in the revised Directive are available for all potential victims of human trafficking, and that mechanisms that enable identification, reporting and representation by third parties are available in practice.

### COMPENSATION

*Article 17* - This article on access to compensation has not been effectively strengthened. The access to compensation is still restricted in the text to existing schemes – and if no schemes exist, there is no access. While the text now mentions that States may establish a compensation fund, they are not bound to do so, and in fact this was already possible.

- Member States should take the necessary measures to ensure that victims of trafficking in human beings, **irrespective of their residence status or type of exploitation**, have access to **schemes** of compensation to victims of crime and necessary measures should be taken to ensure that recovered assets and administrative fines are used to pay compensation to victims.
- More EU guidance is needed to define material and immaterial damages.
- Member States should ensure that victims have the right in practice to claim and receive compensation during criminal procedures, and have access to legal assistance or representation, next to advance payment.

### **NRMs AND EUROPEAN REFERRAL MECHANISM & FOCAL POINTS**

*Article 11* - The Directive calls for strengthened NRMs. EU Member States should take measures to establish by law one or more NRMs. The Directive now also describes what the minimum tasks of this NRM should include. Furthermore, Article 11 refers to the establishment of a European Referral Mechanism and focal points. While we can support this, we critically note that:

- EU Member States should ensure that sufficient capacity and resources are allocated to NRMs, including priority funds for victim support, which are currently lacking.
- The formalising of NRMs should by no means be used to further limit the outreach and support to victims.
- The establishment of a European Referral Mechanism (ERM) should not be taken top down but be developed in close cooperation with national actors and the inclusion of civil society from the outset. The ERM should primarily focus on the adequate and safe referral of victims based on a human rights-based approach, including needs and risk assessments. It should not be (mis) used as a vehicle for victim return.
- For the proposed national focal points for victims, common criteria should be developed including a leading role for civil society actors and other support organisations in their coordination.

### **CRIMINALISATION OF THE KNOWING USE**

*Article 18* - This article of the Directive now criminalises the use of a service from a victim of trafficking in human beings when it is committed intentionally and with the knowledge that the person providing the service is a victim. We believe that criminalisation of “knowing use” will not strengthen victims’ rights or the prevention and prosecution of human trafficking. In fact, it is likely to cause human rights violations instead. Evaluations conducted, including by the European Commission, have so far shown the absence of any proven positive impact of such a provision. Most of the EU Member States have already introduced such provisions in national criminal law and there is only very limited prosecutorial activity and few convictions across the EU.<sup>2</sup>

While we are relieved that the final text of article 18 ensures that criminalization of the use of services requires **intent, profit and knowledge** and applies equally to all forms of trafficking in human beings, we remain concerned that states might see it as a call to criminalise the provision of sexual services, especially as **Recital 9a** calls for more stringent criminal rules, including criminalising the purchase of sexual acts. We therefore insist that:

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<sup>2</sup> See further [LSI policy paper](#)

- States should regularly evaluate and report about the criminalisation of the knowing use, especially looking into the human rights impact on the most vulnerable population such as migrants, sex workers and other precarious workers. Anti-trafficking measures shouldn't adversely affect human rights of vulnerable groups.
- The European Commission should raise awareness of this crime across Europe and ensure adequate awareness campaigns. Such campaigns should address all services and not be misused to advocate against sex work.
- Anti-trafficking measures should generally not be conflated with or used to criminalise sex work and criminalisation should always target the use of services provided within the framework of exploitation covered by the offence of trafficking in human beings (rec. 9.a)

### INDEPENDENT RAPPORTEURS

*Article 19* - In this article, the Directive has weakened the call for a National Rapporteur to be established in each EU MS and instead there is a call for strong coordination. We regret that there is not more binding language included for independent Rapporteurs, who are necessary for the independent and critical assessment of the impact of THB measures, which is urgently needed for us to critically evaluate efforts taken.

- It is important that coordination bodies are clearly separated from National Rapporteurs, who should independently and critically monitor the implementation and impact of anti-trafficking measures.
- Member States should appoint independent Rapporteurs, who should as well as collecting data and monitoring anti-trafficking measures, carry out specific assessments on the human rights impact of anti-trafficking measures on a regular basis.
- EU MS/Rapporteurs should collect data that provides more insight in the access of victims to their rights embedded in the Directive, including their right to identification, the reflection period, temporary and longer-term residence including on personal grounds, non-punishment, compensation, and international protection, next to assistance and support.

#### **Signed by:**

European Council on Refugees and Exiles (ECRE)

European Sex Workers' Rights Alliance (ESWA)

Global Alliance against Traffic in Women (GAATW)

La Strada International – European NGO Platform against Trafficking in Human Beings

Platform for International Cooperation on Undocumented Migrants (PICUM)

Victim Support Europe (VSE)