

► Research Brief

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Access to protection and remedy for human trafficking victims for the purpose of labour exploitation in Belgium and the Netherlands

Key findings, good practices and action points

Introduction

This research brief is based on a comprehensive [study on access to protection and remedy for human trafficking victims in Belgium and the Netherlands](#). The study focuses explicitly on (potential) human trafficking victims for the purpose of labour exploitation.¹ This research brief zooms into the key findings, good practices and action points that emerge from the study.

Access to protection: detection and referral to the National Referral Mechanism

Key findings

- ▶ Despite the institutional and policy framework in place to tackle human trafficking in both countries most victims are not detected.
- ▶ A key obstacle to detection appears to be a lack of self-identification of victims (e.g., due to dependency on employer housing and income, lack of awareness of rights, lack of trust in authorities).
- ▶ Human trafficking for the purpose of labour exploitation is often a 'hidden' crime requiring a lot of time, capacity and resources to investigate. This can be a challenge for authorities such as prosecutors and labour inspectors who already have limited staff and budget to dedicate to such cases.
- ▶ Many workers endure severe labour law violations, but their situation may not amount to human trafficking for the purpose of labour exploitation. These workers are often very dependent on their employer (income, housing)

¹ In this study "victim" refers to those persons who have been identified through the National Referral Mechanism (NRM) and have been granted access to protection and remedy through the anti-trafficking law and policy framework. "(Potential) victim" refers to those persons who refuse to cooperate with authorities and therefore are not given victim status and those who have their victim status withdrawn, (e.g., case is dismissed for procedural issues, has been dismissed, or proceedings have started but prosecutor decides to prosecute for other offences than human trafficking)

and may not have a residence permit or a work permit. In both countries, it is difficult for such workers to report on their situation or file a complaint.

- ▶ Civil society support organisations and trade unions play an important role in detecting potential victims and providing them with information about their rights and possibilities for access to protection and remedy. Labour inspectors have an important role in detecting victims of human trafficking for the purpose of labour exploitation. In the Netherlands, the labour inspectorate’s role extends beyond detection as its criminal investigation unit is competent to investigate cases and *de facto* grants the recovery and reflection period.
- ▶ Information gathered in inspection reports about the situation/job role/working conditions of potential victims (including their contact details) by labour inspectorates is often crucial for potential victims to access support and remedy at a later stage.
- ▶ In Belgium, labour inspectors have a formal obligation to report to immigration authorities migrant workers in an irregular situation (if they are not detected as potential trafficking victims) if they come across them during workplace inspections. In the Netherlands, there is no such obligation. However, in practice labour inspectors conduct joint inspection with police specialised in trafficking and immigration matters in order to check the employers’ compliance with their obligation not to hire third country nationals in an irregular situation. This may lead to reporting of migrant workers in an irregular situation to immigration authorities.

Good Practices

- ▶ In both countries, it is very positive that labour inspectors, prosecutors and police receive training on the issue of trafficking in human beings.
- ▶ The thematic programme on labour exploitation by the Dutch Labour Inspectorate is a promising initiative as it allows to better “bundle” information received on potential human trafficking cases and makes an effort to use all tools available to the inspectorate to address labour exploitation. It is also positive that from 2021, the inspectors are asked to refer underpaid workers to lawyers to facilitate claiming back wages.
- ▶ In the transport sector, there are promising examples of ongoing cooperation that establish better cross-border linkages between the Dutch and Belgian trade unions and the labour inspectorate that benefits detection and support to potential victims.

Action Points

- ▶ Continuous training and awareness raising is needed in both countries on human trafficking for frontline actors - in particular for labour inspectors - to ensure changes in mandates or personnel do not negatively affect acquired institutional knowledge on this issue.
- ▶ In both countries, better support for reporting and lodging complaints is needed for migrant workers (in particular those in an irregular situation) who experience very poor working conditions. At a minimum, such workers should be systematically informed about their rights and possibilities to claim unpaid wages and social security contributions upon detection. If they lodge complaints these should be taken seriously by authorities.

- ▶ In both countries, awareness raising should be carried out amongst labour inspectors on the importance of writing comprehensive and detailed inspection reports that include contact details of potential victims (taking into consideration the mobility of the potential victim), information on work environment, and a description of detected victim's role that can be used for calculation of wages.
- ▶ In line with ILO Labour Inspection Convention, 1947 (No. 81) ratified by both countries, labour inspectors' main concern during workplace inspections should be ensuring safe and healthy working conditions for workers (as opposed to finding migrant workers in an irregular situation). To eliminate tensions between the mandate of labour inspectors and immigration police (*Afdeling Vreemdelingenpolitie, Identificatie en Mensenhandel- AVIM*), Dutch labour inspectors should explore modified operational practice when verifying employers' legal obligations not to hire third country nationals. For example, Article 15a of the Aliens Employment Act (*Wet Arbeid Vreemdelingen*) appears to offer an alternative manner to verify the identity of migrant workers that does not require the presence of police. There should also be a reflection on the decoupling of AVIM's anti-trafficking tasks from its immigration competence.
- ▶ Sector specific, multidisciplinary cross border engagement on detection should be encouraged (e.g., FNV-VNB Trade Union Foundation promising practicing in transport sector) in both countries.

Access to protection: reflection and recovery period

Key findings

- ▶ While in both countries victims are entitled to an unconditional reflection and recovery period, in practice, it is not always granted unconditionally and/or for the full duration. This may be problematic in light of human trafficking for the purpose of labour exploitation often not being evident at first glance and requiring further investigation.
- ▶ In the Netherlands, tension exists between the right of a potential victim to have an unconditional access to the reflection and recovery period according to the slightest indication criteria and the intake interview. The latter partly already seeks to assess potential investigative leads with a view to a successful prosecution. This is not aligned with the purpose of the reflection and recovery period.

Action Points

- ▶ In both countries, if potential victims without residence status are detected, the recovery and reflection period should be granted to allow for further investigation (e.g., by the labour inspectorate) before any decisions are made to deport them.
- ▶ In the Netherlands, access to the unconditional reflection and recovery period should be decoupled from investigative considerations.

Access to protection: identification as a victim of human trafficking

Key findings

- ▶ In both countries, receiving human trafficking victim status is conditional upon cooperation with authorities.
- ▶ The interpretation of the cooperation condition appears to be “light” in Belgium and rather “heavy” in the Netherlands.
- ▶ Many victims seem to refuse to cooperate with criminal proceedings (for a variety of reasons) and hence, do not receive human trafficking victim status and its associated rights.
- ▶ In the Netherlands, on exceptional grounds certain victims (e.g., those who are too traumatised) may apply for a residence permit without complying with the cooperation condition. However, these options appear not to be used much in practice.
- ▶ There are indications that EU nationals might be less willing to be referred to the National Referral Mechanism (NRM) and to cooperate with the authorities in both countries. This might have to do with the fact that it is easier for them to move on with their lives, which is facilitated by their access to the labour market.
- ▶ In both countries, the threshold applied in practice to successfully prosecute for human trafficking is described as high. This appears to be an obstacle to victim identification as frontline actors such as police, labour inspectors and civil society support organisations appear to anticipate this threshold when detecting or advising potential victims.
- ▶ In the Netherlands, long-term access to accommodation for human trafficking victims who cooperate with authorities following the reflection and recovery period is problematic, in particular in group cases where multiple victims have been identified.
- ▶ If human trafficking victim status is withdrawn, generally victims lose access to formal support structures (shelter, residence and work permits etc).
- ▶ Acquittal of the perpetrator has no impact on human trafficking victim status in Belgium but appears to lead to withdrawal of status in the Netherlands.
- ▶ Following withdrawal of human trafficking victim status, it seems many workers disappear into the informal economy and are at risk of re-exploitation and re-victimisation.
- ▶ Good cooperation between anti-trafficking actors can facilitate the preparation of exploring other avenues for remedy (e.g., in Belgium, a specialised centre may ask a lawyer to access the file and/or launch civil proceedings).

Good Practices

- ▶ In Belgium, if the prosecutor decides to prosecute for the offence of trafficking in human beings, and the trafficker is acquitted, victims retain their victim status and associated rights, including access to a permanent residence permit.
- ▶ In both countries, if criminal investigations have been ongoing for a number of years but have not yet reached the trial stage, victims may apply for permanent residence.

Action Points

- ▶ In both countries, support and assistance should be decoupled from conditionality (in particular cooperation with authorities in criminal proceedings) in both countries. Where conditionality still exists, it should be designed in a way that takes into consideration the best interest of the victims.
- ▶ Given the positive evaluation of the Dutch pilot project on victim identification this model should be reconsidered by the government.
- ▶ In both countries, migrant workers (including those in an irregular situation) who have their victim status withdrawn should be provided with information on the rights and avenues for remedy available to them (such as how to claim possible back wages and social security). For example, a multilingual brochure could be developed, which includes contact details of organisations where they can get support.
- ▶ Prosecutors, police and labour inspectors should be adequately funded and have enough resources to fully investigate potential human trafficking situations in both countries.
- ▶ In the Netherlands, more efforts should be made to guarantee access to long-term accommodation in practice after the reflection and recovery period in particular in group cases where multiple victims have been identified.
- ▶ In the Netherlands, human trafficking victim status should be retained regardless of outcome of criminal proceedings.
- ▶ More efforts should be made in both countries to collect consistent and comparable data. Such as on how many potential victims have been referred within the NRM, how many were granted the reflection and recovery period. It would also be useful to distinguish between EU nationals and third country nationals in the data.

Access to remedy from the victim's perspective

Key findings

- ▶ Receiving back wages appears to be a key form of remedy for many (potential) victims.

Action Points

- ▶ More efforts should be made in both countries to promote practices that allow potential victims and (workers in general) to effectively receive their back wages in a simplified and timely manner.

- ▶ Potential victims, and in particular those in an irregular situation, should be protected during the period their complaint is being examined/ or proceedings are ongoing. Both countries should consider making use of the temporary residence permits provided for in Article 13 (4) of the Employers' Sanctions Directive.² This would allow workers without residence status to remain in the country during proceedings to claim back due wages and social security contributions.

Access to remedy in criminal proceedings

Key findings

- ▶ While frequently unsuccessful, criminal proceedings seem to be the most viable route for victims of human trafficking to claim compensation.
- ▶ There are only very limited options to claim remedy for potential victims who do not cooperate or are not referred to the NRM.
- ▶ Victims must join as civil parties (BE)/ injured parties (NL) to be eligible to claim compensation in criminal proceedings. It is important to systematically inform victims that they can join as civil party/injured party to claim compensation.
- ▶ The high threshold of the judicial interpretation of the human trafficking offence appears to often lead prosecutors to prosecute for lower-level offences. This has very detrimental effects upon victims' access to protection and remedy. In particular, victims without residence status will lose their entitlement to a temporary residence permit, as well as access to shelter and support services.
- ▶ The high threshold applied to the human trafficking offence appears to be particularly detrimental in prosecutions involving multiple victims. Where multiple victims have been identified, only those with the strongest evidence will be included on the indictment (the latter being a precondition to claim compensation). In addition, procedurally it is in the interest of the prosecutor to keep the indictment brief to ensure efficiency of the proceedings.
- ▶ Even where there is a successful prosecution for human trafficking and compensation has been awarded, it is very difficult for victims to actually claim it in practice.
- ▶ In Belgium, filing a complaint with the labour prosecutor is a potential avenue for compensation under the Social Criminal Code. However, if a labour prosecutor launches proceedings following the complaint, the victim's access to compensation hinges on the charges included on the indictment.
- ▶ Means tested legal aid is a barrier to accessing remedy in criminal proceedings in both countries.

² 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 *OJ L 168, 30.6.2009*, p. 24-32.

Good Practices

- ▶ In the Netherlands, if victims of human trafficking have not received compensation awarded in criminal proceedings from the perpetrator, eight months after the verdict they can ask the government to pay the compensation.
- ▶ In both countries, good cooperation between the different actors exists which is beneficial for victims' access to protection and remedy.

Action Points

- ▶ In both countries victims' entitlement to compensation must be taken into account at the earliest possible stage of the investigation/prosecution and assets seized accordingly to ensure compensation can be claimed from the perpetrator following conviction.
- ▶ In the Netherlands, compensation claims should be drafted clearly and comprehensively by prosecutors so that they can be handled by criminal judges.
- ▶ In both countries, access to protection and remedy should be explored for those victims who have been excluded from the indictment (and hence cannot claim compensation as civil or injured parties) but who were detected in the same situation as victims who are named.
- ▶ In both countries, the impact of a decision not to prosecute for human trafficking on the victim's access to remedy should be taken into account by the prosecutor when determining the final indictment e.g., inclusion of offence of non-payment of wages in order to recuperate unpaid wages (in Belgium).
- ▶ Reflection is needed in both countries on how potential victims can best be supported if their case is prosecuted for lower-level criminal offences to ensure they can effectively claim and receive compensation (e.g., granted temporary residence permit for the duration of the proceedings).
- ▶ Prosecutors should make use of the presumption of an employment relationship for three in months (BE)/ six months (NL) in order to determine back wages due for compensation claims.

Access to remedy in civil proceedings

Key findings

- ▶ In theory, potential victims (including migrant workers in an irregular situation) have access to remedy through civil proceedings in both countries. However, in practice, using this avenue appears to be fraught with obstacles for potential victims. The support of civil society organisations and trade unions appears to be crucial to make successful use of these avenues.
- ▶ In addition to obstacles such as duration, costs and burden of proof, very practical factors such as a lack of access to a bank account can be a significant final hurdle for the worker to recuperate unpaid wages.

- Despite both countries providing for a presumption of an employment relationship (3 months in BE and 6 months in NL), in accordance with the Employers' Sanctions Directive, this appears to rarely be made use of in practice for claims in civil court.

Action Points

- In both countries, exploration of how the existing access to remedies under civil proceedings could be simplified to make them accessible in practice (cost, duration, burden of proof, free legal aid) is needed.
- The protective elements of the Employers' Sanctions Directive (e.g., Articles 6, 8, 13) should be fully transposed in both countries. For example, both countries should consider granting migrant workers in an irregular situation a temporary residence permit for the duration of proceedings in accordance with Article 13 (4) of the Directive
- In both countries awareness-raising amongst labour inspectors, judges, lawyers and prosecutors should be carried out with regard to the provisions included in the Employers' Sanctions Directive, in particular the presumption of an employment relationship for at least three months (BE) and six months (NL).
- In Belgium, in cases where an employer is fined for non-payment of social security contributions, the employer should also be ordered to pay the arrears of social security contributions in the same judgment.

Access to remedy via the labour inspectorate

Key findings

- In both countries, migrant workers in an irregular situation can file a confidential complaint to the labour inspectorate.
- Most potential victims do not proactively file a complaint. This appears to be due to their precarious situation (dependency on employer for income and potentially housing, irregular residence status).
- In practice support organisations/unions appear to play a key role when workers seek to submit a complaint to the labour inspector.
- In case of severe labour law violations by an employer, labour inspectors can impose a fine or close down a company for a certain time period.
- Where labour inspectors detect non-compliance with labour laws, the 'go to' solution is to impose an administrative fine, which fails to materially benefit the worker.

Good Practices

- ▶ “On the spot” payments by labour inspectors as applied in Belgium are a promising practice as they allow for immediate (or almost immediate) remedy for the worker. This practice could be reinforced in all regions of Belgium and replication in other countries should be explored. However, the use of such a mechanism should not preclude potential victims from being referred to the NRM if it is a potential human trafficking case.
- ▶ The Belgian Deposit and Consignment Fund (DCK-CDC) is an important tool to ensure potential victims without a bank account can receive compensation even if they have been returned to their country of origin.
- ▶ In Belgium, labour inspectors following a complaint have the possibility to retroactively formalise the employment relationship for the period a worker had been (irregularly) employed. This ensures wages are paid to the workers and social security contributions are paid for him or her.

Action Points

- ▶ In both countries, complaints to labour inspectors in particular by potential victims in an irregular situation should be better facilitated, for instance through clearer protocols on non-reporting and confidentiality. Inspectors should receive training in this regard.
- ▶ In both countries at a minimum, workers found to be working in sub-standard working conditions should be informed of their rights and given the opportunity to file a complaint.
- ▶ In particular for migrant workers in an irregular situation it should be explored how possibilities could be expanded to file a complaint/report on their situation in both countries.
- ▶ Labour inspectors should make full use of their available tools in both countries and impose sanctions consistently, including temporary closure of companies in case of repeated severe violations to protect workers and ensure a level-playing field for employers. In the Netherlands, labour inspectors should apply more consistently their tools available to ensure underpaid workers receive their back pay.
- ▶ In both countries, authorities should explore how administrative fines, at least in part, could also materially benefit workers and (potential) victims.
- ▶ In the Netherlands, when wages are recuperated but a worker does not have access to a bank account, there should be mechanisms in place for such workers to receive their wages, even if they have returned to their country of origin.

Access to remedy through state compensation funds/schemes

Key findings

- ▶ State compensation funds for victims of crime exist in both countries though the accessibility for human trafficking victims for the purpose of labour exploitation differs between the two countries.

- ▶ In Belgium domestic remedies have to be exhausted before submitting claims. In addition, it appears to be difficult for human trafficking victims for the purpose of labour exploitation to claim benefits as they are required to show evidence of “intentional violence” to be eligible.
- ▶ In the Netherlands, access to the victims of crime compensation fund does not require exhaustion of other remedies which lowers the barrier to access the fund in practice. The recent change in policy has the potential to significantly facilitate access to remedy from the fund for human trafficking victims for the purpose of labour exploitation as they no longer have to prove ‘serious injury’ which had previously been a key obstacle.
- ▶ In both countries, workers are entitled to compensation for workplace accidents either through employer’s insurance or state schemes. In Belgium, migrant workers in an irregular situation are entitled to benefit from the workplace accident state fund Federal Agency for Occupational Risks (*Federaal Agentschap Voor Beroepsrisico’s/ Agence fédérale des risques professionnels* -FEDRIS). In practice though, such workers appear to rely on the support of civil society support organisations to make use of it. In the Netherlands, however, migrant workers in an irregular situation are not entitled to benefits under the state fund in cases of work accidents.
- ▶ Despite the *Tümer* judgment of the EU Court of Justice clarifying that migrant workers in an irregular situation are entitled to compensation where their employer becomes insolvent, there are obstacles to effectively accessing such compensation in practice.

Good Practices

- ▶ Practical arrangements exist that make it possible for third country nationals to benefit from FEDRIS effectively even if they are no longer in the country (e.g., payment of travel/ allowing visa to enter Belgium to have the mandatory medical check-up to continue to receive benefits).
- ▶ Domestic remedies do not have to be exhausted before applying to the state compensation fund for victims of crime which appears to lower the barrier for access in the Netherlands. The recent change of policy in the fund has the potential to significantly lower the barrier for human trafficking victims for the purpose of labour exploitation to have access to the fund.

Action Points

- ▶ In Belgium, access to compensation funds for victims of crime should be facilitated for victims of human trafficking for the purpose of labour exploitation (regardless of evidence of intentional violence).
- ▶ In both countries, where workers (including those in an irregular situation) are entitled to compensation for workplace accidents, insolvency etc. effective receipt of what workers are entitled to should be ensured (including when they have returned to their country of origin).

- In Belgium, the FEDRIS model and the arrangements made to ensure entitled third country beneficiaries that are no longer in the country can effectively access benefits, should be formalised. Where possible they should be replicated in other countries.

Alternative (informal) mechanisms for recuperation of wages

Key findings

- Informal negotiations with employers for back wages are frequently used by civil society support organisations and trade unions on behalf of (potential) victims, but the effectiveness appears to depend on the leverage of the actor involved.
- Many potential victims are willing to accept payment of wages below the minimum wage in such informal negotiations as they will receive it quicker (as opposed to having to go through formal proceedings).

Action Points

- In both countries, targeted sectoral initiatives involving government and social partners (e.g., the Collective Labour Agreement for Temporary Agency Workers (*Stichting Naleving CAO voor Uitzendkrachten* -SNCU)) should be encouraged to better ensure compliance with and enforcement of applicable labour law.
- In the Netherlands, more emphasis should be placed on ensuring that workers benefit from the fines collected by the SNCU including migrant workers in an irregular situation.

The parallel use of different avenues for access to remedy

Key findings

- If criminal proceedings are pursued, they take precedence over civil proceedings. A successful outcome in the former can be important for the latter.
- Civil society support organisations and trade unions are key to navigating the different mechanisms for remedy available and to provide tailor made advice to the particular situation of potential victims.

Action Points

- The important role of civil society support organisations in navigating, advising and supporting (potential) victims throughout proceedings should be better recognised in both countries.

The key role of third-party organisations in facilitating access to remedy

Key findings

- ▶ Access to effective remedy for individual potential victims appears to be nigh on impossible without the advice and guidance of civil society support organisations or trade unions.
- ▶ Specialised support organisations (for human trafficking victims) and civil society organisations have amassed key institutional knowledge and expertise when it comes to the options for support and remedy. They have very good professional contacts with key actors and can facilitate and advise on bespoke access to protection and remedy on a case-by-case basis.
- ▶ Support organisations have a crucial role in evidence gathering and advising workers on how to collect the best evidence, so that objective and subjective elements can be used in subsequent investigations.
- ▶ Working practice appears to heavily rely on good professional working relationships between support organisations and competent authorities.
- ▶ Trade unions have an important broader political role in ensuring workers' voices are represented in structural and political discussions related to the economy and the labour market that can be facilitated by strategic litigation. In the narrower anti-trafficking context, trade unions are not overall visible as a key actor. However, there are exceptions that demonstrate the role unions can play in the detection and in facilitating access to remedy (Dutch FNV-VNB foundation in the transport sector, CSC-ACV Brussels migration focal point).
- ▶ Where trade unions assist potential victims (or workers more generally), their role and support can be crucial (e.g., access to specialised legal assistance).
- ▶ Civil society support organisations are underfunded, which is particularly problematic given their importance and the estimated number of potential victims.

Good Practices

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| <ul style="list-style-type: none"> ▶ Informal working agreements and protocols ensure potential victims, and in particular those without a residence status, can access the benefits they are entitled to (e.g., for instance FAIRWORK Belgium has agreements in place with immigration authorities and the FEDRIS fund that ensures irregular workers are not detained and can have access to benefits). | <ul style="list-style-type: none"> ▶ The reduced CSC-ACV membership fee for migrant workers in an irregular situation enables them to benefit from the full services and assistance the union can offer. ▶ The FNV-VNB engagement and outreach with workers in the transport sector facilitates the detection victims of human trafficking and provides support with their complaints. |
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Action Points

- ▶ In recognition of the key role of civil society support organisations, their capacity and resources should be strengthened in both countries.

- ▶ Informal agreements between civil society support organisations and government actors should be examined in more detail and, where possible, be formalised.
- ▶ In Belgium, FAIRWORK Belgium should be legally mandated as a designated third party for the complaint mechanism for the payment of unpaid wages established under Law of 11 February 2013 as part of the transposition of the Employers' Sanctions Directive into national legislation
- ▶ In both countries trade unions should be encouraged to strengthen their engagement with the anti-trafficking actors, both with regard to detection of (potential) victims and to supporting access to remedy. Increasing their outreach towards migrant workers in irregular situations appears to be a central element in this regard.

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